"HEY, THE BOSS JUST CALLED ME INTO THE OFFICE. . . ."

The *Weingarten* Decision and the Right to Representation on the Job

by Steve Diamond

NEW EDITION

Center for Labor Research
and Education

Institute of Industrial Relations
University of California
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I. INTRODUCTION

The scenes described below may sound familiar to many union activists. They represent the kind of ongoing tension and difficulty unionists face in organizing and representing their fellow workers. Under the constant pressure of management, workers are often threatened with or actually subjected to investigations, interrogations, and discipline and discharge. But these two cases are different not because of what happened during the incidents described but because of what occurred afterwards. The unions in each case, the Retail Clerks and the Garment Workers, filed unfair labor practice charges with the National Labor Relations Board and these charges were eventually heard by the United States Supreme Court.

RETAIL CLERKS PUSH FOR REPRESENTATION

In June 1972, Leura Collins, a lunch-counter sales clerk for the J. Weingarten, Inc., Store No. 98, in Houston, Texas, was called into her store manager's office and interrogated by the Manager and an undercover investigator employed by the store. Unknown to Collins, the investigator had had Collins under surveillance for the previous two days. He had been investigating a report that Collins was stealing money from the lunch counter cash register. His investigation had turned up no evidence of wrongdoing, but the store manager had received a report from another employee that Ms. Collins "had purchased a box of chicken that sold for $2.98, but had placed only $1.00 in the cash register."

During the questioning regarding this incident, Ms. Collins requested that her shop steward or another union

representative from her union, Local 455 of the Retail Clerks, be called into the interrogation session. Her repeated requests for such assistance were denied. In response to questions about the chicken, Ms. Collins explained that she had only taken a dollar's worth of food, but had used a larger box to place it in because the store had run out of smaller boxes. The investigator left the office and confirmed this fact with other store employees. Upon return to the interview he "told Collins that her explanation had checked out, that he was sorry if he had inconvenienced her, and that the matter was closed."

Collins then broke down and began to cry. She "blurted out that the only thing she had ever gotten from the store without paying for it was her free lunch." The manager and investigator were surprised by this admission, because free lunches were not allowed at this particular store. They once again began an interrogation of Collins. She once again requested the presence of her shop steward, and the store manager again denied her request.

During the course of the questioning the investigator asked Collins to sign a statement that she owed the store approximately $160 for lunches. She refused to sign the statement. Collins pointed out that in Store No. 2 of the Weingarten chain, where she had worked for nine years prior to her transfer to No. 98, free lunches were a regular policy. When Weingarten, Inc., headquarters confirmed this fact, the interrogation was ended and Collins left the store manager's office. Though told to keep the matter to herself, Collins "reported the details of the interview fully to her shop steward and other union representatives" and an unfair labor practice charge was filed.

SIT-IN FOR SHOP STEWARD GOES TO SUPREME COURT

On October 16, 1969, owners of the Quality Manfacturing Co., a West Virginia women's clothing factory, fired employee Catherine King, International Ladies Garment Workers' Union shop chairlady Delia Mulford, and assistant chairlady Martha Cochran. The firings came after a week-long series of confrontations between the three and management of the firm. The events began on Friday, October 10, when King and two other employees complained to the company president that "they were unable to make a satisfactory wage under the piece work system then in effect." The meeting was bitter and ended with an order from the president to return to work and a threat that they were free to "'go elsewhere' if they were dissatisfied with the company."

Soon after the meeting, the company production manager, wife of the president, noticed that King had turned off her machine and was speaking to a group of workers on the shop floor who had also turned off their machines. The manager ordered them back to work, but King told her to mind her own business. The manager ordered her to follow her to the company president's office. King asked Mulford, the union chairlady, to accompany her. The president told Mulford to go back to work and ordered King to meet with him alone—she refused. That evening Mulford was called at home by the company manager and suspended for two days.

