THE EXTENSION OF *WEINGARTEN* TO NONUNION EMPLOYEES: DID THE NLRB FORGO AN OPPORTUNITY IN *EPILEPSY FOUNDATION OF NORTHEAST OHIO?*

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I. INTRODUCTION

It is not an unusual event for an employee to be called into his or her supervisor's office to be questioned about some act that may lead the employer to discipline the employee. For over twenty-five years, employees employed in a unionized environment have had the right to ask a co-worker to be present during such questioning. However, for employees working in a nonunion environment that same right has been dependent upon the composition of the National Labor Relations Board (NLRB). In *Epilepsy Foundation of Northeast Ohio,*[1] the NLRB considered whether to extend the right that unionized employees have enjoyed to nonunionized employees. In a decision issued with strong dissents, the Board held that an employee in a nonunionized environment has the right to representation if the employee reasonably believes that the investigatory meeting may result in disciplinary action.

The Board's decision in *Epilepsy Foundation* came some twenty-five years after the Supreme Court held in *National Labor Relations Board v. Weingarten,*[2] that a unionized employee has the right to have a representative present when discipline may reasonably result. Although the *Weingarten* Court did not specifically consider the question of whether a nonunion employee had "Weingarten rights," since that decision the NLRB has considered the issue of a nonunion employee's rights on several occasions with differing results. The Board's decision in *Epilepsy Foundation* is its latest attempt at confronting the issue. This article will review the Supreme Court's decision in *Weingarten*[3] and NLRB decisions issued since the Court's decision. Consideration will be given to whether the Board's analysis in *Epilepsy Foundation* is merely a return to its earlier position in *Materials Research,*[4] or whether the current Board has taken a different approach in its statutory interpretation. Attention will also be paid to the practical effect of the "right" articulated in the *Epilepsy Foundation* decision in a nonunion setting. The article will conclude with the author offering an alternative approach to the Board's broad

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[1] 331 N.L.R.B. 92, slip opinion (2000). The part of the NLRB's decision that extended *Weingarten* to nonunion employees was upheld on appeal, while the NLRB's retroactive application of the ruling was overturned. Epilepsy Foundation v. NLRB, 268 F.3d 1095 (D.C. Cir. 2001).

[2] 420 U.S. 251 (1975).

[3] *Id*.

[4] 262 N.L.R.B. 1010 (1982).

extension of *Weingarten* to nonunion venues that would be consistent with the Supreme Court's decision and the Board's definition of "concerted activity."

II. THE FIRST WORD[5]

The employer in *Weingarten* operated a chain of retail stores with lunch counters. The Retail Clerks Union represented its sales personnel. An employee at the Company was accused of taking a box of chicken and paying less than the cost of the food. The employee was called to a meeting of company personnel and questioned about her conduct. When the employee requested that her shop steward or other representative be present, the Company denied her request. As the employee was about to be cleared of any wrong doing she "blurted out" that she had in fact taken lunch from the store without paying. After making the incriminating statement the employee again asked for a union representative and her request was again denied. The United States Supreme Court concluded that Section 7 of the National Labor Relations Act granted an employee the right to union representation. The Court stated, "… it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy."[6]

The Court conceded that the "employee alone may have an immediate stake in the outcome; he seeks 'aid or protection' against a perceived threat to his employment security."[7] However, the Court noted that the union representative was also safeguarding the "interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly."[8] In reaching this conclusion, the Court imposed limitations, stating "the right arises only in situations where the employee requests representation," and the "right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action."[9] Additionally, the Court stated that "exercise of the right may not interfere with legitimate employer prerogatives. The employer had no obligation to justify its refusal to allow union representation, and despite the refusal, the employer is free to carry on its inquiry without interviewing the employee, thus leaving the employee to choose between having an interview unaccompanied by his representative, or having no interview and forgoing any benefits that might be derived from one."[10]

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[5] Although *Weingarten* was the first case in which representation was allowed, Board cases before *Weingarten* had not permitted representation. In fact, the dissenting justices in *Weingarten* commented "[t]he brief but spectacular evolution of the right, once recognized, illustrates the problem." 420 U.S. at 268.

[6] *Id*. at 257.

[7] *Id*. at 259.

[8] *Id*. at 260.

[9] *Id*.

[10] *Id*.

