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THE ONGOING BATTLE OVER WEINGARTEN RIGHTS FOR NON-UNION EMPLOYEES IN INVESTIGATIVE INTERVIEWS: WHAT DO TERRORISM, CORPORATE FRAUD, AND WORKPLACE VIOLENCE HAVE TO DO WITH IT?

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INTRODUCTION

National leaders have called on all Americans to make sacrifices to combat terrorism, corporate fraud, and workplace violence. Under the guise of responding to these concerns, in its recent decision in IBM Corporation,¹ the National Labor Relations

* Associate Professor of Law, Columbus School of Law, The Catholic University of America; formerly Vice President & General Counsel, National Railroad Passenger Co.; Chief Counsel, University of Pennsylvania Health System; and Partner, Williams & Connolly, Washington, D.C. My deepest thanks to Kirk Renaud for his unfailing support and editorial advice; to Roger Hartley, Jon Hiatt and Jim Coppess for their insights and comments on drafts of the Article; to Kesha Hawkins and Steve Young for their invaluable help with research; and to Jean Connelly for her tireless assistance with preparing the manuscript. This Article had its genesis in an inquiry into employee rights in the context of corporate internal investigations. While the right to union or co-worker representation is traditionally associated with workplace investigations involving rule violations, tardiness, or similar issues, in recent years the rapid expansion of the internal investigation as a tool to protect business entities from civil and criminal liability has significantly expanded the scope of investigations in the workplace. For a more general discussion of issues pertaining to employee interviews in the context of internal investigations, see Sarah Helene Duggin, Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview, 2003 COLUM. BUS. L. REV. 859 (2003).

1. IBM Corp., 341 N.L.R.B. No. 148 (June 9, 2004). The employees petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of the decision, but the petition was voluntarily withdrawn and the case dismissed in November 2004. Schult v. NLRB, No. 04-1225, 2004 WL 2595890 (D.C. Cir. Nov. 2, 2004) (per curiam). The NLRB has subsequently applied its IBM holding in other cases. See, e.g., Wal-Mart Stores, Inc., 343 N.L.R.B. No. 127, slip op. at 1 (Dec. 16, 2004) (confirming that, pursuant to IBM, “an employer in a non-union workplace need not accede to its employees’ requests for the presence of a co-worker,” but an employee “cannot be disciplined for making such a request”); BLT Enterprises of Sacramento, Inc., 345 N.L.R.B. No. 39, slip op. at 1 n.3 (Aug. 27, 2005) (affirming pro forma finding of violation of employee’s pre-IBM right to co-worker representation but denying remedy in light of IBM holding “that employees in a non-unionized workplace do not have a right to representation at a disciplinary interview”). In a related context, in October 2004, the NLRB ruled against an employee disciplined for
Board ("NLRB" or "Board") unfairly and unnecessarily deprived American workers of a basic procedural protection. Citing "the troubled times in which we live,"2 "ever-increasing requirements [for employers] to conduct workplace investigations, . . . the rise in instances of workplace violence[,] . . . the increase in the number of incidents of corporate abuse and fiduciary lapses, . . . and . . . the events of September 11, 2001 and their aftermath,"3 in IBM Corporation the Board eviscerated the right of non-union soliciting a co-worker to serve as a witness in a sexual harassment proceeding before a state administrative body. See Holling Press, Inc., 343 N.L.R.B. No. 45 (Oct. 15, 2004). The Board held that employee efforts to secure co-worker assistance with legal actions outside the workplace are not protected by the National Labor Relations Act, 29 U.S.C. §§ 151-69 (2000) [hereinafter NLRA]. The majority ruled that the point of the external proceeding was to vindicate an individual claim. Consequently, the employee was not engaged in concerted action for "mutual aid or protection" within the ambit of Section 7 of the NLRA. See infra note 20, 29 U.S.C. § 157 (2000). Member Liebman dissented, objecting to the distinction drawn by the majority between workplace investigations and external proceedings involving employment discrimination claims. She opined: "This was a textbook example of 'circumstances where individual employees seek to initiate or to induce or to prepare for group action.'" Holling Press, 343 N.L.R.B. No. 45, slip op. at 4-5 (quoting Meyers Industries (Meyers II), 281 N.L.R.B. 882, 887 (1986), enforced sub nom. Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987)). In support of her position, Member Liebman noted that four of the five NLRB members in IBM agreed that "an employee's request for a co-worker representative in a disciplinary meeting is protected, concerted activity, which cannot be the basis for discipline (even if the employer is free to refuse the request)." Holling Press, 343 N.L.R.B. No. 45, slip op. at 5 (citing IBM, 341 N.L.R.B. No. 148, slip op. at 7 (Battista, Chairman & Meisburg, Members, majority opinion); id. at 20 n.13 (Liebman & Walsh, Members, dissenting) (2004)). She further emphasized that "[t]he Board has long recognized that alleviating unlawful discrimination in the workplace is in the interest of all employees." Holling Press, 343 N.L.R.B. No. 45, slip op. at 6 (citing Tanner Motor Livery, Ltd., 148 N.L.R.B. 1402, 1404 (1964)).

2. IBM, 341 N.L.R.B. No. 148, slip op. at 7.

that the need to fully protect society from potential terrorist attacks does not include a need for employers to interrogate employees about matters that could lead to discipline without a representative present. . . . To rely on such concerns distorts the debate and unnecessarily injects political considerations into a matter that should be decided on its legal merits and has no relevance to the question of whether the employee is or is not represented by a labor organization.
employees to the presence of a co-worker in investigative interviews they reasonably believe may lead to disciplinary sanctions.\textsuperscript{4} In so doing, the Board took away an important procedural protection once afforded to millions of Americans employed in non-unionized workplaces. Unfortunately, while it deprives nearly ninety percent of the workforce\textsuperscript{5} of a significant right, the Board's ruling is likely to do little, if anything, to mitigate the problems it purports to address. The decision exacts a high price, but offers nothing in return to those who are most vulnerable to corporate misconduct and the impact of terrorism and other violence in the workplace. Instead, the IBM Corporation decision undermines the basic policies of the National Labor Relations Act (NLRA).\textsuperscript{6}

The NLRB's decision to take away "Weingarten rights"—named for the pivotal U.S. Supreme Court decision upholding the safeguard in a union context—\textsuperscript{7} is yet another battle in an

\textit{Id.} at 2. Issues concerning the possible limitation of employee rights in connection with the threat of terrorist activity also have been raised in another matter currently pending before the Board. See Firstline Transp. Sec. Inc., Case 17-RC-12354, \textit{rev. granted}, 344 N.L.R.B. No. 124 (June 30, 2005) (granting review of issue of "whether the Board has statutory jurisdiction over privately employed airport security screeners and, if so, whether the Board should exercise that jurisdiction").


7. NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). In Weingarten, discussed \textit{infra} Part I.B.2, the Supreme Court upheld the right of unionized
ongoing conflict over co-worker representation rights pursuant to the NLRA. The degree of protection afforded to American workers all too often waxes and wanes as political stars rise and fall, and this is particularly true with respect to Weingarten employees to the presence of a union representative during an investigative interview that an employee reasonably believes may result in disciplinary sanctions. In a companion case, the Court ruled that discharge of a union steward for insisting on the right to respond to an employee’s request for representation in an investigative interview violated Section 8(a) of the NLRA. See Int'l Ladies' Garment Workers' Union v. Quality Mfg. Co., 420 U.S. 276 (1975). See also Robert A. Gorman & Matthew W. Finkin, Basic Text on Labor Law 527 (2d ed. 2004) (citing Quality Mfg., 420 U.S. 276). As Gorman and Finkin point out, because the Supreme Court grounded its decision in Section 8(a)(1) of the NLRA rather than Section 8(a)(5), employers have no duty to bargain with Weingarten representatives. See id. at 405. Following the Weingarten decision, Congress afforded federal workers who belong to unions similar rights pursuant to the Federal Service Labor-Management Relations Act, 5 U.S.C. § 7114(a)(2)(B) (2000). The Supreme Court has held that this statutory right applies even to investigatory interviews by agency inspectors general in instances in which an employee reasonably believes that the examination may result in disciplinary action against her. See NASA v. Fed. Labor Relations Auth., 527 U.S. 229 (1999). See infra text accompanying notes 245–49. For a general discussion of employee rights in investigative interviews, see Joseph F. Coyne, Jr. & Charles F. Barker, Employees' Rights and Duties During an Internal Investigation, in Internal Corporate Investigations (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2003).

8. In the words of one commentator, "The old adage that 'nothing is certain but uncertainty' must have been coined by someone watching the National Labor Relations Board in action." Paul H. Derrick, Deja Vu All Over Again, 16 S.C. Law., Sept. 2004, at 24 (2004). The Board first confirmed the entitlement of non-union employees to the presence of a co-worker during an investigative interview in 1982 in its decision in Materials Research Corp., 262 N.L.R.B. 1010 (1982). The Board changed tack and took Weingarten rights away from non-union employees in E.I. DuPont De Nemours, 289 N.L.R.B. 627 (1988), enforced in relevant part, Epilepsy Found. v. NLRB, 268 F.3d 1095 (D.C. Cir. 2001) but restored these rights in its 2000 decision in Epilepsy Found. of Ne. Ohio, 331 N.L.R.B. 676 (2000), review granted in part, decision rev’d in part & enforced in part, Epilepsy Found. v. NLRB, 268 F.3d 1095 (D.C. Cir. 2001). In IBM Corporation, the Board once again reversed course, this time holding three-to-two that employees who are not represented by a union are not entitled to Weingarten rights. IBM, 341 N.L.R.B. No. 148.

9. See Union, Management Attorneys Disagree on Significance of Recent NLRB Rulings, 73 U.S. L. Wk. Legal News 2729 (June 7, 2005) (quoting AFL-CIO General Counsel Jon Hiatt’s criticism of the current Board’s elimination of Weingarten rights for non-unionized employees, as well as its reversal of other longstanding rulings and unwillingness to utilize available remedies in response to unfair labor practices). For discussion of the political aspects of NLRB decision making, see, e.g., Epilepsy Found. v. NLRB, 268 F.3d 1095, 1097 (D.C. Cir. 2001) (noting impact of changes in NLRB membership on Board’s interpretation of NLRA); Tracey Cullen, NLRB Flip-Flops Again on Non-union Employees’ Weingarten Rights, N.Y. Emp. L. Letter, Nov. 2004, at 2; James O. Castagnera et al., NLRB Reverses Application of Weingarten Rights to Non-Union Employees, Termi-
In this instance, the Board claims a new, supposedly higher, ground for restricting worker protections: physical and financial "security concerns that are an outgrowth of the troubled times in which we live." There is simply no support for the Board's invocation of events that victimize workers themselves to justify restricting their rights. The Board's mandate is to enforce the policy of the NLRA, not to restrict workers' rights in response to concerns beyond its special competence.

The purpose of this Article is to explore critically the novel policy justifications proffered by the NLRB majority in *IBM Corporation* as grounds for narrowing one of the few protections previously enjoyed by all American workers. Accepting *arguendo* that the Board has authority to determine whether or not to require employers to afford *Weingarten* rights to non-unionized employ-

10. See supra note 8. The dispute in *Weingarten* involved a unionized workplace. See *Weingarten*, 420 U.S. 251. Consequently, the Court had no occasion to address the question whether *Weingarten* rights are available to members of non-unionized workforces. See infra Part I.B.2.


12. It is well settled that Congressional "policy cannot be defeated by the Board's policy," *Colgate-Palmolive-Peet Co.* v. *NLRB*, 338 U.S. 355, 363 (1949), and that the Board's charge is to enforce the fundamental objective of the NLRA "to eliminate the 'inequality of bargaining power between employees ... and employers.'" *Weingarten*, 420 U.S. at 262 (quoting 29 U.S.C. § 151). The NLRB does not have expertise in national security issues, nor does it have authority to sacrifice the Congressional objectives declared in the NLRA on the basis of concerns over the obligations imposed on employers by other legal obligations absent direct conflict. Even where there is a direct conflict between the policies underlying the NLRA and those of another statute, the Board should "minimize [ ] the impact of its actions on the policies of the other statute," but its primary obligation is still to "fully enforce the requirements of its own statute ... insofar as possible." *Can-Am Plumbing, Inc.* v. *NLRB*, 321 F.3d 145, 153-54 (D.C. Cir. 2003) (quoting *N.Y. Shipping Ass'n v. Fed. Mar. Comm'n*, 854 F.2d 1338, 1367 (D.C. Cir. 1988)).
the principal thesis of the Article is that the Board’s reli-

13. Commentators have extensively debated the question whether the NLRA mandates, permits, or prohibits extension of Weingarten rights to non-union employees. See, e.g., Finkin, supra note 9, at 182-83 (suggesting that “[t]he statutory theory in Weingarten is that the individual’s request for aid, in seeking the protection of another against a perceived threat to employment security, is concert of action and must be accommodated by the employer”); Sarah C. Flannery, Extending Weingarten to the Nonunion Setting, 49 CLEV. ST. L. REV. 165 (2001) (opposing Weingarten rights for non-unionized employees on policy grounds); Heldman et al., supra note 9, at 211 (describing the 2001 NLRB decision to extend Weingarten rights to all employees as not only “manifestly correct,” but “wise and good”); Ostmann, supra note 5 (extension of Weingarten rights to non-unionized employees unwarranted); Steve Carlin, Note, Extending Weingarten Rights to Non-union Employees, 86 COLUM. L. REV. 618 (1986) (arguing that non-union workers are entitled to Weingarten rights pursuant to Section 7 of the Act and that extension of these rights does not interfere with the policies of Section 9(a)); Jill D. Flack, Note, Limiting the Weingarten Right in the Non-union Setting: The Implication of Sears, Roebuck and Co., 35 CATH. U. L. REV. 1033, 1059 (1986) (criticizing the 1982 NLRB decision denying Weingarten rights to non-union employees on grounds that “[a]n employee’s request for the presence of a co-worker witness constitutes an attempt to engage in concerted activity, albeit in its most formative stage”); Robyn Wilensky, Note, Can I Get a Witness?: Extension of the Weingarten Right in the Non-Unionized Workplace—Problems of Implementation Create Potential Harm for Both Employers and Employees, 36 GA. L. REV. 315 (2001) (arguing against extension of Weingarten rights to non-unionized workers on grounds of inadequate guidance with respect to application).

Three different answers are possible to the question of whether or not Weingarten rights are available to non-unionized employees. All three depend in the first instance on statutory interpretation: (1) the NLRA, specifically Section 7, mandates provision of Weingarten rights to all employees whether or not they belong to unions; (2) the NLRA prohibits extension of Weingarten rights to non-union employees either under all circumstances—because this aspect of Section 7 applies only where employees have elected union representation and because of the exclusivity provision of Section 9(a)—or at least where an employee’s request for the presence of a co-worker arises in isolation rather than in the midst of other attempts by workers to engage in concerted activity, see, e.g., E.I. Du Pont de Nemours & Co. v. NLRB, 707 F.2d 1076 (9th Cir. 1983), discussed infra Part I.D; or (3) the availability of Weingarten rights to non-union employees during any given time frame rests within the NLRB’s discretionary authority to interpret the NLRA. The Board has most often rested decisions extending Weingarten rights on the third basis—that it has discretion to interpret the NLRA to provide these rights to all workers—a construction arguably validated by the Supreme Court’s Weingarten decision, 420 U.S. at 266-67, and affirmed by the U.S. Court of Appeals for the District of Columbia, Epilepsy Found. v. NLRB, 268 F.3d 1095, 1102 (D.C. Cir. 2001), and Third Circuit, Slaughter v. NLRB, 876 F.2d 11, 12-13 (3d Cir. 1983), vacated, 733 F.2d 296 (3d Cir. 1984). The Third Circuit specifically rejected the second proposition—that the NLRA prohibits extension of Weingarten rights to non-union employees—in overturning a Board decision denying Weingarten rights to employees in a non-unionized work force. Slaughter v. NLRB, 794 F.2d 120 (3d Cir. 1986). The court, however, subsequently upheld a supplemental decision reaching the same result on the basis of the Board’s discretionary authority to interpret the
ance on the increasing frequency of workplace investigations, corporate fiduciary lapses, terrorism, and workplace violence to justify eliminating Weingarten rights for non-union employees rests on faulty premises. There is no rational basis to suppose that restricting the rights of line employees will minimize corporate financial debacles or prevent workplace violence, and the notion that our nation’s defense against terrorism depends on the ability of private employers to interrogate non-union employees without a witness is patently absurd—particularly given the Board’s admission that these considerations are not weighty enough to bar union representatives from investigative interviews.