On Monday, October 13, King was again ordered to meet with the company president. This time she asked the assistant union chairlady, Cochran, to accompany her. They were met outside the president's office by his wife, the production manager, who refused to allow Cochran into the meeting. She told Cochran that if she wanted to keep her

job she should return to work. Cochran replied, "Well, Mrs. Gerlach, I'm sorry, but if that's what you want to talk to her about [referring to the dispute which had started the previous Friday], that is union business and she has asked me to represent her." Management refused to meet and refused to allow King to return to work. The two employees then sat down outside the president's office and waited.

Their sit-in continued on the next day, Tuesday, and Cochran was then suspended for two days. On Wednesday they were joined in their protest by Mulford whose two-day suspension had now ended. King once again refused to meet with the company president without union representation. On Thursday, October 16, all three women went once again to the company president's office. Cochran was ordered to return to work and did so. King was ordered again to meet with management alone, she again refused and was fired. ILGWU shop chairlady Mulford was also fired.

Later in the day, Cochran attempted to file grievances on behalf of all three employees with the president. "He stated he was about to leave town and had no time for such things. When she put the list of grievances on his desk, he picked them up and threw them into the wastebasket. He then pulled Cochran's timecard and told her, 'You've worked this morning, but you're not working this afternoon.' When Cochran asked if she had been fired he replied, 'Just go home. You wanted to draw unemployment now go on and draw it.'"

A UNION VICTORY IN THE SUPREME COURT

On February 19, 1975, the Court issued a decision, the same for both the Texas Retail Clerks and the West Virginia Garment Workers, that the employees had been the victims of an unfair labor practice (*NLRB v. J. Weingarten, 420 U.S. 251).* An important new right for workers came out of this decision: ***an employee may be represented by the union at an investigatory interview with his/her employer when the employee reasonably believes that the interview may lead to disciplinary action.*** It is the purpose of this pamphlet to review the basis for the Court's decision, and to summarize the development of the law since the Court's 1975 decision.

II. THE WEINGARTEN RULE: AN EMPLOYEE'S RIGHT TO REPRESENTATION

The Court's decision in favor of the employees of both *Weingarten, Inc.* and *Quality Manufacturing Co.*, was based on the Justices' interpretation of Section 7 of the National Labor Relations Act. This section reads as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection....

The Act enforces this right through its Section 8(a)(1), which reads:

> It shall be an unfair labor practice for an employer—
>
> to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

These rights are part of the Act because, according to the Court, "it is a goal of national labor policy to protect 'the exercise of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of...mutual aid or protection.' (Section 1, of the NLRA.) To that end, the Act is designed to eliminate the "inequality of bargaining power between employees and employer." (*Weingarten*, at pp. 261-2).

According to the opinion of the Court, the request for a shop steward by the threatened employee is a basic expression of "concerted activity":

> The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of Section 7....This is true even though the employee alone may have an immediate stake in the outcome; he seeks "aid or protection" against a perceived threat to his employment security. The union representative whose participation he seeks is, however, safeguarding not only the particular employee's interest, but also 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.
>
> (*Weingarten*, at pp. 260-1)

The court concluded that the NLRA in practice should allow the union to indicate its support of workers in such conflicts. "The representative's presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview." (*Weingarten*, at p. 261.) The Court argued that such a situation, though it may involve only an individual employee, is similar to the basic solidarity expressed by workers in strikes or job actions carried out on behalf of a fellow employee:

> 'When all other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity then so established is "mutual aid" in the most literal sense, as nobody doubts.'
>
> (*Weingarten*, at p. 261—quoting *Houston Contractors Assoc. v. NLRB*, 386 U.S. 664, 668-669 (1967))

Both Leura Collins and the three employees of Quality Manufacturing were unjustly denied the right to union representation. The Court, agreeing with the unions on this basic point, set down specific guidelines for the application of this right to representation. As with many court decisions, the guidelines provide a framework for the exercise of a legal right. A summary of these makes up the next section of this pamphlet. They do not answer every particular question or controversy that might arise in the workplace. A number of such questions regarding the right to union representation have arisen since the *Weingarten* and *Quality* cases. The most important of these questions are examined later in this pamphlet.

