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Chapter 5: Weingarten Rights

(UNION REPRESENTATION DURING INVESTIGATORY INTERVIEWS)

A VITAL FUNCTION of a steward is to prevent management from coercing employees into confessions of misconduct. This is especially important when a worker is questioned by a supervisor experienced in interrogation techniques.

The NLRA's protection of concerted activity includes the right to request assistance from union representatives during investigatory interviews. This was declared by the Supreme Court in 1975 in *NLRB v. J. Weingarten, Inc.*¹⁹⁵. The rights announced by the Court have become known as *Weingarten* rights.

Unions should educate their members about the advantages of having a steward present at an investigatory interview. These include the ability of the steward to:

- serve as a witness to prevent a supervisor from giving a false account of the conversation;
- object to intimidation tactics or confusing questions;
- help an employee to avoid making fatal admissions;
- advise an employee, when appropriate, against denying everything, thereby giving the appearance of dishonesty and guilt;
- warn an employee against losing his or her temper;
- discourage an employee from informing on others; and
- raise extenuating factors.

WHAT IS AN INVESTIGATORY INTERVIEW?

Weingarten rights apply only during investigatory interviews. An investigatory interview occurs when: (1) management *questions an employee* to obtain information; and (2) the employee *has a reasonable belief that discipline or other adverse consequences may result*. For example, an employee questioned about an accident would be justified in fearing that she might be blamed for it. An employee questioned about poor work would have a reasonable fear of disciplinary action if he should admit to making errors.

Shop-floor conversation. Not every discussion with management is an investigatory interview. For instance, a supervisor may speak with an employee about the proper way to do a job. The supervisor may even ask questions. But because the likelihood of discipline is remote, the conversation is not an investigatory interview.

A shop-floor conversation can change its character, however. If the supervisor's attitude becomes hostile and the meeting turns into an investigatory interview the employee is entitled to representation.

Disciplinary announcement. When a supervisor calls an employee to the office to announce a warning or other discipline, is this an investigatory interview? The NLRB says no, because the supervisor is merely informing the employee of an already-made decision.¹⁹⁶ Unless the supervisor asks questions about the employee's conduct, the meeting is not investigatory.

EMPLOYEE RIGHTS

Under the Supreme Court's *Weingarten* decision, the following rules apply to investigatory interviews:

- The employee can request union representation before or at any time during the interview.
- When an employee asks for representation, the employer must choose from among three options:
 1. Grant the request and delay questioning until the union representative arrives;
 2. Deny the request and end the interview immediately; or
 3. Give the employee a choice of: (a) having the interview without representation or (b) ending the interview.
- If the employer denies the request for union representation and continues the meeting, the employee can refuse to answer questions.

STEWARD RIGHTS

Employers sometimes assert that the only function of a steward at an investigatory interview is to observe the discussion; in other words, to be a silent witness. This is incorrect. The steward must be allowed to advise and assist the employee in presenting the facts. When the steward arrives at the meeting:

- The supervisor or manager must inform the steward of the subject matter of the interview: in other words, the type of misconduct being investigated.¹⁹⁷
- The steward must be allowed to have a private meeting with the employee before questioning begins.¹⁹⁸
- The steward can speak during the interview, but cannot insist that the interview be ended.¹⁹⁹
- The steward can object to a confusing question and can request that the question be clarified so that the employee understands what is being asked.²⁰⁰
- The steward can advise the employee not to answer questions that are abusive, misleading, badgering, or harassing.²⁰¹
- When the questioning ends, the steward can provide information to justify the employee's conduct.²⁰²

EDUCATING MEMBERS

Employees sometime confuse *Weingarten* rights with *Miranda* rights. Under the Supreme Court's *Miranda* decision, police who question criminal suspects in custody must notify them of their right to have a lawyer present. The Supreme Court did not impose a similar requirement in *Weingarten*. An employer does not have to inform an employee that he or she has a right to union representation.

Unions should explain *Weingarten* rights to members in newsletters and at union meetings. Consider distributing wallet-sized cards such as the following:

WEINGARTEN CARD

(If called to a meeting with management, read the following or present this card to management when the meeting begins.)

If this discussion could in any way lead to my being disciplined or terminated, or affect my personal working conditions, I respectfully request that my union representative, officer, or steward be present at this meeting.

Until my representative arrives, I choose not to participate in this discussion.

NLRB CHARGES

An employer's failure to comply with a worker's request for union representation, or a violation of any other *Weingarten* right, is an unfair labor practice. Unless a grievance is pending on the matter, the NLRB does not defer *Weingarten* charges.²⁰³

QUESTIONS AND ANSWERS

STEWARD'S REQUEST

Q. If I see a worker being questioned in a supervisor's office, can I ask to be admitted?

A. Yes. A steward has a right to insist on admission to a meeting that appears to be a *Weingarten* interview.²⁰⁴ If the interview is investigatory, the employee must be allowed to indicate whether he or she desires the steward's presence.²⁰⁵

COERCION

Q. An employee, summoned to a meeting with her supervisor, asked for her steward. The supervisor said, "You can request your steward, but if you do, I will have to bring in the plant manager and you know how temperamental she is. If we can keep it at this level, things will be better for you." Is this a *Weingarten* violation?