Moreover, while our times are indeed troubled, the Board first established Weingarten rights in 1972 when the Vietnam War, terrorism, significantly higher crime rates, and a host of other problems rocked the country14—an era when antiwar protestors seized the Statue of Liberty, the Weather Underground group bombed the U.S. Capitol, and Black September terrorists murdered eleven Israeli athletes at the Munich Olympic games.15 There was no conceivable connection between Weingarten rights and national security then, and there is none now. The Board’s IBM Corporation ruling reflects an ill-considered and dangerous decision to restrict important safeguards in the name of enhanced security—both physical and economic—without any critical analysis of the legitimacy or efficacy of doing so.16 If any-

NLRA. Slaughter v. NLRB, 876 F.2d 11, 13 (3d Cir. 1986). Taken together, Weingarten, Epilepsy Foundation, Slaughter, and Du Pont thus offer strong support for the Board's assertion that it has broad discretion in this area. See generally GORMAN & FINKIN, supra note 7, at 17; Heldman et al., supra note 9, at 206–07. From time to time, members of the NLRB have contended that an employee’s request for the presence of a co-worker representative in a disciplinary interview falls outside the ambit of Section 7, 29 U.S.C. § 157. See, e.g., Materials Research Corp., 262 N.L.R.B. 1010, 1018 (1982) (Van de Water, Chairman, dissenting), overruled in part by Sears, Roebuck & Co., 274 N.L.R.B. 230 (1985); IBM, 341 N.L.R.B. No. 148, slip op. at 8–18 (Schaumber, Member, dissenting). In several cases, however, even Board members who have ruled against extension of Weingarten rights to non-union employees have acknowledged that Section 7 protects an employee’s request for the presence of a co-worker. See IBM, 341 N.L.R.B. No. 148, slip op. at 7 (Battista, Chairman & Meisburg, Member, majority opinion); id. at 20 n.13 (Liebman & Walsh, Members, dissenting).

14. See infra Part III.B.
thing, the relevant policy considerations support enhancement rather than restriction of the safeguards afforded workers in investigative interviews.

Part I of the following discussion begins with a brief history of the development of the right of employees to co-worker representation. Part II analyzes the Board’s June 2004 decision to withdraw Weingarten rights from non-union employees, and Part III explores key policy factors relevant to recognition of an employee’s right to the presence of a co-worker in an investigative interview. Part IV argues that, rather than eliminating Weingarten rights for non-unionized workers, the NLRB should take the next available opportunity to reaffirm and enhance these safeguards.

I. THE ORIGIN AND EVOLUTION OF WEINGARTEN RIGHTS

Like comets that travel through the solar system, Weingarten rights for non-union employees tend to appear for brief interludes and then vanish. In their wake, they leave observers hopeful, but never certain, that they will reappear in the not-too-distant future. In light of this history, before turning to the Board’s most recent ruling, it is helpful to review the evolution of Weingarten rights and their application to union and non-union workplaces. The following section briefly encapsulates relevant developments, beginning with a summary of Weingarten and its antecedents, and then presents highlights of the Board’s ongoing struggle to determine the rights of employees in investigative interviews.17


17. The interviews at issue with respect to Weingarten rights are described as either “investigative” or “investigatory.” This discussion utilizes the word
A. Early Board Decisions

Employees sought to obtain the right to union or co-worker representation in investigative interviews as early as the 1940s, and for many years the NLRB and several U.S. Courts of Appeals struggled with the relevant analyses. By 1972, however, the Board had focused its attention specifically on Sections 7 and 8(a)(1) of the NLRA. In *Quality Manufacturing Company* and *Mobil Oil Corporation*, cases involving union members who sought to have their representatives present at investigative interviews, the Board viewed these requests as concerted activity for mutual aid or protection within the meaning of Section 7.

“investigative,” but the terms are intended to be interchangeable. Issues pertaining to the existence and scope of *Weingarten* rights for union and non-union employees have come before the Board, as well as the federal courts of appeals in the context of petitions for review of NLRB decisions, on many occasions. The following discussion focuses only on the most significant antecedents of the Board’s 2004 *IBM Corporation* decision. It is important to note that the rights guaranteed by the U.S. Constitution are not available to private-sector employees in the absence of state action. See, e.g., Coyne & Barker, *supra* note 7, at 173–74; Heldman et al., *supra* note 9, at 206. See also infra note 235 and accompanying text. Consequently, private-sector employees do not enjoy the privilege against self-incrimination, the right to counsel, or other constitutional protections, absent state statutes providing specific rights as a matter of state employment law. *Id.*


20. 29 U.S.C. §§ 157 & 158(a)(1) (2000). 29 U.S.C. § 157 provides: 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 . . . . *Id.* Pursuant to 29 U.S.C. § 158(a)(1), it is an unfair labor practice for employers “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157.” *See generally GORMAN & FINKIN, supra* note 7, at 402–06.


22. Mobil Oil Corp., 196 N.L.R.B. 1052 (1972), *enforcement denied*, Mobil Oil Corp. v. NLRB, 482 F.2d 842 (7th Cir. 1973).

Consequently, the Board held that members of unionized workforces have a right to the presence of a union representative in investigative interviews that an employee reasonably believes might lead to disciplinary sanctions.\textsuperscript{24} This issue came before the U.S. Supreme Court a few years later in \textit{Weingarten}.\textsuperscript{25}

\textbf{B. Weingarten}

1. The NLRB Ruling

\textit{Weingarten} involved an unfair labor practice charge brought by Leura Collins, a lunch stand employee who allegedly had taken money from a cash register and paid too little for some chicken nuggets at a lobby food counter operated by her employer.\textsuperscript{26} In the course of investigating the allegations, the store manager and a company "loss prevention specialist" interviewed Ms. Collins.\textsuperscript{27} At several points, Collins asked to have her union shop steward present, but the manager refused her requests.\textsuperscript{28} After interrogating Collins, the interviewers determined that the allegations were unfounded and apologized for inconveniencing her.\textsuperscript{29} A subsequent comment from a tearful Collins, however, led to additional questioning and concomitant problems, although the interview terminated without the imposition of any sanctions against her.\textsuperscript{30} The manager asked Collins not to discuss the matter with anyone, but she reported what had happened to her shop steward.\textsuperscript{31} The union subsequently filed unfair labor practice charges on her behalf.\textsuperscript{32}

\begin{itemize}
\item \textsuperscript{24} \textit{Quality Mfg.}, 195 N.L.R.B. at 199; \textit{Mobil Oil}, 196 N.L.R.B. at 1052–53.
\item \textsuperscript{25} \textit{NLRB v. J. Weingarten, Inc.}, 420 U.S. 251, 254 (1975). The NLRB's decision is found at 202 N.L.R.B. 446 (1973).
\item \textsuperscript{26} \textit{Weingarten}, 420 U.S. at 254.
\item \textsuperscript{27} \textit{Id.} at 254–55.
\item \textsuperscript{28} \textit{Id.} at 254.
\item \textsuperscript{29} \textit{Id.} at 255.
\item \textsuperscript{30} \textit{Id.} When the interviewers told Collins that "the matter was closed," she "burst into tears and blurted out that the only thing she had ever gotten from the store without paying for it was her free lunch." \textit{Id.} at 254–55. Unfortunately for Collins, while many J. Weingarten stores, including the one to which she previously had been assigned, provided employees with free lunches, the lobby lunch counter where she worked at the time of the interview did not do so. \textit{Id.} at 255. Predictably, the store manager and the loss prevention specialist proceeded to question Collins about the lunches she had obtained allegedly in violation of company policy. They prepared a bill for one-hundred sixty dollars and asked her to sign it, but Collins refused to do so. Subsequent inquiries by the manager and investigator to corporate headquarters revealed so much uncertainty about the free lunch policy that they decided not to pursue the matter. \textit{Id.}
\item \textsuperscript{31} \textit{Id.} at 256.
\item \textsuperscript{32} \textit{Id.} at 256 n.4.
\end{itemize}
The NLRB ruled in Collins’ favor, applying the standard previously articulated in *Quality Manufacturing* and *Mobil Oil*. The Board, however, was careful to note the limitations on the right to union representation in investigatory interviews: these rights arise only in response to an employee’s request; they are limited to circumstances in which the employee’s belief in the possibility of disciplinary sanctions was reasonable; they do not apply to “run-of-the-mill shop-floor conversations—e.g., the giving of instructions or training or needed corrections of work techniques”; employers remain free to decline an employee’s request to have a union representative present and forego the interview without justifying their refusal; and there is no duty to bargain with union representatives attending investigative interviews with employees.

Despite these limitations, *J. Weingarten, Inc.* found the decision unacceptable, and the NLRB filed a petition for enforcement in the U.S. Court of Appeals for the Fifth Circuit. The Circuit Court declined to enforce the Board’s order, holding that the majority had improperly construed Section 7. The Fifth Circuit panel recognized that Section 7 protects “concerted activities” for the “mutual aid and protection” of all employees, but it held these safeguards inapplicable to investigative interviews. The U.S. Supreme Court subsequently granted certiorari.


34. *Mobil Oil Corp.*, 196 N.L.R.B. 1052 (1972), rev’d, 482 F.2d 842 (7th Cir. 1973).


36. *Id.* It would then be the employee’s decision whether to go forward with the interview or await the employer’s determination without presenting his or her own position on the matter in question.

37. *Id.*


39. *Id.* at 1138 (citing Mobil Oil Corp. v. NLRB, 482 F.2d 842, 847-48 (7th Cir. 1973) (denying enforcement of the NLRB order requiring employer to afford *Weingarten* rights to non-union employees on grounds that “the novel ‘right to representation’ . . . is not a ‘concerted activity’ within the meaning of the Act,” or it “would have been recognized many years ago.” (quoting NLRB v. Ross Gear & Tool Co., 158 F.2d 607 (7th Cir. 1947); Texaco v. NLRB, 408 F.2d 142 (5th Cir. 1969))))).


41. The Supreme Court subsequently noted that the question of the right to the presence of a union representative at investigatory hearings the employee reasonably believes might lead to disciplinary action was a recurring
2. The Supreme Court’s Decision

In Weingarten, the Supreme Court reversed the Fifth Circuit and upheld the Board’s ruling. Four themes run through the majority opinion: the objectives of the Act with respect to concerted action; the usefulness of assistance to individual employees summoned to investigative interviews they reasonably believe may lead to disciplinary sanctions; the benefits of the presence of union representatives at such interviews; and the deference due the Board’s interpretation of the NLRA. The Court also noted the limitations inherent in the right to representation.

Justice Brennan, writing for a six-member majority, began by focusing on the purposes of the NLRA. He described the Board’s ruling as “plainly effectuat[ing] the most fundamental purposes of the Act,” including the legislative objective of “eliminat[ing] the ‘inequality of bargaining power between employees . . . and employers.’” The Court specifically determined that an individual employee’s request for union representation in an investigative interview “clearly falls within the literal wording of § 7 that ‘[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.’” In contrast,

requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safe-

one, citing more than twenty other NLRB cases involving the same issue. 420 U.S. 251, 253 n.3 (1975).

42. Id. at 253.

43. See id. at 256–59. Later NLRB decisions have further clarified the scope of Weingarten rights. See Gorman & Finkin, supra note 7, at 406. Principally, Weingarten rights are available only with respect to interviews involving development of facts related to discipline prior to the imposition of sanctions; Weingarten rights may be waived in collective bargaining agreements; employers have no duty to communicate the existence of Weingarten rights to their employees; and the representatives may speak, but may not disrupt the investigative interview. Id. at 406, 528–29. Employees and their unions generally may choose representatives and consult with their representatives prior to interviews. Id. at 528–29. See also, e.g., Heldman et al., supra note 9, at 205.

44. Weingarten, 420 U.S. at 261.

45. Id. at 262 (quoting 29 U.S.C. § 151 (2000)).

46. Id. at 260 (quoting Mobil Oil Corp. v. NLRB, 482 F.2d 842, 847 (7th Cir. 1973) (quoting 29 U.S.C. § 157)). This is true even though a particular employee has a uniquely personal interest in her own position, because affording such a right “safeguard[s] 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.” Id. at 260–61.
guards the Act provided "to redress the perceived imbalance of economic power between labor and management."\textsuperscript{47}

The Court expressed concern that an employee confronted alone by an employer might be "too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors."\textsuperscript{48} The opinion also emphasized the importance of timing, observing that once an employer imposes discipline "it becomes increasingly difficult for an employee to vindicate himself, and the value of the representation is correspondingly diminished."\textsuperscript{49}

If the Court had limited its analysis to the mutual aid and protection language of Section 7, the course of future developments might have been less tortured. Justice Brennan, however, also discussed the reasons why the presence of a union representative would be valuable for all concerned, making it unclear whether the Court intended to limit its decision to union employees or simply to focus on the precise issue before it.\textsuperscript{50} In any event, the Court observed: "A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview."\textsuperscript{51}

Finally, the Court specifically rejected J. Weingarten's arguments that the NLRB's "earlier precedents . . . impair[ed] the validity of the Board's construction."\textsuperscript{52} Noting the Board's need to shape standards pursuant to "an evolutionary process,"\textsuperscript{53} the Court explained that "[t]he use by an administrative agency of the evolitional approach is particularly fitting. . . . 'Cumulative experience' begets understanding and insight . . . by which judg-

\textsuperscript{47} Id. at 262 (quoting Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316 (1965)).

\textsuperscript{48} Id. at 262–63.

\textsuperscript{49} Id. at 263–64. The Court rejected the company's argument that "union representation at this stage is unnecessary" because inappropriate disciplinary action could be corrected after the decision to impose discipline had become final. The Court reasoned that following the imposition of sanctions, "[t]he employer may then be more concerned with justifying his actions than re-examining them." Id. at 263–64.

\textsuperscript{50} Justice Powell, however, concluded that the Court's analysis necessarily extended to non-unionized as well as unionized workplaces. See id. at 270 n.1 (Powell, J., dissenting) and infra text accompanying notes 60–62.

\textsuperscript{51} Id. at 263.

\textsuperscript{52} Id. at 264.

\textsuperscript{53} Id. at 265.
ments are validated or qualified or invalidated."\textsuperscript{54} The Court emphasized the judicial deference due to the NLRB:

The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board. . . . It is the province of the Board, not the courts, to determine whether or not the "need" exists in light of changing industrial practices and the Board's cumulative experience in dealing with labor-management relations.\textsuperscript{55}

Accordingly, the Court ruled that "the Board's recognition that Section 7 guarantees an employee's right to the presence of a union representative in an investigative interview in which the risk of discipline reasonably inheres is within the protective ambit of the section 'read in the light of the mischief to be corrected and the end to be attained.'"\textsuperscript{56}

While the Court did not clarify whether a contrary ruling would have been inconsistent with the rights guaranteed by Section 7, Justice Brennan observed that the Board's decision was "in full harmony with actual industrial practice."\textsuperscript{57} On behalf of the Court, he emphasized the judicial deference owed to the Board in this context:

[T]he Board's construction . . . , while it may not be required by the Act, is at least permissible under it, and, insofar as the Board's application of that meaning engages in the "difficult and delicate responsibility" of reconciling conflicting interests of labor and management, the balance struck by the Board is "subject to limited judicial review."\textsuperscript{58}

Chief Justice Burger dissented from the Court's decision, stating that the appropriate resolution would have been a remand to the NLRB because of the Agency's failure to provide the explanation necessitated by "[t]he tortured history and inconsistency of the Board's efforts in this difficult area."\textsuperscript{59} Justice Powell, joined by Justice Stewart, dissented on substantive grounds. He contended that "[t]he type of personalized interview with which we are here concerned is simply not 'concerted

\textsuperscript{54} \textit{Id. at} 265-66 (quoting NLRB v. Seven-Up Co., 344 U.S. 344, 349 (1953) (quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941))).

\textsuperscript{55} \textit{Id. at} 266.

\textsuperscript{56} \textit{Id. at} 262.

\textsuperscript{57} \textit{Id. at} 267. The Court noted that "a 'well-established current of arbitral authority' sustains the right of union representation at investigatory interviews which the employee reasonably believes may result in disciplinary action against him." \textit{Id.}

\textsuperscript{58} \textit{Id. at} 266-67.

\textsuperscript{59} \textit{Id. at} 269.
activity' within the meaning of the Act. To Justice Powell, '[t]he power to discipline or discharge employees has been recognized uniformly as one of the elemental prerogatives of management.' Lamenting the Court's incursion on managerial prerogatives, Justice Powell observed: "While the Court speaks only of the right to insist on the presence of a union representative, it must be assumed that the § 7 right today recognized, affording employees the right to act 'in concert' in employer interviews, also exists in the absence of a recognized union." A few years after Justice Stewart wrote these words, the NLRB confirmed that Weingarten did indeed extend to employees in non-unionized workplaces.