III. THE COURT'S GUIDELINES

1. The employee must request that a union representative be called into the meeting with management.

The Court wrote: "[T]he right arises only in situations where the employee requests representation. In other words, the employee may forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative." (*Weingarten*, at p. 257.)

2. There must be a reasonable belief that discipline will result from the investigatory meeting.

> "[T]he employee's 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. Thus, the [National Labor Relations] Board stated in [its] *Quality* [decision]: 'We would not apply the rule to such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training, or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative.'"
>
> (*Weingarten*, at pp. 957-8.)

The right to representation exists even in cases where no discipline does result from the interview. That is exactly

what happened in the original Weingarten incident. The employee even admitted taking free lunches, but the employer did not discipline her. The Court pointed out, though, that since employee theft is a basis for automatic discipline at the Weingarten Store, as it is with most employers, it was reasonable of Ms. Collins to assume that discipline would result if the investigation found her guilty —even though she did not think that she had violated the company's rules. The right to representation is based on the reasonable belief of the employee, not anyoneelse in the situation.

3. The Court's decision does not force the employer to interview the employee.

The employer may decide not to interview the employee, if the employee requests the presence of a union steward, but may continue the investigation:

> [E]xercise of the right [to the presence of a shop steward] may not interfere with the legitimate employer prerogatives. The employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and forgoing any benefits that may be derived from one. As stated in *Mobil Oil [196 NLRB 1052]:* 'The employer may, if it wishes, advise the employee that it will not proceed with the interview unless the

> employee is willing to enter the interview unaccompanied by his representative. The employee may then refrain from participating in the interview, thereby protecting his right to representation, but at the same time relinquishing any benefit which might be derived from the interview. The employer would then be free to act on the basis of information obtained from other sources.'
>
> (*Weingarten*, at pp. 258-9)

Though this appears to leave the union and employee a choice to make, there is, in fact, nothing to be gained by meeting with management without one's union representative. An employer who is serious about resolving a problem should welcome a union's participation. The choice, then, remains with the employer.

4. Finally, "the employer has no duty to bargain with the union representative at an investigatory interview."

"'The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation.' Brief for Petitioner 22." (*Weingarten*, at p. 260; emphasis added.)

IV. CURRENT DEVELOPMENTS

A number of decisions by the National Labor Relations Board and various U.S. Courts of Appeal have examined the *Weingarten* rule in different situations. Their conclusions have interpreted and extended the original decisions. Below we examine the most important of these decisions. It should be kept in mind when reviewing Appeal Court cases that there are thirteen different regional courts at the appellate level. Decisions made by one appellate court may differ or even contradict that of another. California is in the Ninth Circuit, therefore a decision made by the Ninth Circuit Court of Appeal holds for all California workers unless overturned by the U.S. Supreme Court. If another Circuit Court of Appeal makes a decision on an issue not yet reviewed by the Ninth Circuit, that decision may be used as a basis for argument with an employer—but it does not yet have the force of law.

PUBLIC EMPLOYEES

California public employees have the same right to representation at an investigatory interview as workers in the private sector, even though the *Weingarten* case itself does not apply to public employees because they are excluded from the NLRA.

A 1979 State Court of Appeal decision, *Robinson v. State Personnel Board* (97 Cal. App.3d 994 (1979)), held that an "employee has a right to union representation at a meeting with his superiors held with a significant purpose to investigate facts to support disciplinary action...." The decision was based on employee representation rights con-

tained in the George Brown Act. The Brown Act is the state public employment relations statute. It has since been superceded for many public employees by more recent laws providing collective bargaining in the public sector. The Public Employment Relations Board, which administers three of these new laws, has held that *Weingarten* rights also exist under these new laws, since the laws contain comparable representation provisions.