A. Yes. The supervisor is raising the specter of increased discipline to coerce an employee into abandoning her *Weingarten* rights.²⁰⁶

CAN EMPLOYEE REFUSE TO GO TO MEETING?

Q. A supervisor told an employee to report to the personnel office for a "talk" about his attendance. The employee asked to see his steward but the supervisor said no. Can the employee refuse to go to the office without seeing his steward first?

A. No. *Weingarten* rights do not arise until an investigatory interview actually begins. The employee must make a request for representation to the person conducting the interview.²⁰⁷ An employee can only refuse to go to a meeting if a supervisor makes clear in advance that union representation will be denied at the interview.²⁰⁸

MEDICAL EXAMINATION

Q. Our employer requires medical examinations when workers return from medical leaves. Can an employee insist on a steward during the examination?

A. No. A run-of-the-mill medical examination is not an investigatory interview.²⁰⁹

LIE DETECTOR TEST

Q. Do *Weingarten* rights apply to polygraph tests?

A. Yes. An employee has a right to union assistance during the pre-examination interview and the test itself.²¹⁰

SOBRIETY TEST

Q. If management asks an employee if he will submit to a test for alcohol, does *Weingarten* apply?

A. Yes. The employee must be allowed to consult with a union representative to decide whether or not to take the test.²¹¹

LOCKER SEARCH

Q. If a guard orders an employee to open a locker, can the employee insist on a steward being present?

A. No. A locker search is not an investigatory interview.²¹²

COUNSELING SESSION

Q. An employee was given a written warning for poor attendance and told she must participate in counseling with the human relations department. Does she have a right to a union steward at the counseling sessions?

A. This depends. If notes from the sessions are kept in the employee's permanent record, or if other employees have been disciplined for what they said at counseling sessions, an employee's request for a steward would come under *Weingarten*.²¹³ But if management gives a firm assurance that the meetings will not be used for discipline, and promises that the conversations will remain confidential, *Weingarten* rights would probably not apply.²¹⁴

PRIVATE ATTORNEY

Q. Can a worker insist on a private attorney before answering questions at an investigatory interview?

A. No. *Weingarten* only guarantees the presence of a union representative.²¹⁵

TELEPHONE INTERVIEW

Q. Over the weekend, a supervisor called a worker's home to ask about missing tools. Did the worker have to answer the questions?

A. No. *Weingarten* applies to telephone interviews. An employee who fears discipline can refuse to answer questions until the employee has a chance to consult with a union representative.²¹⁶

STEWARD OUT SICK

Q. If a worker's steward is out sick, can the worker insist that a *Weingarten* interview be delayed until the steward returns?

A. Usually, no. Management does not have to delay an investigation if another union representative is available to assist the employee.²¹⁷

INTERROGATION OF A STEWARD

Q. If a steward is called in by supervision to discuss her work, can she insist on the presence of another steward?

A. Yes. Stewards have the same rights to assistance as other employees.²¹⁸

SHOP MEETING

Q. When management calls a meeting to go over work rules, do employees have a right to demand a union representative?

A. No. *Weingarten* rights do not arise unless management asks questions of an investigatory nature.²¹⁹

REMEDIES

Q. If management rejects a worker's request for union assistance at an investigatory interview, induces him to confess to wrongdoing, and fires him, will the NLRB order the worker reinstated because of the *Weingarten* violation?

A. No. The NLRB considers reinstatement to be an unwarranted "windfall" for an employee who confesses to serious misconduct.²²⁰ The usual *Weingarten* remedy is a bulletin-board posting in which the employer acknowledges that it violated the *Weingarten* rules and promises to obey them in the future.

NOTE: The remedy is different when an employee is discharged for requesting a steward or refusing to answer questions without one. In such cases, the NLRB orders reinstatement with back pay.²²¹ A make-whole remedy is also imposed if an employee is demoted, transferred, or loses privileges because of a request for union representation.

RECORDING THE INTERVIEW

Q. Can a supervisor tape record an investigatory interview?

A. This depends. The *Weingarten* decision itself does not forbid an employer from tape recording an investigatory interview. But, if this represents a new policy on the part of the employer, the steward can object on the grounds that the union did not receive prior notice and an opportunity to bargain.²²²

PARTICULAR REPRESENTATIVE?

Q. If an employee asks to be represented by her chief steward instead of her departmental steward, must management comply?

A. Usually, yes. If two representatives are equally available, an employee's request for a particular representative must be honored.²²³

QUESTIONS ABOUT OTHERS

Q. If a worker is summoned to a meeting and asked about the role of other employees in illegal activities, can he insist on assistance from a union representative?

A. Yes. Although the employee may not be involved in wrongdoing himself, he risks discipline if he refuses to inform on others or admits that he was aware of illegal activities. Because what he says at the meeting could get him into trouble, he is entitled to union representation.

OBSTRUCTION

Q. The company is interviewing employees about drug use in the plant. If I tell my people not to answer questions, could management go after me?