C. Materials Research Corporation

The dispute at issue in Materials Research Corporation arose out of the efforts of several staff members led by employee Steve Hochman to discuss an order for immediate implementation of a new work schedule with Material Research Corporation’s management. After an abortive effort by Hochman and two other employees to discuss the changes with supervisory personnel, Hochman’s supervisor admonished him that he had no right to convene an employee gathering. Later that same day, the supervisor summoned Hochman, informed him that the encounter constituted “a disciplinary hearing,” and delivered, memorialized, and placed in Hochman’s file a verbal warning admonishing him for his conduct. On each occasion, Hochman asked the supervisor to permit a co-worker to join them, but the supervisor denied his requests.

Hochman subsequently filed an unfair labor practice charge alleging that his employer had violated Section 8(a)(1) of the NLRA by refusing to permit him to have a co-worker present dur-

60. Id. at 275.
61. Id. at 273. Given the restricted nature of Weingarten rights, however, "employer prerogative determines whether Weingarten rights will be extended to the employee. Thus, the Weingarten right is not guaranteed in all circumstances; rather it is a conditional privilege subject to the employer’s consent." Flack, supra note 13, at 1055 (footnotes omitted). Exercise of the right requires an employee to request a representative. In response an employer may grant the request or proceed without a hearing. Id.
62. Weingarten, 420 U.S. at 269 n.1 (emphasis added).
64. Id. at 1010.
65. Id. at 1011.
66. Id.
67. Id.
ing an investigatory interview that he reasonably believed could lead to disciplinary action. A divided Board ruled for Hochman, overturning an administrative law judge’s decision in favor of the company. Concluding that Weingarten rights arise from the safeguard provided by Section 7 protecting concerted activity for mutual aid and protection, rather than the exclusive representation rights of unions found in Section 9(a), the majority reasoned that it would be inconsistent with the statutory scheme of the NLRA to restrict Weingarten rights to employees represented by unions. The majority explained that the Weingarten Court focused on the rights of union employees because of the fact pattern presented by the case, “not because the Court intended to limit the right recognized in Weingarten only to unionized employees.”

The Board emphasized that “Section 7 rights are enjoyed by all employees and are in no wise dependent on union representation for their implementation,” stressing that:

the need of unrepresented employees to support each other through this type of conduct may well be greater than that of represented employees. Unrepresented employees normally do not have the benefit of a collective-bargaining agreement which serves as a check on an employer’s ability to act unjustly or arbitrarily. Nor do they

68. Id. at 1010. For the text of Section 8(a)(1), see 29 U.S.C. § 158(a)(1) (2000), excerpted in pertinent part in supra note 20.
69. Materials Research Corp., 262 N.L.R.B. at 1010. The administrative law judge’s decision is set forth in the appendix to the NLRB decision. Id. at 1022.
70. Id. at 1010. The text of Section 9(a) is set forth infra note 104.
71. Materials Research Corp., 262 N.L.R.B. at 1012. The majority further observed that “the Court carefully differentiated the role assigned to a ‘representative’ at an investigatory interview from that of a collective-bargaining representative acting in its representative capacity,” noting that the role of a representative in an investigative interview is primarily one of assisting the employee, clarifying facts, or suggesting other sources of pertinent knowledge. Id. The majority declared that by 1982 it had become “axiomatic that, with only very limited exceptions, 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.” Id.
72. Id. at 1013. In the majority’s view, to hold otherwise would be “to interpret Section 7 in a manner which is clearly restrictive of its broad scope or does violence to its purposes.” Id. The majority’s conclusion that “the rationale enunciated in Weingarten compels the conclusion that unrepresented employees are entitled to the presence of a co-worker at an investigatory interview,” id. at 1014, accords with the view Justice Powell expressed in his Weingarten dissent: “it must be assumed that the § 7 right today recognized, affording employees the right to act ‘in concert’ in employee interviews, also exists in the absence of a recognized union.” 420 U.S. at 270 n.1.
usually have the protection of a grievance-arbitration procedure to police the terms of such an agreement. Indeed, when confronted with the prospect of an investigatory interview which might result in discipline, the only assistance readily available to an unrepresented employee lies in fellow employees, and an employee attempt to enlist that type of protection is precisely what the Act is designed to safeguard.

Reasoning that "the Court's primary concern was the right of employees to have some measure of protection against unjust employer practices," the majority explained that "[s]ince a purpose underlying Weingarten is to prevent an employer from overpowering a lone employee, the presence of a co-worker, even if that individual does nothing more than act as a witness, still effectuates that purpose, just as the presence of a union representative."

Chairman Van de Water and Member Hunter each filed separate opinions concurring in part and dissenting in part from the Board's decision. The gravamen of Chairman Van de Water's opinion, as described by the majority, was that Weingarten rights attach only in unionized workplaces, because Section 7 rights in this context are available only where there is a collective bargaining agreement to define the relationship between management and employees. The Chairman traced the development of the principle, concluding that "the existence of an established collective-bargaining relationship and the statutory obligations which arise therefrom were central to the definition and scope of an employee's right to representation."

Despite the Supreme Court's focus on Section 7 in Weingarten, to Chairman Van de Water, in the absence of a recognized union, extension of Weingarten rights would violate Section 9(a).

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74. *Id.* See also NLRB v. Wash. Aluminum, 370 U.S. 9 (1962) (holding Section 7 rights applicable to both unionized and non-unionized employees).

75. *Materials Research Corp.*, 262 N.L.R.B. at 1015 (emphasis added).

76. *Id.* at 1015–16. The majority reiterated, however, that: [A]n employer retains broad prerogatives when faced with an employee's request for assistance at an investigatory interview. . . . There is no obligation to accede to such a request, and an employer is free to carry on its inquiry without interviewing the employee, leaving the employee the choice between having an interview unassisted, or having no interview and foregoing any benefits that might be derived from one . . . .

*Id.* at 1015–16. The employer also remains free to act on the basis of the other information it gathers. *Id.*

77. *Id.* at 1018.

78. *Id.*
In a similar vein, Member Hunter opined that:

[T]he holding in *Weingarten* is rather clearly grounded in the Supreme Court's recognition of the unique right and obligation of the collective-bargaining representative in terms of protecting the interests not only of the particular individual or individuals called to an investigative interview, but also of all the members of the unit.\textsuperscript{79}

He characterized the extension of *Weingarten* rights to unrepresented employees as one of a number of "expansionist Board decisions" transforming investigative interviews into "formalized adversary proceeding[s]."\textsuperscript{80}

D. Du Pont, Sears, and Slaughter

Shortly after *Materials Research Corporation*, E.I. Du Pont de Nemours, Inc., became involved in two legal battles over the company's obligation to afford *Weingarten* rights to employees in non-unionized facilities. Resolution of these matters required five NLRB rulings and four federal appellate court decisions.

1. The Ninth Circuit Case

The first of the two Du Pont company disputes to reach a federal appellate court involved Henry Burke, an employee with a troubled job history.\textsuperscript{81} Du Pont terminated Burke after he refused to sign documents memorializing his performance deficiencies and a related development plan without a co-worker as a witness.\textsuperscript{82} Burke filed unfair labor charges against the company, and the Board ruled in his favor on the basis of the principles articulated in *Materials Research Corporation*.\textsuperscript{83}

Du Pont petitioned the Ninth Circuit for review of the Board's order. The Court of Appeals granted the petition and denied enforcement.\textsuperscript{84} Although, as the Third Circuit later observed, it was not at all clear that Burke's request to have a co-worker witness his signing of the deficiency statement and devel-

\textsuperscript{79} Id. at 1021 (Hunter, Member, concurring in part and dissenting in part).

\textsuperscript{80} Id. He further described the Board's ruling as opening a Pandora's box in a manner the Supreme Court could not have intended. Id.

\textsuperscript{81} E.I. Du Pont de Nemours & Co. v. NLRB, 707 F.2d 1076 (9th Cir. 1983).

\textsuperscript{82} Id. at 1077.

\textsuperscript{83} The Board issued a cease-and-desist order to Du Pont and instructed the company to reinstate Burke with back pay. Id.

\textsuperscript{84} Id. at 1080.
opment plan constituted an investigative interview, the Ninth Circuit panel, like the NLRB, analyzed the matter in terms of the Supreme Court's *Weingarten* decision. In so doing, the court focused solely on the nature of "concerted activities" protected by Section 7. The opinion observed that *Weingarten* "assumed without discussion that a request invoking union assistance is concerted activity," and that Leura Collins' representation request "partook of the concertedness inherent in union activity." Conversely, the Ninth Circuit concluded that in Burke's case there were no indicia of concerted activity within the meaning of Section 7, and therefore no basis for his claim of entitlement to *Weingarten* rights. The court, however, took pains to note:

[W]e do not foreclose the possibility that a request for a fellow employee may be found concerted in the non-union setting. Section 7 applies to non-union employees as well as union employees, ... and unionization is not the only sure indicator of concertedness. There must, however, be a showing that the requesting employee acts as part of a group.

The opinion also emphasized that the court did not "embrace Du Pont's view that a coemployee might not at times

85. E.I. Du Pont de Nemours & Co. (Chestnut Run) v. NLRB (Du Pont I), 724 F.2d 1061, 1067 (3d Cir. 1983), vacated, 733 F.2d 296 (3d Cir. 1984). Some commentators, however, refer to the Ninth Circuit decision as "Du Pont I" and the first Third Circuit decision as "Du Pont II." To avoid confusion, this article refers to the opinion published at 707 F.2d 1076 as the "Ninth Circuit decision" and follows the Third Circuit's nomenclature with respect to that court's three decisions in the Du Pont Chestnut Run matter.

86. *Du Pont*, 707 F.2d at 1076 n.1.

87. *Id.* at 1078. Four of the five IBM board members acknowledged that the request of an individual employee for the assistance of a co-worker or union representative at an investigative interview constitutes concerted activity protected by Section 7. *See* IBM Corp., 341 N.L.R.B. No. 148, slip op. at 1-8 (June 9, 2004); *id.* at 18-24 (Liebman & Walsh, Members, dissenting); Holling Press, Inc., 343 N.L.R.B. No. 45, slip op. at 4-6 (Oct. 15, 2004) (Liebman, Member, dissenting).

88. *Du Pont*, 707 F.2d at 1078.

be as capable of providing assistance as a union representative," or accept Du Pont's "management prerogative arguments."

2. The Third Circuit Proceedings

The second Du Pont matter involved a dispute at the company's non-unionized Chestnut Run, Pennsylvania facility. Du Pont had discharged employee Walter Slaughter for refusing to submit to an investigative interview without a co-worker present. The issue that triggered the dispute arose when Slaughter posted an NLRB notice without obtaining prior approval of the posting as required by company policy. Keeping track of the subsequent proceedings—a microcosm of the Board's overall treatment of the issue—is a bit like watching a ping-pong match.

a. Round One: The Initial NLRB and Third Circuit Decisions

In its first decision in the Slaughter/Du Pont matter, the Board applied its Materials Research Corporation analysis to hold that Section 7 of the Act protected Slaughter's refusal to submit to an interview without the presence of a co-worker. Du Pont filed a petition for review in the U.S. Court of Appeals for the Third Circuit, and in Du Pont I, an appellate panel upheld the Board's decision on grounds that the extension of Weingarten rights to non-union employees was permissible, albeit not required, by the NLRA. Du Pont then petitioned for rehearing and rehearing en banc. Before the court ruled on the petition, however, the Board moved to vacate Du Pont I and requested the court to remand the case for consideration along with another matter then before the Board involving Sears, Roebuck and Company. The Third Circuit acceded to the Board's request in

\[90.\text{Du Pont, 707 F.2d at 1079.}\]

\[91.\text{Id. Concern over infringement of management prerogatives was one of the principal bases on which Justices Powell and Stewart dissented from the Court's decision in Weingarten. See NLRB v. J. Weingarten, Inc., 420 U.S. 251, 273–74 (1975) (Powell, J., dissenting); see also supra text accompanying notes 60–62.}\]

\[92.\text{E.I. Du Pont de Nemours & Co. (Chestnut Run) v. NLRB (Du Pont I), 724 F.2d 1061, 1063–64 (3d Cir. 1983).}\]

\[93.\text{Id.}\]

\[94.\text{E.I. Du Pont de Nemours, 262 N.L.R.B. 1028 (1982).}\]

\[95.\text{Du Pont I, 724 F.2d at 1063.}\]

\[96.\text{E.I. Du Pont de Nemours & Co. (Chestnut Run) v. NLRB (Du Pont II), 733 F.2d 296 (3d Cir. 1984). See supra note 83.}\]

\[97.\text{Id. at 296.}\]
Du Pont II on the basis "of the deference owed the Board's special expertise in interpreting the Act." 98

b. Round Two: Sears and the NLRB’s First Supplemental Decision in Slaughter

Before the Board returned to Slaughter's claims, it decided Sears, Roebuck and Company. 99 In Sears, Roebuck and Company, a dispute involving a request for co-worker representation by an employee who had been accused of falsifying company records, 100 the Board reexamined the statutory bases for its earlier holdings and determined that the NLRA did not support the provision of Weingarten rights to non-unionized employees after all. The Board now concluded that the Act prohibited the extension of this procedural protection. 101 In reaching its decision, the Board incorporated and expanded on the analysis of Chairman Van de Water's dissent in Materials Research Corporation. 102 First, the Board stated that Weingarten rested in part on the right of organized employees not to deal with employers individually with respect to terms and conditions of employment. 103 Second, the Board determined that interpreting Section 7 as an independent source of a right to co-worker representation would conflict with the exclusivity principle set forth in Section 9(a) of the NLRA. 104

98. Id. at 297-98. In the appellate court's view, the best exercise of its discretion was to "postpon[e] further judicial involvement until we have been informed of a comprehensive adjudication by the NLRB." Id. at 298.
100. Id. at 240.
101. Id. at 231.
102. Slaughter v. NLRB, 794 F.2d 120, 125 (3d Cir. 1986). See supra text accompanying notes 74-76.
103. Sears, Roebuck & Co., 274 N.L.R.B. 230, 231 (1985). In the view of Matthew Finkin, [this] entire argument rests upon a non sequitur . . . if, as the Supreme Court held [in Weingarten], the employer has no statutory duty to bargain with the Weingarten representative, the function of that representative in the unorganized setting cannot be in derogation of the exclusivity principle or any other important statutory policy. Finkin, supra note 9, at 182. In Finkin's view, "The statutory theory in Weingarten is that the individual's request for aid, in seeking the protection of another against a perceived threat to employment security, is a concert of action and must be accommodated by the employer" pursuant to Section 7 of the NLRA. Id. at 182-83.
104. Section 9(a) of the NLRA provides:
Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of
In arriving at these conclusions, the majority reasoned that the employer would have a duty "to deal" with a co-worker representative in some circumstances—for example, with respect to proposals of alternative sanctions in cases in which management decided to discipline the interviewee. According to the majority, this kind of exchange "is a primary indicium of labor organization status as well as a traditional union function" and therefore requires the employer "to recognize and deal with the equivalent of a union representative." The Board therefore determined "that the Act compels the conclusion that non-union employees do not enjoy the rights recognized in the Weingarten decision." Applying this analysis, the Board held Weingarten inapplicable in the absence of representation by a certified union.

Member Hunter agreed with the majority, but he found the extension of Weingarten rights to non-unionized employees to be "unwarranted and unwise," rather than prohibited by the NLRA. He reasoned that employees who have not elected union representation should not be entitled to co-worker representation, and he opined that co-workers had neither the skills nor the emotional distance necessary to serve successfully as representatives for their peers.

On the basis of Sears, Roebuck and Company, the Board issued a supplemental order reversing its earlier determination in Du Pont. Slaughter petitioned for review of the Board’s supplemental order, and the Third Circuit overturned the Board’s new ruling in Du Pont II. Writing for a unanimous panel, Judge Leon Higginbotham stated: "Because we adhere to this Court’s earlier view, stated in DuPont I, that Materials Research Corporation represented a permissible interpretation of the Act, we cannot

employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.


105. Sears, 274 N.L.R.B. at 232.
106. Slaughter, 794 F.2d at 122 (citing 274 N.L.R.B. at 230 n.5).
108. Id. at 234.
109. Id. at 232–34 (Hunter, Member, concurring).
110. Id.
111. Sears, 274 N.L.R.B. 1104.
112. Slaughter v. NLRB, 794 F.2d 120 (3d Cir. 1986).
sustain the Board’s action.” 113 In reaching its decision, the Third Circuit relied on Weingarten and reiterated the Du Pont I panel’s conclusion “that the logic and reasoning of Weingarten carry equal force in the non-union context.” 114 As a matter of law, the court specifically rejected the Board’s contention “that § 7 rights are circumscribed by § 9(a),” 115 as well as its position that the extension of the Weingarten right to non-union employees “conflicts with § 9(a)’s exclusivity principle.” 116 Concluding that the Board’s decision rested on “an unsustainable reason,” 117 the Third Circuit panel granted the petition and remanded the case to the NLRB for further proceedings. 118

c. Round Three: The Board’s Second Supplemental Decision

In its Second Supplemental Decision, 119 after reviewing the checkered history of its own precedent and related judicial decisions, 120 the Board endorsed its most recent preceding resolution of the dispute, albeit on different grounds. 121 This time, the

113. Id. at 122. The court noted that “if we are to sustain the Board’s action, it must be on the basis that no other interpretation of the Act is permissible, regardless of whether their order could be sustained on other grounds.” Id. (citing SEC v. Chenery Corp., 318 U.S. 80, 87, 95 (1943); KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 14.29 (2d ed. 1980)).