Finally, the Court noted "the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview."[11] Thus, the role of the representative attending is to assist the employee by suggesting other witnesses that may be contacted or to help clarify the facts. However, the employer was not obligated to speak to anyone suggested by the representative of the employee.

Interestingly, although the majority did not indicate that its ruling should extend to a nonunion setting, in their dissent Justices Powell and Steward stated in a footnote that the Section 7 right "also exists in the absence of a recognized union."[12] It was this footnote that the Board relied upon in its decision in *Glomac Plastics, Inc. and Textile Workers Union of America, AFL-CIO-CLC*[13] in holding that employees who had been denied union representation as a result of the employer's refusal to bargain were entitled to representation at a disciplinary interview. The Board went beyond the facts of the *Glomac Plastics* case by stating that:

> Our own reading of *Weingarten* and *Quality* persuades us that the Court's primary concern was with the right of employees to have some measure of protection against unjust employer practices, particularly those that threaten job security. These employee concerns obtain whether or not a union represents the employees. Indeed, these concerns are more compelling where the employees are without union representation as a result of their employer's misconduct. The absence of union representation in such circumstances does not operate to deprive employees of these rights which they enjoy by virtue of the plain mandate in Section 7.[14]

The Board signaled its direction in *Glomac Plastics*, and in *Materials Research Corporation*,[15] officially extended the *Weingarten* right to nonunion employees. In *Materials Research*, employees were given one-day notice that their work schedule would be changed. Several employees told the manager that the new schedule created problems for them. In addition, the employees "talked among themselves and expressed annoyance" at the change in schedule. The following day a group of employees went to see management about the schedule change.[16] The supervisor told the employees "that there was no group problem, and that he was available to discuss individual problems with any employee."[17] However, he refused to meet with the group again.

Evidence also existed of other attempts at organizing group meetings. Shortly after these attempts at group discussions with management, employee Hochman, one of the employees actively involved in the discussions, was approached by one of the managers and asked to come to his office. Hochman informed the manager "that he was entitled under Federal law to have another worker present at a disciplinary hearing or at an investigative hearing from which discipline could reasonably result."[18] The manager told him that he had no such right but that the manager would like to discuss the matter further and that he would be in his office. Despite being denied a representative,

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[11] *Id.* at 259.
[12] *Id*. at 270 n. 1.
[13] 234 N.L.R.B. 1309 (1978)
[14] *Id*.
[15] 262 N.L.R.B. 1010 (1982).
[16] *Id.* at 1011.
[17] *Id*.
[18] *Id*.

Hochman followed the manager to his office. While in the office Steve Hochman and the manager discussed the scheduling issue as well as why Hochman had organized the group meeting. The meeting ended without any discipline being issued. However, later that day Hochman was called back to the manager's office and was told that it was a disciplinary meeting. Hochman got up to leave saying that he wanted representation. The manager ordered Hochman to sit down and Hochman complied. Hochman was given a verbal warning for failure to follow the company grievance procedure and for "organizing that group meeting."[19] In extending *Weingarten* rights to unrepresented employees, the Board stated:

> It is by now axiomatic that, with only very limited exceptions, [footnote omitted] the protection afforded by Section 7 does not vary depending on whether or not the employees involved are represented by a union, or whether the conduct involved is related, directly or indirectly, to union activity or collective bargaining.[20]

The Board, in a footnote, also cited numerous other instances in which concerted activity was found.[21] The decision in *Materials Research* had two dissenting opinions. Chairman John Van De Water looking to the intent of Section 9(a) of the Act argued that in the absence of a recognized bargaining representative, an employer is "free to deal with [footnote omitted] its employees individually.[22] In addition, Van De Water rejected the notion that "the presence of a fellow employee at an investigatory interview accords employees some measure of 'mutual aid or protection.'"[23] Van De Water reasoned that it is the presence of a union that makes the rights "operational."[24] However, Van De Water conceded that "in a situation where no union is present, employees could band together and agree to ask their employer to submit all changes in the workplace to a majority vote of the employees. By so doing, the employees plainly would be seeking mutual aid and protection against potentially arbitrary or onerous employer actions."

Van De Water suggested that while it would be a violation for an employer to discipline an employee for asking that a fellow employee be present at an investigatory interview, it would not be a violation in a nonunion setting for the employer to deny the request.[25] Board Member Hunter in his dissent raised what he considered "practical concerns." At the outset he suggested that the *Weingarten* Court anticipated "a knowledgeable union representative" being present.[26] Hunter suggested that in a nonunion setting having the employee's friend present might add to the emotions of the interview.