THE NON-UNION WORKER

Non-union workers no longer have the right to the presence of a union representative or fellow employee in a meeting with management. In *Sears, Roebuck and Co. and International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC* (274 NLRB 55), the National Labor Relations Board held "that *Weingarten* rights are inapplicable where, as in the case before us there is no certified or recognized union." Only three years ago the Board had ruled in *Materials Research Corporation* [262 NLRB 1010 (1982)] that such employees did have the right to representation. This most recent decision, issued on February 22, 1985, is consistent with a general tendency by the Board to "whittle away at the ability of workers to organize," according to Robert Friedman, general counsel for the IUE.

The *Sears* case grew out of a complex set of unfair labor practice charges filed against the corporation by the IUE during an organizing drive at its Oklahoma City, Oklahoma Service Center in the late 1970s. Larry Ward, a service technician and a union organizer, was discharged for alleged absentee problems. During a discussion of these problems with his supervisor, Ward requested the presence of a union representative or a fellow employee as a witness. His supervisor denied the request stating that

the company did not have a union and that the matter was "strictly between the Company and the Ward." After a lengthy discussion of Ward's personnel record, Ward was fired. An Administrative Law Judge for the NLRB and then the Board itself sustained the firing.

The NLRB had held in 1982 that "the need of unrepresented employees to support each other through this type of conduct [presence of a shop steward] may well be greater than that of represented employees.... Correcting the relative imbalance between unrepresented employees and their employer is not achieved by forcing an employee to attend a disciplinary interview alone. To counter this imbalance, employees in a unrepresented unit must look to each other for whatever mutual aid or protection they can muster in the fact of unjust or arbitrary employer action." (See *Materials Research Corporation*, 110 LRRM 1401, 1405.)

The NLRB's new *Sears* decision, made by members appointed by President Reagan, sidesteps the arguments made in *Materials Research*. The new Board contends, instead, that "when no union is present, the imposition of *Weingarten* rights upon employee interviews wrecks 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." The positive role of a union representative or fellow employee in a disciplinary interview is seen by the Board as an "imposition" on the rights of employers. The fundamental basis of the NLRA, originally to offer protection for workers, is now seen as offering added protection to the employers.

CAN A SHOP STEWARD BE PRESENT IN ALL MEETINGS WITH MANAGEMENT?

The *Weingarten* and *Quality* decisions make it clear that a representative can only be present in meetings where the employee has a reasonable belief that the investigation will lead to discipline. In *Lennox Industries, Inc.* the Fifth Circuit Court of Appeals summarized the current limitations on *Weingarten* representation rights:

> Under Weingarten, an employee is entitled to a union representative only when (1) the interview in question is **investigatory**, i.e., when it is designed to elicit answers to work-related questions which might affect the employee or the bargaining unit, and (2) the employee reasonably fears that discipline might result from the interview. Thus where the purpose of a meeting is **disciplinary** rather than **investigatory**, i.e., where the meeting is designed simply to inform an employee of a previously made decision to impose discipline, no union representative is required since there is no attempt to elicit facts which might result in discipline.... Similarly, where the purpose of a meeting is **supervisory** rather than **investigatory**, e.g., where the meeting is designed simply to show an employee how to improve his work performance, no right to union representation inheres.
>
> (*Lennox Industries v. NLRB*, 106 LRRM 2607, 2609)

Of course, the key question is when is it reasonable to fear discipline? In *Lennox* the Court concluded that an

employee's fear was reasonable even when no discipline was intended by the employer. The Court pointed out, for example, that in

> an interview in which work-related questions are asked of an employee, but which the employer does not intend to result in discipline may nevertheless result in discipline if the employee surprises his employer with an answer which the employer finds unsatisfactory or threatening. The *Weingarten* rule is designed to protect such "fearful" or "inarticulate" employees from the inadvertent results of their answers during work-related interviews.
>
> (*Lennox*, 106 LRRM 2607, 2610)