114. Id. at 124 (quoting E.I. Du Pont de Nemours & Co. (Chestnut Run) v. NLRB (Du Pont I), 724 F.2d 1061, 1065 (3d Cir. 1983)). The court noted the Board’s own prior declaration “that non-union employees may have an even greater need for Weingarten representation than union employees, since they do not normally have the benefits of a collective bargaining agreement or established grievance procedures,” id. at 124 (citing Materials Research Corp., 262 N.L.R.B. 1010, 1014 (1982) (emphasis in original)), as well as its recognition that co-workers, like union representatives, could substantially assist an employee in an investigatory interview. Id.

115. Id. at 127.

116. Id. The court noted that it had “no occasion to consider . . . whether the interpretation of the Act announced in Sears is a permissible one, or whether the Board’s action might be sustained on that alternative ground.” Id.

117. Id. at 128 (quoting Henry J. Friendly, Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders, 1969 DUKE L.J. 199, 222).

118. Id. at 128.


120. Id.

121. In its Second Supplemental Decision, the Board emphasized the Weingarten Court’s recognition that the Board is free to reexamine past constructions of the Act, noting that it is in “the nature of administrative decision-making to proceed through a gradual process, based on ‘cumulative experience’ and ‘trial and error’ in construing and applying the Act.” Id. at 628 (quoting NLRB v. J. Weingarten, Inc., 420 U.S. 251, 265–66 (1975)). The Board also cited the Court’s acknowledgment that the Board has ongoing responsibility for the “difficult task of reconciling conflicting interests of labor and management.” Id. (quoting Weingarten, 420 U.S. at 267).
majority emphasized that "we are more assured of striking 'a fair and reasoned balance' between the conflicting interests [of labor and management] by not imposing the constraints on investigatory interviews that recognition of 'the Weingarten right' entails."\textsuperscript{122} Applying this reasoning, the Board concluded that "an employee in a non-unionized workplace does not possess a right under Section 7 to insist on the presence of a fellow employee in an investigatory interview by the employer's representatives, even if the employee reasonably believes that the interview may lead to discipline."\textsuperscript{123}

In support of its decision, the Board harkened back to many of the arguments offered by Chairman Van de Water and Member Hunter in \textit{Materials Research Corporation}.\textsuperscript{124} and adopted by the Board in \textit{Sears, Roebuck and Company}.\textsuperscript{125} The majority reiterated earlier rationales for differentiating between union and non-union employees with respect to the right to assistance during an investigative interview and raised the concern that affirmation of \textit{Weingarten} rights for non-unionized workers might cause employers to dispense with hearings entirely.\textsuperscript{126} The Board, however, acknowledged:

\begin{quote}
[T]here is no denying that an employee in a workplace without union representation might welcome the support of a fellow employee at an interview he or she fears will lead to discipline and no denying that, in some circumstances, the presence of such a person might aid the employee or both the employee and the employer.\textsuperscript{127}
\end{quote}

Nevertheless, the ultimate decision rested on the conclusion that factors mitigating in favor of "such representation under Section 7 are less numerous and less weighty than the interests apparent in the union setting."\textsuperscript{128} Consequently, the Board concluded "that the interests of both labor and management are better served by declining to extend this right into that forum."\textsuperscript{129}

3. Match Point: The Third Circuit's Enforcement Decision

Following the Board's Second Supplemental Decision, Slaughter once again petitioned the Third Circuit for review. This time, however, the court denied his petition and enforced

\textsuperscript{122} \textit{Id.} (quoting \textit{Weingarten}, 420 U.S. at 267).
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{See supra} text accompanying notes 76–80.
\textsuperscript{125} \textit{See supra} text accompanying notes 102–07.
\textsuperscript{126} \textit{Du Pont}, 289 N.L.R.B. at 628.
\textsuperscript{127} \textit{Id.} at 630.
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.}
the Board's order. In an accompanying per curiam opinion, a new Third Circuit panel identified the issue then before it as the reasonableness of the Board's construction of Section 7. The court stated:

The scope of our review over permissible Board constructions of the Act is highly deferential. The Board, with its considerable expertise in labor relations, is better equipped than this Court to determine what reasonable interpretation of § 7 of the Act will best promote its purpose of insuring employees' rights to joint action and collective bargaining, as well as that of promoting industrial peace.

As a result, only union members enjoyed Weingarten rights for the next several years.

E. Epilepsy Foundation

In 2000, however, the Board again reversed course in its decision in Epilepsy Foundation of Northeast Ohio. Epilepsy Foundation involved two health care workers, Ashraful Hasan and Amis Borgs, who had expressed significant differences with their supervisor and written memoranda seeking to dispense with his supervisory authority over their cases. The Epilepsy Foundation terminated the men after each refused to participate in investigative interviews without a co-worker present. Their entitlement to co-worker representation was one of a number of issues raised before the NLRB.

The Board once again began its analysis of the co-worker representation issue with the Supreme Court's decision in Weingarten. 130 Slaughter v. NLRB, 876 F.2d 11 (3d Cir. 1989).

131. Id. at 12–13.

132. Id. at 13. The court explained:

Other conclusions may be possible, perhaps even reasonable. However, the Board is the authoritative expert on what will best further the purpose of § 7 of the Act. It has decided against Slaughter on a reasonable interpretation of the Act and we must defer to its judgment in that respect.

Id.; see also id. at 13 n.4 ("We do not sit to substitute our wisdom on the subject of labor relations for that of the Board, nor to ensure 'academic consistency' in its interpretation of the Act." (quoting Slaughter v. NLRB, 794 F.2d 120, at 124–25 (3d Cir. 1986))); id. at 13 n.3 ("It is the Board's duty to choose amongst permissible interpretations of the Act to best effectuate its overarching goals." (quoting Slaughter, 794 F.2d at 125)).


134. Id.

135. Id.
The majority concluded that, read together, the Court's key pronouncements "explain that the right to the presence of a representative is grounded in the rationale that the Act generally affords employees the opportunity to act together to address the issue of an employer's practice of imposing unjust punishment on employees." Finding no evidence that reviving Weingarten rights for non-union employees would "wreak havoc" with NLRA provisions applicable to dealings between employers and non-union employees, the majority stressed that "the right to have a co-worker present at the investigatory interview affords unrepresented employees the opportunity to act in concert to prevent a practice of unjust punishment." Accordingly, the Board held that the Epilepsy Foundation had "violated Section 8(a)(1) of the Act by terminating Borgs for insisting on having his co-worker, Hasan, present at an investigatory interview." The Board then determined to apply its Section 8(a)(1) ruling retroactively.

Members Hurtgen and Brame concurred in portions of the Board's decision but dissented from the recognition of Weingarten rights for non-union employees. Member Hurtgen focused in particular on the absence of a bargaining unit and the concomitant lack of a union representative in non-unionized workplaces. On this basis, he concluded that the reasoning of Weingarten did not apply in the absence of a duly authorized union, although he indicated that employees could not be sanctioned simply for requesting representatives. Member Brame echoed arguments raised nearly a decade earlier by Chairman Van de Water in his dissent in Materials Research Corpora-

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136. Id. at 677. The Board also noted that in Du Pont, its predecessors had "acknowledged that 'the statute might be amenable to other interpretations,'" id. (quoting E.I. Du Pont de Nemours, 289 N.L.R.B 627, 628 (1988)), and that the earlier Board had "specifically disavowed Sears insofar as it held the Act compels a finding that Weingarten rights are applicable only in unionized workplaces." Id. (citing Du Pont, 289 N.L.R.B. at 628 n.8).

137. Id. at 678.

138. Id. Like the Third Circuit in Du Pont III, the Board dismissed the dissent's characterization of the right of non-union employees to the presence of a co-worker in an investigative interview as forcing an employer "to 'deal with' the equivalent of a labor organization" in conflict with Section 9(a) as a "non sequitur." Id. (quoting Slaughter v. NLRB, 794 F.2d 120, 127 (3d Cir. 1986)). See also Finkin, supra note 9, at 183–85.


140. Id. at 679–80.

141. Id. at 682–84 (Hurtgen, Member, dissenting in part).

142. Id.

143. Id.
tion,\textsuperscript{144} further elaborating on the significance of the absence of a recognized union to employees who were not union members.\textsuperscript{145} He also raised concerns about the competency of co-worker representatives, as well as the possibility that an employee might choose a co-worker representative already involved in a particular dispute.\textsuperscript{146}

The case subsequently came before the U.S. Court of Appeals for the D.C. Circuit, pursuant to the Epilepsy Foundation’s petition for review.\textsuperscript{147} Chief Judge Harry Edwards, writing for a unanimous panel, upheld the Board’s ruling with respect to extension of Weingarten protections to non-union workers.\textsuperscript{148} Although the court overturned the Board’s retroactive application of the new rule, as well as some of its evidentiary findings on another aspect of the case,\textsuperscript{149} it upheld the decision to revive Weingarten rights for future employee disputes as “a reasonable reading of § 7 of the NLRA . . . entitled to deference.”\textsuperscript{150} Refusing to accept the Epilepsy Foundation’s argument that the Board was bound by its own prior precedent, Judge Edwards succinctly summarized the political reality: “It is a fact of life in NLRB lore that certain substantive provisions of the NLRA invariably fluctuate with the changing compositions of the Board.”\textsuperscript{151}

In reaching its decision, the D.C. Circuit panel rejected the notion that “an unrepresented employee cannot invoke any collective rights of the sort found in a unionized workplace”\textsuperscript{152} as a “terribly shortsighted” understanding of concerted activity.\textsuperscript{153} The court found the NLRB’s position reasonable, opining:

\textsuperscript{144} See id. at 685–98 (Brame, Member, dissenting in part).
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Epilepsy Found. v. NLRB, 268 F.3d 1095 (D.C. Cir. 2001).
\textsuperscript{148} Id. at 1100–02.
\textsuperscript{149} Id. at 1102–03.
\textsuperscript{150} Id. at 1097. The court specifically rejected the Epilepsy Foundation’s contention that the decision was legally infirm because the Board gives renewed, rather than new, meaning to a disputed statutory provision. Id. The Board’s conclusion obviously is debatable (because the Board has ‘changed its mind’ several times in addressing this issue); but the rationale underlying the decision in this case is both clear and reasonable. That is all that is necessary to garner deference from the court. “When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.” Id. at 1102 (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984)).
\textsuperscript{151} Id. at 1097.
\textsuperscript{152} Id. at 1100.
\textsuperscript{153} Id.
[T]he presence of a co-worker gives an employee a potential witness, advisor, and advocate in an adversarial situation, and, ideally, militates against the imposition of unjust discipline by the employer. The Board's position also recognizes that even non-union employees may have a shared interest in preventing the impositions of unjust punishment, and an employee's assertion of Weingarten invokes this shared interest. The Board's determination that an employee's request for a co-worker's presence at an investigatory interview is concerted action for mutual aid and protection and thus within the realm of § 7 is therefore reasonable.\footnote{154. Id. (emphasis added). The court also agreed with the majority's rejection of the argument advanced by Member Brame and the Epilepsy Foundation that extending Weingarten to non-union employees effectively forces a non-unionized employer "to deal with the equivalent of a labor organization." Id. at 1101 (quoting Epilepsy Found. of Ne. Ohio, 331 N.L.R.B. 676, 679 (2000)). Citing the Board's characterization of the logic of the position as "strained," because "[t]he employer is completely free to forego the investigatory interview and pursue other means of resolving the matter," id. at 1101 (quoting Epilepsy Found., 331 N.L.R.B. at 679) the court observed, "[t]here is nothing more to be said on this matter, for the Board decision says it all." Id. 155. Id.
\footnote{156. IBM Corp., 341 N.L.R.B. No. 148 (June 9, 2004).}
\footnote{157. Id., slip op. at 24–25.}} Accordingly, the court upheld the reincarnation of Weingarten rights for non-union employees, although it rejected the Board's decision to apply its ruling retroactively.\footnote{155. Id.}

II. IBM CORPORATION: THE BOARD'S MOST RECENT COURSE REVERSAL

In 2004, the Board once again abandoned its support of Weingarten rights for non-union employees. A dispute between IBM Corporation and three of its employees provided the vehicle for the Board to revisit the issue.\footnote{156. IBM Corp., 341 N.L.R.B. No. 148 (June 9, 2004).}

A. Background

The circumstances that brought IBM and its former employees before the NLRB arose following the company's receipt of a letter from an attorney representing a contract worker who had provided services to the company. The letter accused IBM employees Kevin Schult and Steven Parsley of harassment and mentioned the name of a third employee—Robert Bannon—in connection with the alleged misconduct.\footnote{157. Id., slip op. at 24–25.} Following separate initial interviews of the men, the company's principal investigator summoned each employee to a second interview. Although all
three asked to have an attorney or co-worker present during the interview, the investigator refused their requests. Each was terminated and subsequently joined in filing a complaint alleging that IBM had violated Section 8(a)(1) of the NLRA by denying their requests for co-worker representation. The Administrative Law Judge (ALJ) who heard the case found in favor of the employees, ruling that IBM had engaged in unfair labor practices in violation of the NLRA. IBM appealed the ALJ's ruling to the NLRB, successfully "urg[ing] the Board to overrule Epilepsy Foundation and return to the principles of E.I. Du Pont & Co."

B. The IBM Corporation Majority and Concurrence

1. The Majority Opinion

Chairman Battista and Members Meisburg and Schaumber formed the Board majority in IBM Corporation, with the Chairman and Member Meisburg joining in the principal opinion. Member Schaumber expressed agreement with the policy analysis set forth in their opinion and also wrote a separate concurring opinion. The majority opinion began by characterizing the issue at stake as a choice between two permissible interpretations of the NLRA. Citing the Supreme Court's decision in Weingarten and the Third Circuit's ruling in Slaughter v. NLRB, Chairman Battista and Member Meisburg concluded:

Because there is Board precedent in this area presenting two permissible interpretations of the statute, the decision as to which approach to follow is a matter of policy for the

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158. Id.
159. Their terminations became final following unsuccessful internal appeals. Id.
160. Id., slip op. at 24.
161. Id.
162. Id., slip op. at 1.
163. Id. Member Schaumberg joined in holding Weingarten rights unavailable to employees in non-union workplaces and "fully concur[red] . . . in finding that the policy considerations advanced in the majority decision support[ed] such a limitation." Id., slip op. at 8 (Schaumberg, Member, concurring). He wrote separately to explain his position with respect to the relevance of Section 9(a) of the NLRA. Id. As in the concurring opinion of Member Schaumber and the dissenting opinion of Members Liebman and Walsh, hereinafter the Battista-Meisburg opinion is referred to as "the majority."
164. Id., slip op. at 8.
165. Id., slip op. at 2 (citing NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975); Slaughter v. NLRB, 794 F.2d 120 (3d Cir. 1986)). The majority focused on the Third Circuit's holding that "the refusal to extend Weingarten to the non-unionized workplace was a permissible interpretation of the Act," although it also acknowledged Epilepsy Foundation's extension of those rights to non-unionized workforces as permissible. Id., slip op. at 2.
Board to decide in its discretion. "It is the Board's duty to choose amongst permissible interpretations of the Act to best effectuate its overarching goals."\(^{166}\)

On the basis of this foundation and their summary of the relevant precedents, the majority proceeded to identify and evaluate the policy considerations they deemed relevant, framing their discussion in terms of escalating requirements for investigatory interviews, the events of September 11, 2001, corporate fiduciary lapses, and purported increases in workplace violence.\(^{167}\) Concluding that "policy considerations ... [earlier articulated] in DuPont have taken on a new vitality"\(^{168}\) because of these developments, the majority returned to the same issues debated in Board precedents spanning three decades. In so doing, Chairman Battista and Member Meisburg identified four principal differences between union representatives and employees in non-union workplaces. First, in the majority’s view, co-workers, unlike union representatives, have no duty of fair representation, are not designated group representatives, and have neither the same legal obligations nor the personal incentives as union representatives.\(^{169}\) Second, co-workers lack the resources and relationships necessary to minimize power imbalances between employers and employees.\(^{170}\) Third, co-workers lack the knowledge and skills of union representatives.\(^{171}\) Fourth, co-workers, unlike union representatives, might compromise confidentiality, thereby embarrassing the interviewee and compromising the employer’s investigation by restricting the employer’s ability to discover the truth and discouraging other employees from coming forward with relevant information.\(^{172}\)

\(^{166}\) Id., slip op. at 2–3 (quoting Slaughter, 794 F.2d at 125). The Board dismissed any objection to yet another change of direction, stating: “we engage in a process both anticipated and approved by the Supreme Court in Weingarten,” id., slip op. at 3, and necessary “to adapt the Act to changing patterns of industrial life.” Id., slip op. at 4 (quoting Weingarten, 420 U.S. at 266).