In 1985, with new appointments to the Board, the extension of *Weingarten* rights to nonunion employees was reversed in *Sears, Roebuck and Co. and International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC*.[27] In its decision, the Board had

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[19] *Id*. at 1011.
[20] *Id*. at 1012.
[21] *Id*.
[22] *Id*. at 1016.
[23] *Id*. at 1020.
[24] *Id*.
[25] *Id*.
[26] *Id*. at 1021.
[27] 274 N.L.R.B. 230 (1985).

a very narrow focus. It was not interested in the surrounding facts of the case other than the fact that "at the time of [the employee's] interview, [the employee] was not represented by a recognized or certified union."[28] In a footnote, the Board "fully endorsed" the dissenting opinion of Chairman Van de Water in *Materials Research*. The Board articulated its position in part as follows:

> When no union is present, however, the imposition of *Weingarten* rights upon employee interviews wreaks havoc with fundamental provisions of the Act. This is so because the converse of the rule that forbids individual dealing when a union is present is the rule that, when no union is present, an employer is entirely free to deal with its employees on an individual, group, or wholesale basis.[29]

The Board noted "the *Materials Research Corp*. majority said that, with respect to disciplinary action, the nonunion employer cannot deal with an employee on an individual basis; it must deal on a collective basis."[30] In a separate concurrence, Member Hunter, argued that extending *Weingarten* to nonunion employees "effectively gives representation to employees who have not chosen to be represented in any of their dealings with their employer."[31] As in his dissent in *Materials Research*, Hunter again raised his concern with the experience of the person assisting a nonunion employee and the fact that unlike a union representative, the person assisting in the nonunion environment does not have the concerns of the "unit as whole" in mind.[32] Finally, Hunter concluded that he failed to see "the relationship between an unrepresented employee's request for *Weingarten* representation and the provisions of Section 9 of the Act … ."[33]

In its 1988 decision *E.I. Dupont DE Memours and Walter J. Slaughter*,[34] the Board had another opportunity to revisit *Sears Roebuck*. Interestingly, none of the Board members that decided *Sears Roebuck* were still on the Board at this time. Although the Board appeared to "soften" its views in *E.I. Dupont*, its final conclusions did not change the practical outcome of *Sears Roebuck*. The "softening" was demonstrated by the Board's conclusion that the holding in *Materials Research* was a "permissible construction." Thus, the Board specifically overruled the finding *in Sears Roebuck* "that the Act compels a finding that unrepresented employees are not entitled to the presence of a fellow employee during an investigatory interview."[35] Despite the view that the Board had discretion in this area, the Board ultimately concluded that "while nothing in *Weingarten* inexorably precludes us from extending the right, we are confident that in carrying out responsibility here — defined by the Court as achieving a 'fair and reasoned' balance between the conflicting interests of labor and management — we best effectuate the purposes of the Act by limiting the right of representation in investigatory interviews to employees in unionized workplaces who request the presence of a union

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[28] *Id*. at 231
[29] *Id*.
[30] *Id*.
[31] *Id*. at 233-34.
[32] *Id*.
[33] *Id*. at 234.
[34] 289 N.L.R.B. 67 (1988).
[35] *Id*. at 629.

representative."[36] As for other factors distinguishing the unionized and nonunion environment the Board stated:

> many of the useful objectives listed by the [Weingarten] Court either are much less likely to be achieved or are irrelevant [in a nonunion setting]. Thus, in a nonunion setting there is no guarantee that the interests of the employees as a group would be safeguarded by the presence of a fellow employee at an investigatory interview. Unlike a union steward (or his or her proxy), a fellow employee in a nonunionized work force has no obligation to represent the interests of the entire bargaining unit. [footnote omitted] Furthermore, an employee in a nonunion work force would be much less able than a union representative to "exercise vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly," [footnote omitted] as it is unlikely that such an employee would have the benefit of a framework similar to that typically established in a collective bargaining agreement in which acts amounting to misconduct and means of dealing with them are defined. Nor would an employee in a nonunion setting be likely to have access to information as to how other employees had been dealt with in similar circumstances; whereas a union representative would typically be entitled to information from which it could be determined whether the employer was maintaining consistency and fairness in discipline.[37]

The Board also expressed concern that under *Weingarten* an employer could decide to forego the interview so as to avoid allowing representation, and that while an employee in a unionized environment would probably have a grievance procedure to use if he or she were actually disciplined, a nonunion employee would potentially lose his one chance to make his or her position known to the company.