The Fifth Circuit Court in *Lennox* specifically rejected language by the Eighth and Ninth Circuit Courts that discipline must be "probable" or "seriously considered" in order to trigger *Weingarten* protections. This decision properly recognizes the unpredictable nature of all face-to-face discussion between management and employees. The different definitions of "reasonable" used by each of these three courts should be kept in mind by unions. One of the best ways to resolve the conflict is through contract language that spells out employees' rights to a shop steward. Sample contract language is provided below.

WHAT ROLE CAN THE SHOP STEWARD PLAY IN THE INTERVIEW?

The shop steward is present in order to assist his or her fellow employee in facing management. The natural fears and concerns that such meetings cause may make it diffi-

cult for an individual, alone, to present an accurate picture of their work performance. The employer may decide to disregard the information provided by a shop steward and the steward cannot insist on bargaining with the employer. However, the employer cannot force the shop steward to be silent and the union should take advantage of this to help the employee as much as possible. In *NLRB v. Texaco, Inc.*, the Ninth Circuit Court of Appeals concluded:

> We agree with the Board [NLRB] that [the language in *Weingarten*] is directed toward avoiding a bargaining session or a purely adversary confrontation with the union representative and to assure the employer the opportunity to hear the employee's own account of the incident under investigation. The passage does not state that the employer may bar the union representative from any participation. Such an interference is wholly contrary to other language in the *Weingarten* opinion which explains that the representative should be able to take an active role in assisting the employee to present the facts....In refusing to permit the representative to speak, and relegating him to the role of a passive observer, the respondent did not afford the employee the representation to which he was entitled.
>
> (*NLRB v. Texaco, Inc.*, 108 LRRM 2850, 2851, Oct. 16, 1981)

This same interpretation has also been made in a number of cases by other Courts of Appeal.

WHAT OTHER RIGHTS DO THE UNION REPRESENTATIVE AND EMPLOYEE HAVE UNDER THE WEINGARTEN RULE?

A recent decision by the Ninth Circuit Court of Appeals, in *Pacific Telephone v. N.L.R.B.* (113 LRRM 3529) outlines three additional aspects of the *Weingarten* rule which it considers crucial to the employee's exercise of his/her rights:

a) the employee is entitled to information from the employer regarding the subject of the meeting;

b) the employee is entitled to consult with his/her union representative prior to the meeting; and

c) the union representative is allowed to request the pre-interview consultation meeting with the employee.

These provisions greatly enhance the ability of an employee and the union to respond effectively to the employer's investigatory efforts. In the words of the Court: "Without such information and such conference, the ability of the union representative effectively to give the aid and protection sought by the employee would be seriously diminished." (113 LRRM 3529, at 3531.)

The *Weingarten* rule also applies to group meetings where management confronts more than one employee at a time. (*Northwest Engineering Co.*, NLRB, 1982, 111 LRRM 1481.)

Finally, an employee may refuse to attend an interview where he/she has been denied a shop steward. The line, however, between insubordination and a legal refusal to participate in an investigatory interview is very thin. (Aspects of this thin line are reviewed in section 6 below.)

If an employer insists on a meeting with an employee alone, and threatens disciplinary action if the employee refuses, it is prudent to advise the employee to attend the meeting but remain silent. Afterwards, with the assistance of the union, the employee can file a grievance and/or an unfair practice charge against management's insistence that the employee forgo the right to representation. This is an extension of the "obey now, grieve later" provision of most union contracts. It is always easier for the union to defend members when they are on the job, not out on the street.

WHAT SPECIFIC LIMITATIONS ARE PLACED ON THE EMPLOYEE?