\(^{167}\) Id., slip op. at 4. As the dissent points out, the majority did not offer any factual support, let alone empirical evidence, for these assertions. Id., slip op. at 18 (Liebman & Walsh, Members, dissenting).

\(^{168}\) Id., slip op. at 4.

\(^{169}\) Id., slip op. at 4–5. The majority also expressed concern over the possibility that an employee might choose a co-conspirator in misconduct as a representative. The Board, however, has previously held that an employee does not have an unlimited right to insist on the presence of a particular co-worker as his representative. Id. See also Int'l Bhd. of Elec. Workers, Local 236, 339 N.L.R.B. No. 156, slip op. 1199, 1200 (Aug. 21, 2003).

\(^{170}\) IBM, 341 N.L.R.B. No. 148, slip op. at 5

\(^{171}\) Id.

\(^{172}\) Id., slip op. at 6. The majority further opined that a co-worker's presence may also "inhibit the targeted employee from candidly answering the
dentiality—and without focusing on the reality that a union's fiduciary obligations run to member employees rather than employers—the majority stressed that the duty of union representatives to provide fair representation precludes them from engaging in bad faith revelations of information disclosed in the course of investigative interviews.\textsuperscript{173} After reviewing these points, the majority concluded: "[O]n balance, the right of an employee to a co-worker's presence in the absence of a union is outweighed by an employer's right to conduct prompt, efficient, thorough, and confidential workplace investigations."\textsuperscript{174}

The majority explained that its decision freed the parties from the consequences of foregoing investigative interviews. Employers would no longer need to make decisions on "incomplete . . . [or] erroneous information," face "charges that [they] did not conduct a fair and thorough investigation,"\textsuperscript{175} or discipline an employee without listening to the employee's side of the story.\textsuperscript{176} The majority also solicitously explained that the decision would save employees from themselves by eliminating the risk that an employee might decide to forego "the chance to tell his [or her own] version of the incident . . . "\textsuperscript{177} Clearly cognizant of the vulnerability of non-union employees, the majority attempted to counter concern about coerced statements by noting the availability of other minimal "due process" safeguards such as peer mediation and ombudsmen, as well as the existence of whistleblower statutes.\textsuperscript{178} The majority also placed great emphasis on its ruling that, while employers can order workers to participate in investigative interviews without a co-worker or any other witness, they cannot discipline employees simply for asking permission for a co-worker to attend the interview.\textsuperscript{179}

In closing, the IBM Corporation majority denied the dissenters' accusation that it was leading the charge in opening "a new

\textsuperscript{173} Id., slip op. at 6 n.10 (citing Marquez v. Screen Actors Guild, 525 U.S. 33, 44 (1998)). The majority's emphasis on this point is attenuated. The fiduciary duty of fair representation runs to the union's members, not to employers. See Marquez, 525 U.S. 33.
\textsuperscript{174} IBM, 341 N.L.R.B. No. 148, slip op. at 7.
\textsuperscript{175} Id.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Id.
\textsuperscript{179} Id.; see also discussion of Member Hunter's dissent in Materials Research Corporation, supra text accompanying notes 79–80.
front in the war on terrorism." Nevertheless, the substantive portion of the opinion stressed the theme infusing the entire analysis: "security concerns that are an out-growth of the troubled times in which we live" justify permitting employers to question employees "on a private basis."

2. The Schaumber Concurrence

Member Schaumber noted his agreement with the policy analysis offered by the Chairman and Member Meisburg, explaining that he wrote separately to emphasize his views on the appropriate statutory interpretation. Returning to the theme originally proposed by Chairman Van de Water in Materials Research Corporation, despite its rejection by the Third Circuit in Du Pont II Schaumber interpreted Section 9(a) of the NLRA to preclude extension of Weingarten rights to employees in non-unionized workforces.

C. The IBM Corporation Dissenters' Perspective

NLRB Members Liebman and Walsh dissented from the Board's ruling, anchoring their opposition to the majority's decision on Section 7's recognition of the right of workers "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." The dissenters found it "hard to imagine an act more basic to 'mutual aid or protection' than turning to a co-worker for help when faced with an interview that might end with the employee fired." They took the majority to

181. *Id.*
182. *Id.*
183. *Id.*, slip op. at 8 (Schaumber, Member, concurring).
185. *See supra* text accompanying notes 96–98.
186. *IBM*, 341 N.L.R.B. No. 148, slip op. at 8 (Schaumber, Member, concurring).
187. *Id.* at 18 (Liebman & Walsh, Members, dissenting) (quoting 29 U.S.C.A. § 157 (2004)). For the text of Section 7, see *supra* note 20.
188. *Id.*; cf. Epilepsy Found. v. NLRB, 268 F.3d 1095, 1100 (D.C. Cir. 2001) ("The Board's determination that an employee's request for a co-worker's presence at an investigatory interview is concerted action for mutual aid and protection and thus within the realm of § 7 is . . . reasonable."); *Materials Research Corp.*, 262 N.L.R.B. at 1014 ("Indeed, when confronted with the prospect of an investigatory interview which might result in discipline, the only assistance readily available to an unrepresented employee lies in fellow employees, and an employee attempt to enlist that type of protection is precisely what the Act is designed to safeguard.").
task for concluding "[w]ith little interest in empirical evidence"\textsuperscript{189} that "non-union workers are not capable of representing each other effectively and therefore have no right to representation."\textsuperscript{190} Members Liebman and Walsh emphatically rejected the conclusion that affording \textit{Weingarten} rights to non-union employees poses any danger to American workplaces\textsuperscript{191} and admonished that "[d]ue process in the non-union workplace should not be sacrificed on such dubious grounds."\textsuperscript{192}

Observing that "[w]orkers without unions can and do successfully stand up for each other on the job—and they have the legal right to try, whether or not they succeed,"\textsuperscript{193} the dissenters delivered a stinging rebuke to the majority:

We are told that everything has changed in "today’s troubled world," following "terrorist attacks on our country," the rise of workplace violence, and an increase in "corporate abuse and fiduciary lapses." But allowing workers to represent each other has no conceivable connection with workplace violence and precious little with corporate wrongdoing, which in any case seems concentrated in the executive suite, not the employee cubicle or the factory floor. Finally, we would hope that the American workplace has not yet become a new front in the war on terrorism and that the Board would not be leading the charge, unbidden by other authorities.\textsuperscript{194}

Pointing out that the rights at stake affect "the great majority of American workers," Members Liebman and Walsh observed that prior to the \textit{IBM Corporation} decision the NLRB had extended \textit{Weingarten} rights to all employees.\textsuperscript{195} They excoriated the majority for "eliminat[ing] the \textit{Weingarten} right for non-

\textsuperscript{189} \textit{IBM}, 341 N.L.R.B. No. 148, slip op. at 18 (Liebman & Walsh, Members, dissenting).

\textsuperscript{190} \textit{Id.}

\textsuperscript{191} \textit{Id.}

\textsuperscript{192} \textit{Id.}

\textsuperscript{193} \textit{Id.}

\textsuperscript{194} \textit{Id.}

\textsuperscript{195} \textit{Id.}, slip op. at 19. The dissent noted, however, that the availability of \textit{Weingarten} rights was not widely known: "As one commentator has observed, before \textit{Epilepsy Foundation}, the ‘scope of coverage of section 7 and its application to non-union employees may have been one of the best-kept secrets of labor law.’" \textit{Id.} (quoting William R. Corbett, \textit{Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again}, 23 \textit{Berkeley J. Emp. & Lab. L.} 259, 267 (2002) (footnote omitted)). The subject, however, is of ongoing concern in many quarters. For example, references to \textit{Weingarten} rights appear in numerous articles dealing with the conduct of corporate internal investigations. \textit{See, e.g.}, Coyne & Barker, \textit{supra} note 7, at 172.
union workers, leaving intact only the protection against discharge or discipline based on the mere request for a co-worker representative," and emphasized that permitting the presence of a co-worker in an investigative interview "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.'"

Members Liebman and Walsh began their dissent by contesting Member Schaumber's implication that the interpretation of the NLRA underlying the Board's decision in Epilepsy Foundation was impermissible. Noting that the NLRA "put an end to narrow notions of when employees were free to act together," they disputed Schaumber's interpretation of concertedness and contended that his views clashed with Weingarten, as well as with the explicit holdings of both the D.C. Circuit and the Third Circuit in Epilepsy Foundation and DuPont I, respectively.

The dissenters then addressed the reasoning of the Battista-Meisburg majority opinion on a point-by-point basis, beginning by faulting the majority for failing to provide compelling arguments explaining "either why there is no Section 7 right implicated here or why, on balance, that right is outweighed—in every case, regardless of the circumstances—by other considerations that the Board legitimately can give weight." They focused in particular on the majority's identification of differences between unionized and non-unionized employees for purposes of Weingarten rights, accusing the Chairman and Member Meisburg of "confus[ing] the efficacy of a right with its existence." In the dissenters' view, the majority offered "a powerful case for unioni-

196. IBM, 341 N.L.R.B. No. 148, slip op. at 20 (Liebman & Walsh, Members, dissenting).

197. Id., slip op. at 19 (quoting Epilepsy Found. of Ne. Ohio, 331 N.L.R.B. 676, 678 (2000)). In Materials Research Corporation, the Board recognized requests for assistance from co-workers, seeking mutual aid or protection, as "concerted activity—in its most basic form," id. at 19–20 (quoting Materials Research Corp., 262 N.L.R.B. 1010, 1015 (1982)), because the existence of these rights assures all employees "that they too can avail themselves of the assistance of a co-worker in like circumstances . . . ." Id., slip op. at 20 (citing Materials Research Corp., 262 N.L.R.B. at 1015).

198. Id., slip op. at 21 (Liebman & Walsh, Members, dissenting).

199. Id.

200. Id.

201. Id., slip op. at 22. The opinion contended that Section 7 does not differentiate among union and non-union representatives on the basis of their ability to represent the entire workforce, their capacity to redress the imbalance of power between employers and employees, or their relative skill sets.
zation, but a weak one for refusing to recognize the rights of non-union workers."\textsuperscript{202}

Members Liebman and Walsh also objected to the majority’s emphasis on the “critical difference between a unionized work force and a non-union work force,”\textsuperscript{203} particularly the notion that an employer whose workforce is not unionized is free “to deal with its employees on an individual basis.”\textsuperscript{204} In their view:

Simply put, requiring a non-union employer to permit co-worker representation (if it chooses to conduct an investigatory interview) is not the equivalent of requiring the employer to bargain with, or to deal with, the representative. Describing that argument as based on the “historic distinction between unionized and non-union employers,” as opposed to the Act itself, does not save it.\textsuperscript{205}

Like the majority’s approach, however, the thrust of the dissenters’ attack addressed policy arguments—specifically, the majority’s assertions that employers must be free to conduct internal investigations without permitting an employee to have a co-worker present because of expanding legal obligations and increasing security concerns.\textsuperscript{206} The dissenters rejected the majority’s position on two principal grounds: their apparent willingness “to pretend that non-union employees have no Section 7 rights that must be respected,”\textsuperscript{207} and the absence of any evidentiary “basis to conclude that co-worker representation has had, or [was] likely [to] have, any of the harmful consequences” predicted by the majority.\textsuperscript{208}

With respect to the former point, the dissenters suggested that, rather than complete abrogation of Section 7 rights, a “process . . . of balancing and accommodation, conducted case-by-case, as federal labor law has long recognized in other contexts,” would be more appropriate.\textsuperscript{209} Accepting \textit{arguendo} the majority’s conclusion that the presence of a co-worker could make employ-

\textsuperscript{202} \textit{Id.}, slip op. at 21.
\textsuperscript{203} \textit{Id.}, slip op. at 22.
\textsuperscript{204} \textit{Id.}
\textsuperscript{205} \textit{Id.} (footnote omitted). The majority’s contention on this point is virtually identical to that of the \textit{Sears, Roebuck and Company} majority—an approach Matthew Finkin describes as “rest[ing] upon a non sequitur.” Finkin, \textit{supra} note 9, at 182. \textit{See also supra} note 103.
\textsuperscript{206} \textit{IBM}, 341 N.L.R.B. No. 148, slip op. at 22–23 (Liebman & Walsh, Members, dissenting).
\textsuperscript{207} \textit{Id.}, slip op. at 22.
\textsuperscript{208} \textit{Id.} The dissenters pointed out that no case had yet come before the Board reflecting that \textit{Weingarten} rights for either unionized or non-unionized employees had created any actual harm. \textit{Id.}
\textsuperscript{209} \textit{Id.}
ers' investigative tasks somewhat more difficult, the dissenders echoed the Supreme Court's earlier admonition that adherence to "legal requirements or moral norms" often imposes some costs. Sardonically commenting that "Star Chamber proceedings, in contrast, were wonderfully efficient," the dissenders argued that co-worker representation should be deemed a presumptive right that could be overcome in appropriate circumstances.

The dissenders also rejected the majority's conclusion that permitting an employee to have a co-worker present during the course of an investigative interview cripples the employer's ability to conduct the interview effectively, especially disagreeing with the majority's conclusion that a union representative is more likely to safeguard important employer interests in confidentiality. To the contrary, the dissenders stressed that "[n]othing in a union's statutory duty of fair representation, which runs to employees, requires the union to serve the employer's interests, whether in imposing discipline or preserving confidentiality." In their view, "given the skill of union representatives and the power of union solidarity (factors noted by the majority), permitting union representation is, if anything, more likely to complicate an employer's investigation than permitting co-worker representation in non-union workplaces." They attacked the majority's view on this point as a rote repetition of "the unsupported assertions of employer advocates," reflecting "a startling lack of interest in what is actually happening in American workplaces."

210. Id.

211. Id.

212. Id. As Gorman and Finkin point out, "The Labor Board has developed a highly nuanced body of law under Weingarten." GORMAN & FINKIN, supra note 7, at 528. For discussion of these rights, see id. at 528-30. See also, e.g., Castagnera, Termination of Update, supra note 9; Cullen, supra note 9; Hopson, supra note 9. See generally, Heldman et al., supra note 9.

213. IBM, 341 N.L.R.B. No. 148, slip op. at 22 (Liebman & Walsh, Members, dissenting). A union's duty of fair representation clearly runs to its members. See supra note 169. Moreover, the Board has upheld reasonable confidentiality policies pertaining to ongoing investigations. See infra note 250.

214. IBM, 341 N.L.R.B. No. 148, slip op. at 22-23 (Liebman & Walsh, Members, dissenting). Turning to the record in the case before the Board, as well as the history of Weingarten rights for both union and non-union workers, the dissenders contended that "[n]othing in the record shows that investigations have come to a halt because of the presence of a co-worker at an investigatory interview, or that information obtained during such an interview has been compromised." Id., slip op. at 23.

215. Id.

216. Id.
Finally, while Members Liebman and Walsh emphasized that they did not interpret the NLRA to mandate the same kinds of constitutional safeguards applicable to persons suspected of criminal activity,\textsuperscript{217} they concluded that "modest as the \textit{Weingarten} right is, it brings a measure of due process to workplace discipline, particularly in non-union workplaces, where employees and their representatives typically are at-will employees, who may be discharged or disciplined for any reason not specifically prohibited by law."\textsuperscript{218} Thus, "[f]ar from being an anachronism, then, \textit{Epilepsy Foundation} is in perfect step with the times,"\textsuperscript{219} and affording \textit{Weingarten} rights to all workers "contributes to a workplace in which employers respect something like the rule of law."\textsuperscript{220}

III. The \textit{IBM Corporation} Board's Flawed Policy Analysis

The tenor of the NLRB's decisions with respect to \textit{Weingarten} rights is directly traceable to the prevailing political climate.\textsuperscript{221} Ironically, one of the most fascinating aspects of the ongoing debate is the tendency of liberals to focus on how their decisions will aid management, while conservatives praise the skills of union representatives. Presumably, both sides engage in this exercise in an effort to preempt the objections of their counterparts. At times, however, the debate approaches absurdity. The \textit{Weingarten} Court itself joined in the game. Justice Brennan, the liberal Democrat who authored the opinion, chose to emphasize the ways in which the presence of union representatives could facilitate the fact-finding process and otherwise assist managers conducting investigative interviews.\textsuperscript{222} Conservative NLRB members, picking up on this approach, invariably laud the skills of shop stewards, express solicitude for the exclusive bargaining

\textsuperscript{217} Id. For discussion of the significant differences between \textit{Weingarten} rights and those guaranteed to persons accused of crimes pursuant to \textit{Miranda v. Arizona}, 384 U.S. 436 (1966), see Heldman et al., supra note 9, at 205 (noting, for example, that \textit{Weingarten} imposes no obligation on employers to notify employees of their rights to representation).