A. Yes. A union representative may not obstruct a legitimate investigation into employee misconduct.²²⁴ If management learns of such orders, you could be disciplined.

Chapter 5 Notes

195. NLRB v. J. Weingarten, Inc. 420 U.S. 251, 88 LRRM 2689 (U.S. Sup. Ct. 1975).

196. Baton Rouge Water Works Co., 246 NLRB 995, 103 LRRM 1056 (1979).

197. Pacific Telephone and Telegraph Co., 262 NLRB 1048, 110 LRRM 1411 (1982), *enforced in part*, 711 F.2d 134, 113 LRRM 3529 (9th Cir. 1983).

198. U.S. Postal Service, 303 NLRB 463, 138 LRRM 1339 (1991).

199. *See* Southwestern Bell Telephone Co., 251 NLRB 612, 105 LRRM 1246 (1980); New Jersey Bell Telephone Co., 308 NLRB 277, 141 LRRM 1017 (1992); Yellow Freight System, Inc., 317 NLRB 115; 149 LRRM 1327 (1995) (steward may be issued a warning letter for repeatedly interrupting interview, profanity, and pounding on manager's desk).

200. U.S. Postal Service, 288 NLRB 864, 130 LRRM 1184 (1998); NLRB v. J. Weingarten, Inc. 420 U.S. 251, 260, 88 LRRM 2689 (U.S. Sup. Ct. 1975).

201. New Jersey Bell Telephone Co., 308 NLRB 277, 141 LRRM 1017 (1992).

202. NLRB v. J. Weingarten, Inc. 420 U.S. 251, 88 LRRM 2689 (U.S. Sup. Ct. 1975).

203. *See* Amoco Oil Co., 278 NLRB 1, 2-3, 121 LRRM 1308 (1986).

204. ILGWU v. Quality Mfg. Co., 420 U.S. 276, 88 LRRM 2698 (U.S. Sup. Ct. 1975).

205. Appalachian Power Co., 253 NLRB 931, 106 LRRM 1041 (1980). An employee's silence, after a steward asks to be present, may be considered agreement with the request. *See* Colgate Palmolive Co. 257 NLRB 130, 107 LRRM 1486 (1981).

206. Southwestern Bell Telephone Co., 227 NLRB 1223, 94 LRRM 1305 (1977).

207. Joseph F. Whelan Co., 273 NLRB 340, 118 LRRM 1040 (1984); Roadway Express, 246 NLRB 1127, 103 LRRM 1050 (1979).

208. *See* Glomac Plastics, Inc., 234 NLRB 1309, 97 LRRM 1441 (1977), *enforced*, 592 F.2d 94, 100 LRRM 2508 (2d Cir. 1979); Interstate Security Services, Inc. 263 NLRB 6, 110 LRRM 1535 (1982).

209. U.S. Postal Service, 252 NLRB 61, 105 LRRM 1200 (1980).

210. Consolidated Casinos Corp., 266 NLRB 988, 1008-10, 113 LRRM 1081 (1983).
211. System 99, 289 NLRB 723, 131 LRRM 1226 (1988).
212. *See* E.I. du Pont de Nemours & Co., 100 LRRM 1633 (Advice Memorandum 1981) (car search); Chrysler Corp. (Advice Memorandum 1981) (cited in Walnut Hill Convalescent Home, 114 LRRM 1255 (Advice Memorandum 1983) (handbag search)).
213. Good Hope Refineries, Inc., 245 NLRB 380, 382-84, 102 LRRM 1302 (1979).
214. Amoco Chemicals Corp., 237 NLRB 394, 396-98, 99 LRRM 1017 (1978).
215. TCC Center Companies, 275 NLRB 604, 119 LRRM (1985).
216. *See generally* Pacific Southwest Airlines, Inc., 242 NLRB 1169, 1175-76, 101 LRRM 1366 (1979) (ALJ's conclusion that telephone interview is covered by *Weingarten*, not rejected by Board).
217. Coca-Cola Bottling Co. 227 NLRB 1276, 94 LRRM 1200 (1977).
218. Keystone Consolidated Industries, Inc., 217 NLRB 995, 89 LRRM 1192 (1975).
219. Northwest Engineering Co., 265 NLRB 190, 111 LRRM 148 (1982).
220. Taracorp, Inc. 273 NLRB 221, 117 LRRM 1497 (1984).
221. Safeway Stores, 303 NLRB 989, 138 LRRM 1007 (1991).
222. *Cf.* Pennsylvania Telephone Guild, 277 NLRB 501, 120 LRRM 1257 (1985), *enforced*, 799 F.2d 84, 123 LRRM 2214 (3d Cir. 1986).
223. Consolidated Coal Co., 307 NLRB 976, 977-78, 140 LRRM 1248 (1992).
224. *See* Manville Forest Products Corp., 269 NLRB 390, 115 LRRM 1266 (1984); Cook Paint & Varnish Co., 246 NLRB 646, 102 LRRM 1680 (1979). *See also* Service Technology Corp., 196 NLRB 845, 80 LRRM 1187 (1972) (employee has no right to refuse to answer questions about misconduct he has been involved in or witnessed).