III. THE *EPILEPSY FOUNDATION* CASE

With another change in the composition of the Board, the issue of extending *Weingarten* to the nonunion setting was revisited in its July 2000 decision in *Epilepsy Foundation.* Employees Borgs and Hasan worked as an employment specialist and transition specialist, respectfully. They worked on a research program concerning school-to-work transition for teenagers with epilepsy. In January 1996, Borgs and Hasan sent a memorandum to their supervisor stating that his supervision was no longer required. The employees also sent a copy of the memorandum to the organization's executive director. Upon learning that their supervisor and the executive director were upset with the content of the memorandum, Borgs and Hasan drafted a second memorandum for the executive director. This memorandum detailed the reasons that they believed that they no longer needed the supervision of their supervisor. The memorandum stated in part:

> As mentioned during earlier discussions (albeit brief) with you, both Hasan and Borgs reiterate that your supervision of the program operations performed by them is not required. Your input to the NIDRR project in the past is appreciated.

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[36] *Id*. at 630-31.
[37] *Id*.

> At this stage, the major area that has to be addressed -- deals with outreach. Only support staff assistance is needed in this regard.

After receiving the memorandum, Borgs was directed to meet with the Executive Director and the supervisor. Borgs was reluctant to attend the meeting because he had previously been reprimanded. Borgs asked if he could meet only with the Director, or in the alternative, if he could have Hasan present. Both requests were denied, and Borgs was told to go home and return the next morning. The next day Borgs was told that his refusal to meet the previous day constituted "gross insubordination," and he was terminated.[38]

The Board concluded that the decision in *Materials Research* was correct "to attach much significance to the fact that the Court's *Weingarten* decision found that the right was grounded in the language of Section 7 of the Act, specifically the right to engage in concerted activities for the purpose of mutual aid or protection."[39] The Board went on to state:

> This rationale is equally applicable in circumstances where employees are not represented by a union, for in these circumstances the right to have a coworker present at an investigatory interview also greatly enhances the employees' opportunities to act in concert to address their concern "that the employer does not initiate or continue a practice of imposing punishment unjustly."[40]

The Board rejected the notion that extending the right to nonunion settings would effectively violate the law by requiring an employer to "deal with" the equivalent of a labor organization, and thereby conflict with the exclusivity principle of Section 9(a) of the Act.[41] The Board noted that the nonunion employer had no duty to bargain with the employee representative and that "dealing is not equivalent to collective bargaining."[42] With regard to suggestions that a nonunion representative does not have the needed skills to perform the necessary task, the Board suggested that the claim is mere speculation and that the employee is free to choose whether to "request or forego representation."[43]

Member Peter J. Hurtgen in his dissent pointed to the differences between a union and nonunion setting. He noted that a representative in a union environment is charged with "safeguarding ….the interests of the entire bargaining unit," but in a nonunion setting there is no "union representative" and no "bargaining unit."[44] Further, he pointed out that an employer in a union setting is not free to deal directly with employees, but in a nonunion setting the freedom to deal directly does exist. He suggested that the majority's rule would forbid an employer from "exercising its right to interview an employee on an individual basis."[45] Hurtgen also argued that a union representative has knowledge of the discipline process and can therefore offer "relevant insights" at an interview. In contrast, he suggested that since there is no collective bargaining process, a nonunion representative would not be in a position to offer the same insights. He also suggested

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[38] 331 NLRB, *supra* note 1, at 5.
[39] *Id.* at 12.
[40] *Id.* at 13.
[41] *Id*. at 14.
[42] *Id*. at 17.
[43] *Id*. at 18.
[44] *Id*. at 40.
[45] *Id*.

that the Board's ruling would create confusion because employers would not be aware of their obligations.[46]