\textsuperscript{218} IBM, 341 N.L.R.B. No. 148, slip op. at 23 (Liebman & Walsh, Members, dissenting).

\textsuperscript{219} Id.

\textsuperscript{220} Id. The dissenters accuse the majority of overruling important precedent "not because they must . . . but because they can." Id. Cf. \textit{Epilepsy Found. of Ne. Ohio v. NLRB}, 268 F.3d 1095, 1097 (2001) ("It is a fact of life in NLRB lore that certain substantive provisions of the NLRA invariably fluctuate with the changing compositions of the Board.").

\textsuperscript{221} See supra note 9 and accompanying text.

\textsuperscript{222} See NLRB v. J. Weingarten, Inc., 420 U.S. 251, 263 (1975); text accompanying supra notes 49–50.
rights of unions, and caution that affording Weingarten rights to non-union workers may hurt more than help these employees.\textsuperscript{223} While liberals talk of assisting management,\textsuperscript{224} conservatives imbue union representatives with great virtue, including a deep sense of fiduciary obligation, a remarkable ability to facilitate employer-employee dialogue, and admirable discretion.\textsuperscript{225} One might readily conclude that managers welcome the presence of union representatives in investigative interviews.\textsuperscript{226} Unfortunately, the picture painted has little to do with reality.

The most pernicious aspect of IBM Corporation, however, is not the majority's rehashing of old issues, but the claim that it is necessary to deprive non-union employees of Weingarten rights to protect national security, safeguard corporate integrity, and make workplaces safer. This assertion is not only insupportable, it is a dangerous proclamation that must not go unchallenged.

A. The Fallacies Inherent in the Majority's General Expressions of Concern

1. The Misguided Notion that Elimination of Weingarten Rights Will Facilitate Discovery of the Truth

The IBM Corporation majority focuses a great deal on the special skills and obligations it attributes to union representatives, as well as their purported ability to make a difference in the outcomes of investigative interviews.\textsuperscript{227} As the dissenters point out, however, a union representative's duty runs to the interviewee and the members of the bargaining unit, not to the employer.\textsuperscript{228} It is not the union representative's job to help management. Consequently, a union representative should attempt to facilitate

\textsuperscript{224} See, e.g., Weingarten, 420 U.S. at 263 ("A knowledgeable union representative could assist the employer by eliciting favorable facts.").
\textsuperscript{225} See, e.g., IBM, 341 N.L.R.B. No. 148, slip op. at 4–6 (noting special skills and fiduciary obligations of union representatives as well as their adherence to confidentiality requirements).
\textsuperscript{226} See id., slip op. at 22–23 (Liebman & Walsh, Members, dissenting) ("given the skill of union representatives and the power of union solidarity (factors noted by the majority), permitting union representation is, if anything, more likely to complicate an employer's investigation than permitting co-worker representation").
\textsuperscript{227} Id. In response, the dissenters observed: "[T]here is no evidence before the Board either that unions have interfered with employers' investigatory obligations since 1975, when Weingarten was decided, or that co-worker representatives have caused harm since Epilepsy Foundation was issued in 2000." Id., slip op. at 23.
\textsuperscript{228} See id.; see also Finkin, supra note 9, at 183–85.
the fact-finding process only when it is in the interviewee's best interest to do so. Even then, the information that the employee and his or her union representative wish to convey may not be what the supervisor or manager is seeking to discover.

As the NLRB recognized in both Materials Research Corporation and Epilepsy Foundation, the most critical function of a representative may be simply to provide moral support and to serve as a witness to the events taking place. There is no reason why a co-worker would be unable to perform these functions equally well. "Moreover, a co-worker who has witnessed employer action and can accurately inform co-employees may diminish any tendency by an employer to act unjustly or arbitrarily."  

Neither is there any basis for presuming that the presence of a non-union co-worker, rather than a union representative, would compromise the ability of managers to ferret out the truth in an interview. As the IBM Corporation majority itself points out, a union representative symbolizes the collective power of an entire bargaining unit and a set of negotiated rights guaranteed by a contract binding on the employer as well as the employee. If anything, as the dissenters suggest, the presence of a union representative seems more likely to empower an employee than to encourage acquiescence in management demands. It defies common sense to believe that union members seek the presence of their representatives at disciplinary hearings to facilitate the fact-finding process rather than to protect themselves.

In Weingarten, as well as in other contexts, the Supreme Court has rejected similar arguments about the dire consequences of admitting third parties—even union representatives—to investigative interviews. The Court, for example, dismissed the argument of NASA's Inspector General that investigative interviews conducted by her investigators should not be deemed subject to a provision of the Federal Service Labor-Management Relations Act affording Weingarten rights to unionized federal workers. The Inspector General insisted that the attendance of union representatives at investigative interviews would compromise the ability of investigators to unearth the

229. See Epilepsy Found. of Ne. Ohio, 331 N.L.R.B. 676 (2000); Materials Research Corp., 262 N.L.R.B. 1010, 1015 (1982) ("the type of assistance that any individual can provide in the situation outlined in Weingarten is limited and can certainly be performed by a fellow employee").


231. IBM, 341 N.L.R.B. No. 148, slip op. at 4.

232. Id., slip. op. at 23 (Liebman & Walsh, Members, dissenting).

233. 5 U.S.C. § 7114(a) (2) (B) (2000).
truth and maintain confidentiality.\textsuperscript{234} The Supreme Court emphatically rebuffed this contention, specifically observing that "[w]henever a procedural protection plays a meaningful role in an investigation, it may impose some burden on the investigators."\textsuperscript{235}

The notion that an employee accompanied by a co-worker is less likely to tell the truth is also suspect. As a recent article points out:

That claim is wrong as a matter of practical reality. This culture has come to understand that isolating vulnerable witnesses from all sources of support, in intimidating situations where they have much to lose, is not (as a factual matter) the method best designed to discover the truth. . . . An employee who is scared, isolated, and feeling no sense of control whatsoever over an investigatory meeting often has less ability to present her own accurate explanation of the facts at issue . . . than she would have if she were supported by a co-worker. There is no real reason to believe that more truth will emerge in a one-sided meeting than in a meeting with a more level balance of power.\textsuperscript{236}

This reasoning is entirely consistent with the Supreme Court's admonition in \textit{Weingarten} that an employee summoned to an investigative interview alone "may be too fearful or inarticulate . . . or too ignorant" to explain the facts pertaining to an incident under investigation.\textsuperscript{237} The presence of a co-worker could help solve this problem.

2. The Dubious Legitimacy of Forcing Workers to Participate in Investigative Interviews

It is remarkable that anyone seriously could suggest that taking away an employee's option to have a co-worker present during an investigative interview that may result in disciplinary sanctions is in his or her best interest. The \textit{IBM Corporation} majority, however, argues that withdrawing \textit{Weingarten} rights ensures that non-unionized employees will have an opportunity to explain their perspectives on incidents that could result in disciplinary sanctions, a privilege they might mistakenly decline if offered an opportunity to make their own decisions.\textsuperscript{238} This contention is either misguided or disingenuous. One could make the same kinds of arguments about the Fifth Amendment—why

\textsuperscript{235} Id. at 234 (emphasis added).
\textsuperscript{236} Heldman et al., \textit{supra} note 9, at 213.
\textsuperscript{238} IBM Corp., 341 N.L.R.B. No. 148, slip op. at 7 (June 9, 2004).
not delete the privilege against self-incrimination from the Bill of Rights to prevent accused persons from foolishly foregoing the opportunity to tell their own stories? This paternalistic approach both abrogates individual responsibility and flies in the face of our society's sense of fair play.\textsuperscript{239}

Nor does elimination of \textit{Weingarten} rights for non-union employees accord with the Board majority's stated objective of permitting managers to conduct investigations "in a thorough, sensitive, and discrete manner."\textsuperscript{240} Unfortunately, excluding witnesses does not guarantee either discretion or sensitivity. As the \textit{IBM Corporation} dissenters note, "Star Chamber proceedings . . . were wonderfully efficient."\textsuperscript{241} Those who convened the infamous court were undoubtedly quite discrete, but few would call their conduct either sensitive or fair. While workplace interviews are a long way from the crown's notorious court, the dissenters' point is well taken. The philosophy of openness infuses our entire system for a reason. The NLRB, for example, is one of the many federal agencies subject to the Sunshine Act,\textsuperscript{242} and the vast majority of employers covered by the NLRA are corporations subject to the public filing requirements of state corporations codes\textsuperscript{243} as well as the financial disclosure mandates of federal securities laws.\textsuperscript{244} Requiring employers to honor a request for the presence of a co-worker in a proceeding that may well result in discipline or termination hardly seems a more onerous burden given the gravity of the stakes for individual employees.\textsuperscript{245}

Nor is it reasonable to suggest that elimination of \textit{Weingarten} rights is necessary because employers will choose to forego interviews rather than allow a co-worker to be present. As one recent article notes:

\textsuperscript{239} Nor does it accord with numerous rulings by labor arbitrators in proceedings involving employees' invocation of the privilege against self-incrimination. Although in the absence of state action, private-sector employees have no basis to claim constitutional protections in connection with employment issues, arbitrators sometimes impose basic procedural protections. See \textit{supra} note 17.

\textsuperscript{240} \textit{IBM}, 341 N.L.R.B. No. 148, slip op. at 3.

\textsuperscript{241} Id., slip op. at 22.


[This concern] postulates the most unreasonable sort of employer (i.e., the employer who elevates its own interest in dominance and control) over the desire to obtain factual information, to such a degree that it is willing to forego any chance of obtaining useful information in order to avoid encountering concerted activity among its employees and oddly urges that the law should cater to the behavior of that employer.246

3. The Erroneous Idea that Privacy Concerns Preclude Co-worker But Not Union Representation

To the extent that the IBM Corporation majority's privacy concerns pertain to persons other than employees summoned to investigative interviews, it is fair to say that employers need to be sensitive to the privacy of alleged harassment victims or other complainants. It is the employer who decides how much information to reveal in the course of an investigation. In any event, the principal concern expressed by the IBM Corporation majority appears to focus on the potential of embarrassment of the interviewees themselves.

As noted above, the majority speculates that a co-worker is far more likely than a union representative to let information slip from the interview, especially inadvertently, although no reason is offered in support of this conclusion.247 While union representatives do have fiduciary obligations to the employees they represent,248 fiduciary relationships are neither necessary to the maintenance of confidences nor a guarantee of discretion. Union representatives, like managers, are susceptible to human frailties. Moreover, their obligations to the bargaining units they represent, as well as union governance structures, may impose obligations to pass on what happens in an investigative interview to other persons who would not otherwise be involved in the matter. As the Supreme Court itself pointed out in rejecting argu-

246. Heldman et al., supra note 9, at 215.
248. Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 44 (citing Vaca v. Spies, 386 U.S. 171, 177 (1967)) ("A union breaches the duty of fair representation when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith."). See generally GORMAN & FINKIN, supra note 7, at 527.
ments against the presence of union representatives in interviews conducted by federal inspectors general, it is "no doubt correct [to] suggest [ ] that the presence of a union representative at an examination will increase the likelihood that its contents will be disclosed to third parties." The Board's attempt to draw a bright-line distinction between union representatives and co-workers with respect to confidentiality is unwarranted.

In any event, it is the interviewee who must live with the consequences of a decision to have a third party present during an investigative interview—whether that third person is a union representative or a non-union co-worker. An employee about to be interviewed is in a far better position than the Board to assess the relative benefits and drawbacks of having a co-worker present in a particular situation, and the employee is free to ask the co-worker to leave once the interview is underway. An employee who wishes to keep a particular incident quiet presumably either would elect not to exercise Weingarten rights or select a co-worker representative with care. Unfortunately, IBM Corporation affords an employee no alternative but to face his or her interrogators alone.

Moreover, the confidentiality interests of both employers and employees can be safeguarded with reasonable restrictions on disclosure of information revealed in the course of investigative interviews. The Board has previously upheld reasonable confidentiality policies, as well as disciplinary sanctions for their violation.250


250. See, e.g., Desert Palace, Inc., 336 N.L.R.B. 271, 272 (2001) (upholding employer's confidentiality rule and discharge of employee who violated it on grounds that employer's interest in confidentiality of ongoing drug investigation outweighed worker's right "to discuss discipline or disciplinary investigations involving fellow employees"); cf. Phoenix Transit System, 337 N.L.R.B. 510 (2002) (holding employer violated NLRA Section 8(a)(1) "by maintaining a confidentiality rule prohibiting employees from discussing their sexual harassment complaints among themselves" after the investigation ended because employer failed to show any legitimate justification for continuing to impose the rule after its investigation had ceased).
B. The Illegitimacy of Relying on the Frequency of Workplace Investigations, Corporate Scandal, Terrorism, or Workplace Violence to Justify Eliminating Weingarten Rights for Employees Who Do Not Belong to Unions

The IBM Corporation majority's conclusion, that arguments against providing Weingarten rights to non-unionized employees have a "new vitality" because of the troubled times in which we live, is both myopic and one-sided. The following discussion focuses on the specific points raised by the majority in support of its pronouncement. None withstands scrutiny.

1. The Increasing Frequency of Workplace Investigations as a Basis for Taking Away Employee Rights

The IBM Corporation majority is correct that the number of workplace investigations has increased in recent years. To some extent this change is due to legislation mandating investigation of various types of events, but it is principally the result of corporate decisions to attempt to avoid the escalating costs of civil and criminal liability exposure. These decisions are, in turn, fueled by the expansion of anti-discrimination laws, the erosion of the at-will employment doctrine in many states, and the rush to create organizational compliance programs in the wake of expanded criminal prosecution of corporations and corporate executives. In each of these cases, the increase in the number of workplace investigations arises in large part from society's desire to hold corporations accountable for conduct attributable to these entities and their managers, including financial dishonesty, environmental damage, treatment of workers, and harassment or other discriminatory practices.

tions such as unwarranted receipt of federal funds. See, e.g., Medicare Fraud Reporting Act, 42 U.S.C. § 1320a-7b(a)(3) (2000).
The majority's reliance on increases in the number of workplace investigations as a justification for depriving non-union workers of Weingarten rights is specious. Surely an increase in the number of arrests of corporate officers and directors would not justify eliminating Miranda warnings or restricting the right of accused executives—or any other individual or group—to counsel. The mere fact that more workers might seek to invoke Weingarten rights does not justify elimination of these safeguards any more than an increase in invocation of the guarantees of the first ten amendments to the Constitution would justify abrogation of the Bill of Rights.

2. The Specter of Terrorism and Workplace Violence as a Rationale for Requiring Employees to Face Interrogation Alone

Terrorism and violence are indeed tragic realities of our times, and there is no doubt that vigilance is necessary to prevent the kinds of horrendous incidents that have cost so many innocent lives. It does not, however, benefit anyone to permit the mere invocation of these words to justify the withdrawal of rights that have little, if any, conceivable connection to either national security or workplace safety. Contrary to the IBM Corporation majority's assertions,253 neither the tragic events of September 11, 2001 nor concerns over workplace violence provide any rational basis for withdrawing Weingarten rights from non-union employees. Even a cursory review of history demonstrates that in equally troubled times in the past, earlier Boards saw no such connection.

In 1972, when the NLRB first recognized the principle now referred to as the Weingarten right, the United States was in the midst of one the most turbulent eras in its national history. Throughout the country, violent crime was approaching its all-time high,254 and there was a great deal of racial tension.255 The


255. See, e.g., Thomas A. Johnson, Pentagon and Racism: Directive Stems from Tensions that Have Plagued Services for 3 Years, N.Y. TIMES, Mar. 6, 1971, at 14; Seth S. King, Black Leaders in Chicago Threaten Demonstrations if Police Superintend-ent and Aides Aren't Removed, N.Y. TIMES, May 14, 1972, at 24; James M. Markham, Curfew Is Continued in Riot-Torn Camden, N.Y. TIMES, Aug. 23, 1971, at 22;
Vietnam War cast a shadow over the nation. Young soldiers faced death in a far-away land, college students seized control of buildings, and antiwar protests throughout the country often ended in violence.\textsuperscript{256} The Weather Underground, the Symbionese Liberation Army, and other radical groups worked to destabilize the status quo.\textsuperscript{257} Only a year earlier, the Weathermen had detonated a bomb in the U.S. Capitol,\textsuperscript{258} and, as 1971 drew to a close, a group of antiwar veterans seized and occupied the Statue of Liberty.\textsuperscript{259} On June 17, 1972, the Watergate scandal burst into the limelight when police apprehended burglars fiddling with eavesdropping equipment in the Democratic National Committee's Washington, D.C. headquarters.\textsuperscript{260} In the international arena, the Cold War dominated superpower politics,\textsuperscript{261} while the tensions that would erupt into the Yom Kippur War during the following year continued to rise.\textsuperscript{262} Violence


\textsuperscript{260} For a comprehensive journalistic treatment of the Watergate scandal, see Revisiting Watergate, Washingtonpost.com, http://www.washingtonpost.com/wpsrv/national/longterm/Watergate/front.htm (last visited Nov. 1, 2005). President Nixon resigned from office on August 8, 1974, as a result of the scandal. Forty other individuals were indicted, and several served prison terms. \textit{Id.}  

\textsuperscript{261} See, e.g., Johnson, supra note 256, at 911 ("During the 1970s the Cold War spread to virtually every part of the globe").  