The thin line between employee disobedience, in refusing to be interviewed, and insistence on the protections of the *Weingarten* rule are illustrated by the decisions in the following cases. Outside of the specific guidelines outlined above, normal management-union relationships are the rule.

a) A union representative cannot be requested for a meeting called simply to announce disciplinary action already decided. (See *Baton Rouge Waterworks Company*, 103 LRRM, 1056 (1979).)

b) An employee cannot refuse an order to leave the shop floor and go to a supervisor's office, even if the request for a shop steward to also go to the office has been denied. (See *Roadway Express, Inc.* 103 LRRM 1050 (1979).) **He may however refuse to meet face-to-face with the supervisor, if discipline is a possible outcome.**

c) The employee does not have the right to the steward of his or her own choice. The available shop steward or union-

appointed representative can be insisted upon by the employer over the objections of the individual employee. (See *Pacific Gas and Electric*, 106 LRRM 1077 (1981).)

REMEDY TO WEINGARTEN VIOLATION WEAKENED

In another reversal of an earlier Board decision, the NLRB declared in its December 12, 1984, *Taracorp Industries* case [273 NLRB 54 (1984)] that an employee who is denied Weingarten representation and is then fired for just cause is no longer entitled to a "make-whole" remedy, i.e., reinstatement with back pay. The Board contended that such a remedy is "bad policy" and that their reversal "will serve the interests of the entire labor-management community." The pre-Reagan Board had held precisely the opposite in *Kraft Foods* [251 NLRB 598 (1980)]. There the Board found that a "make-whole" remedy was appropriate even where management fired an employee for just cause. The current Board still agrees, however, that if an employee can prove that he was fired for exercising his *Weingarten* right and not for just cause that he is entitled to a "make-whole" remedy.

V. SAMPLE CONTRACT LANGUAGE FOR THE *WEINGARTEN* RULE

To provide the best protection for a union's members it is recommended that the union attempt to negotiate into its contract or memorandum of understanding the basic provisions of the *Weingarten* decision. This will also provide a strong educational tool for the union. Too often court decisions in favor of workers, the few that exist, are written about only in obscure journals. If it's in the contract, then the union membership is in the best position to understand and exercise its legal rights. If the *Weingarten* rule is in the contract then it will be subject to the grievance procedure. This means these legal protections can be enforced with less time and expense than is involved by going to court. Below we provide sample language along the lines provided by the *Weingarten* decision in three major union contracts.

1) General Motors Corporation and the United Auto Workers Covering Production and Maintenance Employees (expires 9/14/84):

"Disciplinary Layoffs and Discharges...When a suspension, layoff or discharge of an employee is contemplated, the employee, where circumstances permit, will be offered an interview to allow him to answer the charges involved in the situation for which such discipline is being considered before he is required to leave the plant. An employee, who, for the purpose of being interviewed concerning discipline, is called to the plant, or removed from his work to the

foreman's desk or to an office, or called to an office, may, if he so desires, request the presence of his District committeeman to represent him during such interview."

2) Goodyear Tire and Rubber Company and the United Rubber Workers Company-Wide Agreement Covering Production and Maintenance Employees (expires 4/21/85):

"Article V, Grievance Procedure
(5)....When supervision discusses with an employee a matter likely to result in his discharge, or suspension, or when a derogatory notation is to be placed on his record, the employee will be reminded of his right to bring his union representative into the discussion at that time and his union representative will be informed of any actions taken;...."

3) Bell Aerospace Textron and the United Auto Workers (expires 6/84):

"If it becomes necessary for management to discipline or discharge any employee, such disciplinary action shall be carried out as follows:

"The employee's supervisor must first discuss the matter of contemplated disciplinary action with the Committeeman or Steward in the employee's zone. The supervisor will promptly inform the committeeman or steward that he is initiating disciplinary action and the reasons therefor.

"The employee and his Committeeman or Steward shall be given a reasonable time to discuss the matter together and with the supervisor. The employee's supervisor will have the authority to resolve the problem at this level."

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