IV. THE PRACTICAL IMPLICATIONS OF THE *EPILEPSY FOUNDATION* DECISION

Although the extension of *Weingarten* to nonunion employees has taken up a significant amount of the Board's time and energy over the years, it is unclear that the "right" plays a significant role in the life of an employee. Clearly, under the Board's current position employees in both union and nonunion environments have the right to have a co-worker present during an interview which the employee has a "reasonable belief may result in discipline." Making a determination as to what constitutes an "investigatory" interview that may reasonably lead to discipline depends on the circumstances. However, if an employer has called the meeting after an incident and the purpose of the interview is to gather facts to determine if discipline is warranted, it appears likely that the Board would find that the employee has the right to request that a representative be present. Thus, a meeting to discuss an employee's insubordinate behavior, record of absenteeism, or allegation of drug use would certainly fall within the realm of an "investigatory meeting" likely to trigger an employee's right to request a representative be present. In contrast, it is unlikely that meetings held with employees to orient them to their positions, or to review new company rules would trigger the right. More importantly, *Weingarten,* and those cases coming after, do not require an employer to permit an employee to have a representative if the only purpose of the meeting is to issue the discipline to the employee and not to conduct a fact-finding which would lead up to the discipline. Of course, the line between fact-finding and the mere issuance of discipline can become unclear and a session can move over the line and trigger the employee's right to request representation. Despite this right, it is important to note that it is up to the employee, and not the employer to request that a representative be present at the interview. It is not the responsibility of the employer to inform an employee of his or her right. Moreover, it is the employee's responsibility and not the responsibility of the employer to provide a representative to be present. In fact, if the employee requests a specific representative to be present and that individual is not available, the employee needs to identify another representative who is available.

It is also noteworthy that the significance of the right of an employee to have a representative present is somewhat diminished by the fact that an employer has the option not to proceed with the interview. In short, while the employee has the right to request a representative, and an employer violates the Act if he proceeds with the "investigatory interview" without granting the request, the employer has the right to terminate the interview, or even to give the employee the option of deciding whether to continue with the interview without a representative. An employee confronted with such an option might well agree to continue with the interview on the theory that it is his or her only opportunity to have his side considered. However, by voluntarily agreeing to proceed, the employee thereby waives his or her right to raise a "*Weingarten*" claim later. In fact,

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[46] *Id*. at 40-41.

nothing in the Board's decision restricts an employer from conducting the investigation without ever interviewing the employee.

The Board's decisions also restrict the role of the employee's representative. The United States Supreme Court and the Board made it clear that an employer is under no obligation to "bargain with" or "deal with" the employee representative. Although the representative's role is more than a witness or "good listener," the role is not intended to interfere with the investigatory process. A representative attending a disciplinary interview may offer suggestions regarding the names of witnesses that the employer might want to contact as part of the investigation, or suggest information either during or after the meeting to the employee that may help to support the employee's position. However, the employer is not legally obligated to actually contact the individuals suggested by the representative. Thus, for an issue that has occupied a considerable amount of time for the Board and courts, it appears to offer little in the way of meaningful rights to employees in either the union or nonunion environment.

V. IS THE BOARD'S *EPILEPSY FOUNDATION* ANALYSIS CONSISTENT WITH ITS DEFINITION OF "CONCERTED ACTIVITY?

In reaching its conclusion in *Epilepsy Foundation* that Section 7 rights are triggered by a nonunion employee's request for representation, the Board relied in part on the view that a request by one employee for a representative constitutes a protected act. Moreover, the Board suggested that the assistance offered by the second employee constituted "mutual aid." Although the Board majority suggested that its decision was consistent with prior decisions dealing with the definition of "concerted activity," a review of those cases raises serious questions as to whether they are consistent. It is that inconsistency which creates a fundamental flaw in the Board's *Epilepsy Foundation* decision.

The question of what constitutes "concerted activity" has been considered in numerous decisions over the years. As in the decisions since *Weingarten*, the Board's decisions defining "concerted activity" generally and "concerted activity" in the nonunion environment specifically have also reflected the changing composition of the Board. In *Interboro Contractors, Inc.*[47] an individual employee complained to the company about alleged contract violations. The Board held that an employee exercising rights contained in a collective bargaining agreement meets the definition of engaging in a concerted act. In reaching this conclusion, the Board suggested that by asserting a right contained in a collective bargaining agreement the employee was asserting a right benefiting the group.[48]

The next significant decision on the issue was *Alleluia Cushion Company*.[49] In *Alleluia Cushion* an employee filed complaints with the Occupational Health and Safety Administration concerning unsafe work conditions. The Board concluded that the employee's complaint was protected because the employee, although acting alone, was attempting to enforce statutory rights that benefited all the employees at the company. In

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[47] 157 N.L.R.B. 1295 (1966), *enforced*, 388 F. 2d. 495 (2nd Cir. 1967).
[48] *Id*.
[49] 221 N.L.R.B. 999 (1975).

its 1977 decision in *Ambulance Service of New Bedford*,[50] the Board affirmed without comment an administrative law judge's decision which found that an employee's assertion of a non-statutory right (the employer's "proclivity" for paying with bad checks) was "part and parcel of the employees common concern with [the employer's] proclivity for paying them with checks it had reason to believe would not be honored."