\textsuperscript{262} See, e.g., Terrence Smith, "Israel's Hopes for Stability in Gaza Wane," N.Y. Times, Oct. 24, 1972, at 8; Terrence Smith, "Israel After the Slayings: Munich Events Seem to End Prospect of Serious Talks With the Arabs Soon," N.Y. Times, Sept. 14, 1972, at 16.
reigned in Northern Ireland in a year that began with "Bloody Sunday," terrorists stormed the Munich Olympic Village, murdering eleven Israeli athletes, and Black September, Baader Mienhoff, and a host of other groups and individuals hijacked airplanes, detonated bombs, and engaged in terrorist activities that bred fear and distrust in venues around the world.

In 1975, the year of the Supreme Court's Weingarten decision, would-be assassins attempted to shoot President Gerald Ford in two different cities within one three-week period. Radical groups continued to attack domestic targets as a bomb exploded in the Washington, D.C. headquarters of the State Department, and members of the Weathermen blew up a factory in Connecticut and abducted three employees in the course of "a mini-war against the United States government."

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266. See, e.g., David Bird, Violence and Presidents, From Jackson to Reagan, N.Y. TIMES, Mar. 31, 1981, at A6; Lacey Fosburgh, Cheers, Then a Shot, and Crowd Screams, N.Y. TIMES, Sept. 23, 1975, at 77; Robert D. McFadden, Suspect Was Defender of the Manson 'Family', N.Y. TIMES, Sept. 6, 1975, at 49.

267. See David Binder, 6,000 in D.C. Flee in Bomb Threats, N.Y. TIMES, Jan. 29, 1975, at 73; John T. McQuiston, State Department Bombed in Protest, N.Y. TIMES, Jan. 29, 1975, at 1.


Membership in the Weathermen, the Black Liberation Army, the FALN and other underground groups was estimated at twenty thousand or more. Internationally, the government of South Vietnam fell to the Communists, and the Cold War persisted as weapons arsenals grew, along with fears of space lasers and "killer satellites." Bombings, kidnappings, and hijackings continued and airline hijackings and other terrorist activities prompted renewed national and international efforts to stop terrorism.

By 1982, the year the Board initially ruled that Weingarten rights extended to non-union employees, President Reagan had been seriously wounded by John Hinckley—yet another would-be assassin—and Pope John Paul II had been gravely injured by another attacker. The Vietnam War had ended, but relations between the United States and the Soviet Union remained tense for many reasons, including the ongoing Soviet occupation of Afghanistan and Soviet responses to increasing political activism in Poland. Terrorists were still active around the globe as the Director of the Central Intelligence Agency warned that "the US must be prepared to counter 'far more lethal forms of violence,' including more sophisticated and powerful bombs and possible attacks on nuclear power installations." Daniel Southerland, CIA's Casey, CHRISTIAN SCI. MONITOR, Oct. 29, 1982, at 12 (quoting William J. Casey).

270. Southerland, supra note 269.


274. See, e.g., Venezuela Says It Will Propose Session on Terrorism, N.Y. TIMES, Dec. 23, 1975, at 10.


276. See, e.g., Edward Giradet, Soviets Accused of Civilian Bombings in Afghanistan: French Doctors Say Attacks Used to Discourage Aid to Guerrillas, CHRISTIAN SCI. MONITOR, Jan. 26, 1982, at 3; Bernard Gwertzman, No Accord at Shultz-
United States initiated an embargo against Libya in response to Muammar Qaddafi's open support for violent extremists. In short, "troubled times" are nothing new.

a. Terrorism

The Board's myopic view of history is exacerbated by an exaggerated sense of the relevance of workplace investigations to the prevention of terrorism. The notion that denying Weingarten rights to employees will help prevent terrorism is nonsense. The Board cannot seriously expect employers to interrogate persons they suspect of possible involvement in terrorist activities. To do so would be ill-advised for a number of reasons, particularly the safety of management employees and the likelihood of losing any possibility of apprehending a suspect who realizes that an employer has become suspicious of his or her behavior. Weingarten rights had no connection whatsoever to the events of September 11, 2001, and they have no conceivable link to any of the terrorist events discussed by the FBI in its public reports on terrorist activity in the United States over the past several years. None of the terrorist threats or incidents reported by the FBI involved employees engaging in terrorist endeavors of any kind in the workplace. In any event, workplace discipline would hardly be an appropriate response to suspected terrorist activity.

As the New York City Bar Association's Committee on Labor and Employment stated in response to the IBM Corporation decision:

[T]he need to fully protect society from potential terrorist attack does not include a need for employers to interrogate employees about matters that could lead to discipline without a representative present. . . . If the National Labor Relations Act, as properly interpreted, provides a right to have a representative present to assist the employee under suspicion, that right is in no way diminished because of a societal concern about terrorists' activity, however valid. . .


The threat of terrorism should not be used to modify the interpretations of a statute passed in 1935 with a purpose of regulating employer-employee relations. To rely on such concerns . . . distorts the debate and unnecessarily injects political considerations into a matter that should be decided on its legal merits and has no relevance to the question of whether or not an employee is or is not represented by a labor organization.279

There are far more effective ways of intercepting potential terrorists in particularly vulnerable facilities such as defense plants, nuclear reactors, and other security-sensitive positions. Background checks and security clearances offer one means of accomplishing security objectives.280 Federal regulations require defense contractors to implement security plans that include notification of the Department of Defense and other appropriate authorities in the event of suspected security breaches,281 and in recent years, law enforcement agencies have taken extraordinary steps to develop easily accessible channels for reporting suspicious conduct in the workplace or anywhere else.282 Neither the Pentagon nor the Department of Homeland Security has suggested deputizing employers to seek out and interrogate suspected terrorists.

b. The Reality of Workplace Violence

The IBM Corporation majority’s references to workplace violence reflect fundamental misperceptions of the nature of the problem. Contrary to the majority’s assertions, workplace violence, along with most kinds of violent crime, has actually

280. Pre-employment checks may also assist in preventing workplace violence. See infra note 298 and accompanying text.
282. For example, the FBI’s website provides a link for easy submission of tips concerning suspicious activities. Fed. Bureau of Investigation, FBI Tips and Public Leads, https://www.tips.fbi.gov (last visited Feb. 9, 2006). On the Washington, D.C. beltway and on U.S. Route 95 heading north and south out of the city, as well as in other parts of the country, electronic overhead signs offer a hotline number for reporting suspicious activities: 1-800-492-TIPS. We need to take care, however, not to let fear get the upper hand. As historian Haynes Johnson notes: In the 1950s, “millions of Americans began to believe civilization, life itself, was teetering on the edge of extinction. Out of this devil’s brew of fear, suspicion, and paranoia—and cynical political opportunism—came McCarthyism.” HAYNES JOHNSON, THE AGE OF ANXIETY: MCCARTHYISM TO TERRORISM 4 (2005). “In today’s America, no less than in the time of McCarthyism, fear again contributes to a climate in which abuses of power, infringement of liberties, and pervasive secrecy thrive.” Id.
decreased in recent years.283 Workplace homicides peaked in 1993 and dropped by nearly forty percent by 2000.284 Nevertheless, although the empirical evidence contradicts the Board's assertion that incidents are increasing, workplace violence remains a very serious problem. "Employers have a legal and ethical obligation to promote a workplace environment free from threats and violence . . . ."285 The connection between efforts to defuse workplace violence and the abrogation of Weingarten rights for non-union employees, however, is extremely tenuous. Elimination of these rights could even be counterproductive in preventing tragedies.286

Workplace violence includes a broad spectrum of conduct ranging from homicide and various kinds of physical assaults to "domestic violence, stalking, threats, harassment, bullying, emotional abuse, intimidation, and other forms of conduct that create anxiety, fear, and a climate of distrust in the workplace."287 These problems fall into four broad categories:

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284. In September 2002, FBI supervisory Special Agent Eugene Rugala testified before a Congressional Committee concerning workplace violence. He reported on a major study spanning the 1990s that has formed the basis for much of the FBI’s subsequent efforts to address the problem. Rugala noted:

Along with all violent crime occurring in the U.S., there was a decrease in workplace violent crime. Since approximately 1993, workplace homicides have been on the decline. Dropping from a peak of over 1000 in the early 1990s to approximately 677 in 2000. It should be noted that the majority of workplace homicides, about 77%, are the result of robberies and related crimes.

285. See supra note 284, at 15.

286. See infra text accompanying note 304.

TYPE 1:
Violent acts by criminals who have no other connection with the workplace but enter to commit robbery or another crime.

TYPE 2:
Violence directed at employees by customers, clients, patients, students, inmates, or any others for whom an organization provides services.

TYPE 3:
Violence against co-workers, supervisors, or managers by a present or former employee.

TYPE 4:
Violence committed in the workplace by someone who doesn't work there, but has a personal relationship with an employee—an abusive spouse or domestic partner.\(^{288}\)

Nearly eighty percent of all workplace violence fits into the first of these categories, and the majority of incidents involve workers in retail and service trades.\(^{289}\) The principal means of preventing these crimes is to improve the physical security of workplaces—e.g., by installing alarms, security lighting, or bulletproof glass—and to ensure that employees are not required to work alone or in circumstances that make them especially vulnerable.\(^{290}\) Type 2 violence is a problem in particular industries and occupations, especially those related to health care,\(^{291}\) while Type 4 incidents cut across all occupations because they arise out of domestic living situations rather than workplace encounters.\(^{292}\) In all of these circumstances, however, the perpetrators are third parties, not employees who can be summoned to supervisors' offices for investigative interviews.\(^{293}\) Consequently,


\(^{289}\) Workplace Violence: Issues in Response, supra note 284, at 13; Nat'l Inst. of Occupational Safety & Health, Violence in the Workplace: Purpose and Scope, http://www.cdc.gov/niosh/violpurp.html (last visited Apr. 21, 2006) ("Workplace violence is not distributed randomly across all workplaces but is clustered in particular occupational settings. . . . Eighty-five percent of nonfatal assaults in the workplace occur in service and retail trade industries.").


\(^{291}\) Id. at 14, 54–56.

\(^{292}\) Id. at 13.

\(^{293}\) It is conceivable that Weingarten rights could come into play in some of these scenarios in a very limited fashion. For example, an employer might interview employees about a failure to lock a nonpublic entryway or negligent
withdrawing Weingarten rights from non-union employees will have no impact whatsoever on the vast majority of incidents involving workplace violence.

One important category remains, however: Type 3 incidents involving violence or harassment committed by workers against other workers or customers. Logic dictates that these are the types of occurrences employers most often are called upon to attempt to prevent or punish. For purposes of the present inquiry, the key question is whether the evisceration of Weingarten rights aids in this process. Some of these crimes involve former employees who return to the workplace to inflict violence following what they perceive to be unjust termination. These kinds of situations, like Type 1, 2, and 4 crimes, would rarely involve Weingarten rights. Nor would issues concerning these safeguards generally arise with respect to incidents of serious physical violence, sexual assault, or related threats, because it is law enforcement authorities, rather than employers, who deal with major crimes.

Weingarten rights would most likely come into play in the subset of instances in which employers must address threats, bullying, various forms of harassment, or perhaps minor physical contacts involving employees and peers, supervisors, managers, or customers. Fortunately, experts estimate that as many as eighty-five percent of incidents of violence by employees and former employees can be predicted and prevented. Aggressive use of investigative interviews, however, is not among the prevention strategies espoused by the FBI and other leading experts. Instead, essential elements of effective prevention include establishing and publicizing a policy prohibiting inappropriate behavior, training managers and employees to recognize and report the signs most commonly associated with the eruption of violence, and avoiding a "toxic climate" of suspicion and distrust.

Other key elements of systems designed to prevent harassment

performance of other security duties, but these instances would be tangential at best, and they would pale in comparison to the perpetration of the violence itself.

295. Threats of violence, as well as incidents, should be reported to law enforcement authorities. "If someone poses a danger to himself or others, appropriate authorities should be notified and action should be taken." Nat'l Inst. of Occupational Safety & Health, Violence in the Workplace: Developing and Implementing a Workplace Violence Prevention Program and Policy, http://www.cdc.gov/niosh/violdev.html (last visited Apr. 21, 2006).
296. Id. at 20.
and bullying, as well as physical violence, include pre-employment screening,\textsuperscript{298} a strong employee assistance program,\textsuperscript{299} a secure, easily accessible system that permits employees to report misconduct without fear of retribution,\textsuperscript{300} and "fair and consistent disciplinary procedures."\textsuperscript{301}

While it is important to protect complainants, there is no evidence that isolating alleged perpetrators or subjecting them to secret interrogation is likely to resolve problems. "[A] lack of respect for employees' dignity and rights [is] likely to undermine, not support, an employer's violence prevention efforts. Workers who perceive an employer's practices as unfair or unreasonable will nurse grievances"\textsuperscript{302} and develop grudges in response to perceptions of unfair treatment, feelings that may fester and erupt into violent behavior at a future date.\textsuperscript{303} At times, imposing sanctions including "[t]ermination may indeed be appropriate, but doing so in the heat of the moment without any time for evaluation or preparation may be exactly the wrong thing to do, removing the potentially dangerous person from observation and possibly bringing on a violent act instead of preventing one."\textsuperscript{304} Rather, employers should focus on "[a]dopting and practicing fair and consistent disciplinary proce-

\textsuperscript{298} Many states require criminal record checks for employees engaged in certain types of work. \textit{See}, e.g., D.C. Code § 44-552(b) (2001) (requiring criminal record checks for hospital workers who are not licensed professionals).

\textsuperscript{299} \textit{See} Stan Duncan, \textit{Ticking Bombs: Defusing Violence in the Workplace}, 67 FBI L. Enforcement Bull. 17 (Dec. 1998) (reviewing \textit{Steve Albrecht, Ticking Bombs: Defusing Violence in the Workplace} (1994)) ("The author advises that a good employee assistance program often represents one of the best security measures that an institution can implement.").

\textsuperscript{300} \textit{Workplace Violence: Issues in Response}, \textit{supra} note 284, at 24–25.

\textsuperscript{301} \textit{Id.} at 20. Where there is no immediate victimization, e.g., in cases involving disgruntled employees whose anger is not focused on any particular person, co-workers and managers need to know how to recognize signs that trouble is looming and how to report their concerns. Precipitating factors identified by the FBI's task force include management failure to communicate reasons for decisions that significantly impact employees, inadequate attention to job definition and allocation of responsibilities, poor management styles, lack of availability of employee counseling, and significant events such as layoffs and downsizing. \textit{Id.} at 22. Experts stress that it is important for employers to seek assistance from medical, law enforcement, and other professionals when serious threats or incidents arise, as well as in instances when upcoming events such as layoffs may engender emotional reactions by those affected. \textit{Id.} at 26 (discussing the importance of establishing assistance contacts as part of workplace violence plan).

\textsuperscript{302} \textit{Id.} at 29.

\textsuperscript{303} \textit{Id.}

\textsuperscript{304} \textit{Id.} at 26.
dures" and "[f]ostering a climate of trust and respect among workers and between employees and management." Allowing an employee to have the support afforded by the presence of a co-worker in an investigative interview—even if only as a witness to the event—could serve to defuse an employee's anger, provide another perspective on the fairness of management procedures, or at least give the affected employee a sympathetic ear. It would be naive to assume that anyone who is disciplined as a result of an investigative interview will praise the fairness of the system, but isolating and interrogating an employee is not at all consistent with the steps experts recommend to minimize the likelihood of violence in the workplace.