However, in *Meyers Industries*[51] the Board held that when an individual not covered by a collective bargaining agreement takes action it must be on behalf of employees who have a common concern with the individual. The Board stated:

> In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.[52]

In short, an individual would no longer be engaged in concerted activity unless the action was "engaged in, with or on the authority of other employees, and not solely by and on behalf of the employee himself."[53] It is also noteworthy that the Board found that it is not a "concerted act" when an employee overhears the complaint of another and the employee stands by while the other employee actually makes the complaint. In fact, the Board went further and stated, "[t]aken by itself, however, individual employee concern, even if openly manifested by several employees on an individual basis, is not sufficient evidence to prove concert of action."[54]

Following the *Meyer's* decision, the Supreme Court issued its decision in *NLRB v. City Disposal System*.[55] The Supreme Court concluded that an employee covered by a collective bargaining agreement who refused to drive an unsafe truck was engaged in a concerted and protected act. The Court reasoned that the individual's conduct was not only on his own behalf but was on behalf of other employees since he was asserting rights under the collective bargaining agreement.[56] On remand,[57] the Board reaffirmed the standard it defined in what has become known as *Meyers I. Meyers Industries, Inc. and Kenneth P. Prill.*[58] In reviewing its reasons for the standard established in *Meyers I*, the Board again noted that:

> It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing

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[50] 229 N.L.R.B. 106 (1977).
[51] 268 N.L.R.B. 493 (1984).
[52] *Id*. at 497.
[53] *Id*.
[54] *Id*. at 498.
[55] 465 U.S. 822 (1984).
[56] Justice O'Connor in dissent argued that even though the right was found in a collective bargaining agreement it did not make the conduct protected. 465 U.S. at 842-43.
[57] As a result of the *City Disposal* decision, the Court of Appeals for the District of Columbia, upon reviewing the *Meyers* decision, remanded the case back to the Board. *See* Prill v. NLRB, 755 F2d 941 (D.C. Cir. 1985), *cert. denied*, 106 S.Ct. 313, 352 (1985).
[58] 281 N.L.R.B. 882 (1996).

> or preparing for group action or that it had some relation to group action in the interest of the employees.[59]

In light of the Board's decision in *Meyers*, it is hard to reconcile the Board's attempt to broadly extend *Weingarten* rights to nonunion employees. Under *Meyers*, it is not reasonable to find that an employee attending an investigatory/discipline meeting with his or her employer relative to a matter of individual concern constitutes a "concerted act." Moreover, it is just as difficult to conclude under *Meyers* that the employee's request to have a representative who has marginal or no interest in the employee's problem constitutes "concerted action." The employee asked to be present during the investigatory interview may well know nothing about the issues confronting the employee under investigation, and may not even agree with the employee's position. While it is understandable that in a unionized setting the representative employee would have the "common issue" of protecting contractual rights, in the nonunion environment the only way in which a "bond" could be created to constitute the "concerted action" would be if the representative employee had a common interest in the issue facing the employee under investigation. In many respects, the co-worker called to the meeting turns into nothing more than a bystander listening to the employee's complaint and not a participant in conduct that he or she has adopted. In *Meyers*, the Board made it clear that the bystander who is simply listening to the complaint does not create a bond sufficient to constitute concerted activity. In requesting a representative, a nonunion employee is not taking action on behalf of other employees. The individual employee has a problem that has no impact on any other employee and it is likely that the co-worker does not even know anything about the incident. Rather, the employee is acting purely out of individual interest. For example, an employee accused of theft, drug use, or even absenteeism is not meeting with his employer because of an interest in the well being of another employee.[60] To suggest otherwise is to create a fiction that is not logical and is inconsistent with Board precedent.

VI. DID THE BOARD FOREGO AN OPPORTUNITY IN *EPILEPSY FOUNDATION*?

In *Epilepsy Foundation* the Board was presented with the opportunity to decide the case on narrower grounds that would have been consistent with its decision in *Meyers Industries*. Such an approach would have required that that a nonunion employee requesting *Weingarten* rights demonstrate that he or she had engaged in concerted activity, and that the concerted activity had directly or indirectly led to the investigatory/disciplinary meeting. In short, the request for representation could not be the concerted activity that triggered the right to representation. Rather, the employee would have to have engaged in "concerted activity" prior to the investigatory meeting to trigger the right.

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[59] *Id*. at 887.

[60] In contrast, an employee covered by a collective bargaining agreement who is accused of theft, drug use etc. is tied to his or her co-workers by the terms of the contract.

The *Epilepsy Foundation* case provided an appropriate setting in which to apply this approach or rule. In *Epilepsy Foundation*, two employees had been involved in a concerted act. Arnis Borgs and Ashraful Haas jointly sent two memos to management. Clearly, the two employees were committed to the same issue and a common purpose. More importantly, when Borgs was directed to attend the "investigatory" meeting he requested Hasan, the very person who he had engaged in the concerted act with to attend the meeting. In short, this is not a case in which an employee was "blindly" called into an investigatory meeting concerning another employee. The *Epilepsy Foundation* case presented the concerted action of two individuals, followed by a request by one of those individuals to have the "other" individual present during the "investigatory interview." Although Hasan, the employee asked to "represent" Borgs, did not have a collective bargaining agreement to rely upon, he was fully familiar with Hasan's concerted action and the surrounding circumstances. Under such circumstances, the *Meyers* standard for concerted activity would be met. In addition, when the employee requesting representation had engaged in a concerted act which led to the disciplinary interview, the "representative" was likely to be an employee who joined in the concerted act and was therefore likely to be a knowledgeable participant in the process. Thus, the dissenter's concern in *Epilepsy Foundation* that an unknowledgeable and inarticulate representative would be involved in the process would be eliminated or at least minimized. [61]

Following a narrower "concerted action" analysis would also minimize the dissent's concern in *Epilepsy Foundation* that the extension of *Weingarten* to nonunion employees would create a "tripwire" for nonunion employers. Although this argument was on its face rather weak because the nonunion employer was obligated to be familiar with many areas of law that could be considered a "tripwire," the approach described above would minimize even the potential for a "tripwire." Moreover, the request for a representative at an investigatory meeting would be far less a "tripwire" for an employer than many other situations created by other laws. In contrast to other laws that require an employer to initiate a particular action, in a *Weingarten* type of case an employer has no obligation to ask the employee if he or she wants a representative. It is the employee who must make the request. The employer is not the initiator, rather it is the employer's refusal to favorably respond to the employee's request that creates the potential violation.

Thus, the employer has a warning signal by the employee in the form of the employee's request that a legal right might be implicated. Certainly, the employer could consult with counsel before responding. Additionally, since the employer will have encountered the "concerted action" of the employee prior to the request for representation, the employer would have still another warning signal that it was moving into legally questionable territory. While possible legal tripwires always exist, using this narrower analysis would offer a significant warning to nonunion employers that an employee's legal rights are potentially involved.

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[61] It is noteworthy that the *Materials Research* case also presented facts that would have lent themselves to the narrower approach. In fact, in *Materials Research*, a number of employees had engaged in a concerted act prior to the "investigatory interview" being called. Although the facts do not indicate who the employee actually requested to be present during the investigatory interview, the author speculates that it could have been one of the employees who had engaged in the concerted activity.

VI. CONCLUSION

With one vacancy currently on the five member NLRB, and the possibility for additional changes in the composition of the Board as a result of the election of President George W. Bush, there is little doubt that the Board will, in the not too distant future, revisit the *Epilepsy Foundation* case. Rather than taking an overly broad approach, the Board should consider requiring that a nonunion employee requesting *Weingarten* rights demonstrate that he or she has engaged in concerted activity and that the concerted activity has directly or indirectly led to the investigatory/disciplinary meeting. The use of the narrower approach to determine a nonunion employee's right to have a representative present would reconcile the *Epilepsy Foundation* type case with the Board's definition of concerted activity, and would address many of the concerns that were articulated by the dissenting opinions in *Epilepsy Foundation.*