3. Corporate Fiduciary Lapses as a Basis for Limiting Worker Rights

The IBM Corporation majority's policy analysis is remarkably unfettered by empirical evidence—perhaps because there is little if any evidence to validate the conclusions set forth in the opinion. This is particularly true with respect to the notion that the increasing incidence of "corporate abuse and fiduciary lapses" requires curtailment of the rights of line employees. It is ironic that, as the IBM Corporation dissenters observe, the majority seeks to utilize restriction of worker rights as a curative for a problem that is "concentrated in the executive suite, not the employee cubicle or the factory floor." Corporate collapses and other scandals have cost tens of thousands of jobs, devastated pension plans, and wreaked havoc with the value of employee stock purchases. President Bush has lambasted dishonest corporate leaders for "hurt[ing] workers who contributed their lives to building a company that hired them." It is ridiculous to sug-

305. WORKPLACE VIOLENCE: ISSUES IN RESPONSE, supra note 284, at 15.
306. Id. As some commentators state:
    If the employer is reluctant to have its conduct in the meeting observed by another employee and if . . . the employer is careful not to tell the employee what it knows about the existence of the [Weingarten] right, it seems to us that this describes a relationship in which there is no real trust whatsoever, in either direction. Heldman et al., supra note 9, at 214.
308. Id.
310. The President promised the public that the newly created Corporate Fraud Task Force, composed of members from the Justice Department, the Securities and Exchange Commission, and other federal agencies, would be
gest that affording managers more freedom to conduct investigation interviews of line employees will help prevent another Enron collapse or stop dishonest executives from using company funds to throw multi-million dollar birthday parties.\footnote{311}

Through Sarbanes-Oxley\footnote{312} and other legislative initiatives, Congress has attempted to curb the misconduct that created these problems by focusing attention where it belongs—on corporate management.\footnote{313} It makes no sense to contend that the debacles that have impacted so many American workers justify depriving these same employees of minimal due process protections to facilitate discovery of corporate wrongdoing. The notion that affording managers maximum freedom to investigate employees will help ferret out corporate scandal and fiduciary lapses is incredible. One might as well give the fox the keys to the henhouse and ask him to investigate whether the hens have been stealing each other’s eggs.

Line employees are particularly vulnerable to the risk that they will become scapegoats.\footnote{314} In most states, an employer may terminate an employee for refusing to participate in an internal investigation, even though talking with managers or attorneys sending a “clear warning and a clear message to every dishonest corporate leader: You will be exposed and you will be punished...” President George Bush, Remarks at the Corporate Fraud Conference (Sept. 26, 2002), available at http://www.whitehouse.gov/news/releases/2002/09/20020926-10.html.

311. For examples of abuses attributed to various corporate executives in recent years, see Alex Kuczynski, \textit{Lifestyles of the Rich and Red-Faced}, N.Y. TIMES, Sept. 22, 2002, at 11.


313. Sarbanes-Oxley, for example, imposed new obligations and corresponding penalties for violations on chief executive and chief financial officers of publicly traded companies to certify corporate financial statements. Sarbanes-Oxley Act § 302 creates new obstruction of justice crimes for tampering with corporate records and enhances penalties under several existing federal criminal statutes. \textit{Id}.

314. \textit{See} Kathryn W. Tate, \textit{Lawyer Ethics and the Corporate Employee: Is the Employee Owed More Protection Than the Model Rules Provide?}, 23 IND. L. REV. 1, 7-8, 11-12 (1990). The question of \textit{Weingarten} rights frequently arises in the course of corporate internal investigations. \textit{See}, e.g., Katharine H. Parker et al., \textit{Conducting an Internal Investigation}, 712 PLI/Lit 689, 696 (2004) (noting the impact of IBM, but observing that in spite of confidentiality concerns, “[r]egardless of the setting (union or otherwise), the employer may often wish to have an employee’s designated representative at the hearing if only to put a witness at ease and to avoid later potential disputes regarding representation rights.”). \textit{See generally} Coyne & Barker, \textit{supra} note 7. There is, however, reason for concern that voluntary admission of a third party, however, could waive the attorney-client or work-product privileges in an internal investigation. \textit{See generally} Paul R. Rice, \textit{Attorney-Client Privilege in the United States} (2d ed. 1999).
representing the company may waive the employee's Fifth Amendment privilege against self-incrimination. Consequently, the pressure to cooperate in investigative interviews, particularly for non-union employees who do not have the benefit of the procedural protections often conferred by collective bargaining agreements, is intense. In some circumstances, the very supervisory or management personnel interviewing an employee may be implicated in the misconduct, or at least bear some share of the blame for the matter under investigation. In other contexts—e.g., investigations conducted by senior managers, compliance officers or corporate counsel—a line employee could easily admit to engaging in particular conduct without realizing that it violated company policy or applicable law, while the more culpable, yet legally more sophisticated superior who initiated the actions under investigation, remains silent. Investigative interviews also may be fraught with other kinds of land mines, particularly those created by organizational politics.

Whenever an investigative interview encompasses conduct that might carry criminal penalties—for individuals or entities—the stakes for participants, particularly line workers, dramatically increase. If, in the course of an interview, an employee responds to a question “in a manner which implicates him personally in criminal conduct, he may have unknowingly lost the value of his Fifth Amendment privilege against self-incrimination.” While this is true for any employee interviewed by management or by counsel acting on behalf of the employer, it is particularly worrisome for lower level workers. Prosecutors often complain that business entities frequently attempt to protect senior managers when misconduct is uncovered. There is, however, no analo-

315. Coyne & Barker, supra note 7, at 173–79, 190–91. Some states have codified the duty to cooperate, while in others, courts have held that it is implicit or implied by law in every employer-employee relationship. Id. at 170–72. Some labor arbitrators, however, have ruled in favor of employees who have refused to provide evidence in the course of an internal investigation on the basis of a constitutional-type analysis. See, e.g., id. at 177; Marvin F. Hill, Jr. & James A. Wright, Employee Refusals to Cooperate in Internal Investigations: “Into the Woods” with Employers, Courts and Labor Arbitrators, 56 Mo. L. Rev. 869, 889–97, 924 n.302 (1991). Employees, however, do not have a right to counsel in investigative interviews. Coyne & Barker, supra note 7, at 178–79; see also Heldman et al., supra note 9, at 206 (noting that Weingarten rights are vastly weaker than Miranda rights).

316. See Duggin, supra note *, at 909.

317. See id.

318. Tate, supra note 314, at 3–4; see also Coyne & Barker, supra note 7, at 173–77.

gous phenomenon where lower level workers are concerned. It is almost always in an employer's best interests to throw a minnow to the sharks in the hope that they will be satisfied with a snack instead of pursuing bigger fish.

The Board also fails to recognize that the fruits of many kinds of investigative efforts are now, far more than ever before, turned over to government authorities. Consequently, what an employee says in the course of an investigative interview may result in consequences far greater than workplace discipline or even job loss—her statements could land her in jail without benefit of any of the constitutional safeguards that would protect her in direct dealings with law enforcement authorities. This phenomenon is an outgrowth of the growing insistence of government authorities on waiver of the corporate attorney-client and work-product privileges as a prerequisite for participation in voluntary disclosure programs, plea negotiations, and other arrangements. This is an occurrence now so frequent that the American Bar Association created a special task force to address the assault on the attorney-client privilege, and in August 2005, the ABA House of Delegates passed a resolution decrying this erosion of the corporate attorney-client privilege. Consequently, the stakes of participating in workplace investigations—particularly interviews that are part of corporate internal investi-

room/usam/title9/crm00162.htm (noting that "[c]mployee discipline is a difficult task for many corporations because of the human element involved and sometimes because of the seniority of the employees concerned").


321. Duggin, supra note *, at 907–09; Tate, supra note 314, at 3–4.

322. See Duggin, supra note *, at 899–901; Zornow & Krakaur, supra note 320, at 153–56.


324. See Resolution Adopted by the House of Delegates of the American Bar Association (Aug. 9, 2005), available at http://www.abanet.org/poladv/report111.pdf. The ABA and a coalition of other interested parties recently succeeded in persuading the U.S. Sentencing Commission to delete a reference to privilege waiver as a condition for "cooperation" from the Commentary to § 8C2.5(g) of the Organization Guidelines. Marcia Coyle, Business Wins Big on Thorny Waiver Issue, NAT'L L.J., Apr. 10, 2006, at P4. This change should lessen the problem to some extent, but it will not eliminate it given current Department of Justice policies.
gations—are higher than ever before, and the need for the presence of a co-worker to provide moral support and to witness the interview is greater now than ever.\textsuperscript{325}

In sum, the \textit{IBM Corporation} majority is correct that the prevalence of corporate scandal and fiduciary lapses uncovered in recent years has given rise to a whole new set of policy concerns relevant to workplace investigations. This newly revealed reality, however, suggests that line employees need more, not less, protection in investigative interviews.

IV. \textit{Weingarten} Rights Should be Afforded to All Workers

Examination of the \textit{IBM Corporation} majority’s analysis demonstrates two fundamental flaws. First, many of the majority’s assumptions are clearly erroneous. The majority misunderstands the reasons why corporate investigations have expanded; fails to offer any plausible reason why employers, rather than law enforcement authorities, would need to interview employees in connection with suspected terrorist activities; evidences little understanding of the nature of workplace violence and the measures necessary to address it effectively; and utterly fails to explain why tipping the balance of power in the workplace in favor of management will ameliorate rather than exacerbate corporate fiduciary lapses.

Second, as a recent article points out, “the boundaries set by \textit{Weingarten} do not erode the employer’s power to discipline employees; rather, they help to protect the fairness of the investigative process.”\textsuperscript{326} Virtually every significant objection the \textit{IBM Corporation} majority raises to affording \textit{Weingarten} rights to non-union workers could be readily addressed with a dose of common sense. An employee summoned to an investigative interview is unlikely to request the presence of a co-worker he or she does not trust with personal information, and there is no reason to believe that a co-worker is more likely to divulge sensitive information than the interviewee. Taking steps to protect the confidentiality of other information may require no more than requesting those present to exercise discretion, or, if necessary,

\textsuperscript{325} It is also important to note that the \textit{IBM Corporation} majority’s point that an employer may voluntarily choose to permit a non-union co-worker to attend an interview neglects to consider the consequences of doing so with respect to the protections of the attorney-client privilege in the context of internal investigations. Voluntary admission of a third party in such situations could arguably waive the employer’s attorney-client privilege. See Rice, \textit{supra} note 315.

\textsuperscript{326} O’Brien, \textit{supra} note 9, at 113.
imposing a reasonable confidentiality policy for the duration of a sensitive investigation.\textsuperscript{327} Fears that employees will seek representation by alleged co-conspirators could be assuaged by allowing management to refuse co-worker representation by employees arguably implicated in the conduct under investigation, provided they do so in good faith.\textsuperscript{328} The NLRB already "has developed a highly nuanced body of law under Weingarten"\textsuperscript{329} for unionized employees that could be adapted as appropriate to the non-union context. This body of law addresses important contours of Weingarten rights ranging from the nature of triggering events to the choice and role of representatives and remedies for violations.\textsuperscript{330} As Members Liebman and Walsh point out in their \textit{IBM Corporation} dissent, the Board's termination of Weingarten rights has cut short the development of an analogous body of law with respect to co-worker representation.\textsuperscript{331}

Undoubtedly, there are many reasons for the decreasing rate of unionization in the United States, particularly in the private sector.\textsuperscript{332} The reality, however, is that the vast majority of Americans do not belong to unions. Consequently, most of this country's workers are susceptible to the very problems that Weingarten rights help to mitigate, particularly the unfair imposition of disciplinary sanctions and scapegoating. As the experts assembled by the Federal Workplace Violence Initiative observe, discipline "must be—and must be seen to be—proportionate, consistent, reasonable, and fair."\textsuperscript{333} if we are to continue to make headway against workplace violence. The same could be said of efforts to restore confidence in the integrity of corporate managers and to reassure all Americans that steps taken in the name of counter-terrorism are actually directed at suspected terrorists,

\textsuperscript{327.} See supra note 250 and accompanying text.
\textsuperscript{328.} See supra note 169.
\textsuperscript{329.} Gorman & Finkin, supra note 7, at 528.
\textsuperscript{330.} See id. at 528–30; see generally Moberly & Lisenbee, supra note 9.
\textsuperscript{331.} IBM Corp., 341 N.L.R.B. No. 148, slip op. at 23 (June 9, 2004) (Liebman & Walsh, Members, dissenting).
\textsuperscript{332.} See Craver, supra note 5; Roger C. Hartley, The Failure of Democracy in Union Governance, 32 CATH. U. L. REV. 13, 15 (1982) (noting impact of doctrinal fragmentation on union cohesion); Steven Greenhouse, A.F.L.-C.I.O. Leader Says Split Hurts Labor, N.Y. TIMES, July 29, 2005, at A14 (noting effect of recent withdrawal of powerful service unions from A.F.L.-C.I.O. on political clout of labor movement); George Will, Labor Union Clout Is Not What It Once Was, MIAMI HERALD, Sept. 21, 2005, at A27 (attributing decreasing effectiveness of strikes and other labor action to fact that "[a] strike, to be effective, must withdraw skills that cannot be replaced and there seem to be fewer of them than there once were").
\textsuperscript{333.} \textit{Workplace Violence: Issues in Response}, supra note 284, at 29.
rather than used as an excuse to eliminate the rights of those who are most vulnerable. The fundamental principles of the NLRA apply to all workers whether or not they belong to unions.

The *IBM Corporation* majority seems to have forgotten that the core objective of the NLRA is "to eliminate the 'inequality of bargaining power between employees . . . and employers" by making it possible for employees to engage in concerted action for their mutual benefit and protection. It is no answer to say that whistleblower laws offer adequate protection, for it blinks reality to believe that most workers will have the wherewithal to position themselves in a way that will invoke statutory protections. In any event, where employers break the law, a whistleblower's path is long and hard, and chances of success are low.

A non-unionized employee facing interrogation by an employer is at an enormous disadvantage, regardless of guilt or innocence of the misconduct under investigation. Permitting an employee to turn to a co-worker for support—even if that co-worker does no more in the interview than sit quietly by as a witness to the events that take place—does not do a great deal to minimize the relative inequality inherent in the employer-employee relationship. Nevertheless, it does something. The presence of the co-worker benefits both the interviewee and all employees by providing a check against arbitrary decisions by employers. It also serves broader societal interests by prodding management to ensure that disciplinary proceedings are reasonably fair and appropriately conducted and by decreasing the chances that an employee will feel so isolated and mistreated that he or she will turn to violence as a solution. Conversely, as history teaches, secrecy breeds abuse and hostility.

Terrorism and workplace violence have destroyed far too many lives and created far too much anxiety over the physical safety of innocent people. The spectacular fall from grace of Enron and other leading corporations has caused still others to

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335. Id. at 260.
fear financial insecurity, particularly those who have lost jobs, savings, and pensions as a result of executive misconduct. It is easy to say that we must do everything in our power to prevent recurrences of these events, but the desire to do so should not blind decision makers to the inequity of actions that discriminate against the victims instead of protecting them from the real perpetrators of wrongdoing. If there are any legitimate arguments against Weingarten rights for all workers, prevention of terrorism, corporate fiduciary lapses, and workplace violence are not among them.

The NLRB needs to take a fresh look at the propriety of extending Weingarten rights to non-union employees. In so doing, its members should follow the same standards society expects of the corporate decision-makers whose interests the majority so zealously seeks to safeguard. While its dictates are sometimes forgotten, the business judgment rule, a cornerstone of corporate law, presumes that corporate managers act "on an informed basis, in good faith and in the honest belief that the action taken [is] in the best interests of the [ir] company."337 In turn, "[t]he determination whether a business judgment is an informed one turns on whether the directors have informed themselves 'prior to making a business decision, of all material information reasonably available to them.'"338 It is difficult to see how a fully informed analysis of the relevant policy considerations could lead anyone to conclude that Weingarten rights should be limited to unionized employees. Instead, these rights should be afforded to all American workers and enhanced in at least one important respect—all employees should have an opportunity to learn that they exist.339 If the Board fails to come to grips with the needs of the vast majority of American workers, Congress should step in to amend the NLRA to provide a statutory guarantee of Weingarten rights.

CONCLUSION

NLRB Members Liebman and Walsh clearly have the better of the arguments over Weingarten rights for non-union employees. As they point out, in the aftermath of the IBM Corporation decision, "American workers without unions, the overwhelming majority of employees, are stripped of a right integral to work-

338. Id.
339. Currently, employers have no obligation to inform employees of the existence of Weingarten rights. See supra note 43.
place democracy.\textsuperscript{340} IBM Corporation requires line employees to forfeit Weingarten rights because of the fiduciary lapses of corporate elites, the misjudgments of intelligence agencies, the misdirected focus of political leaders, and the reprehensible conduct of the perpetrators of fraud and violence. The Board's decision is wrong. American workers should not be forced to pay a price that will never buy freedom from terrorism, workplace violence, or dishonest executives.

\textsuperscript{340} IBM Corp., 341 N.L.R.B. No. 148, slip op. at 18 (June 9, 2004) (Liebman & Walsh, Members, dissenting).