

E.I. Dupont and Manhattan Beer: How Far Do Weingarten Rights Extend? A Union Perspective

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Introduction

In 1975, the Supreme Court issued *NLRB v. J. Weingarten, Inc.*,¹ holding that a bargaining unit employee is entitled to union representation upon request during an investigatory interview the employee reasonably believes might result in discipline.² Under *Weingarten*, if an employee requests such representation, the employer may lawfully (1) grant the request, (2) deny the request and conduct its investigation without interviewing the employee, or (3) give the employee a clear choice between having the interview without representation or ending the interview.³

Since that time, the National Labor Relations Board has considered and reconsidered *Weingarten's* scope. In 1982, the Board found in *Materials Research Corp.*⁴ that a non-union employee had the right to have a co-worker present during an investigatory interview.⁵ Three years later, the Board reversed its position in *Sears, Roebuck & Co.*⁶

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1. 420 U.S. 251 (1975).

2. *Id.* at 260. Disciplinary decisions do not necessarily have to originate with the employer. In *Menorah Medical Center*, the National Labor Relations Board (Chairman Mark Pearce and Members Kent Hirozawa and Harry Johnson) rejected the employer's argument that it did not violate the National Labor Relations Act by denying union representation to nurses at a peer review committee meeting. 362 N.L.R.B. No. 193, slip op. at 1 (Aug. 27, 2015). The employer had argued that because the state licensing agency, and not the employer, disciplined nurses based on the outcome of such meetings, nurses had no reasonable fear of discipline. *Id.*, slip op. at 4. The Board noted that if the state licensing agency revoked the nurses' licenses, the employer would have no choice but to suspend or discharge the nurses. *Id.*, slip op. at 6.

3. *Weingarten*, 420 U.S. at 256–59.

4. 262 N.L.R.B. 1010 (1982), *overruled in relevant part by Sears, Roebuck & Co.*, 274 N.L.R.B. 230 (1985).

5. *Id.* at 1016 (“[T]he right enunciated in *Weingarten* applies equally to represented and unrepresented employees.”).

6. 274 N.L.R.B. 230, 230 (1985) (“*Weingarten* rights are inapplicable where . . . there is no certified or recognized union.”).

In 2000, *Epilepsy Foundation of Northeast Ohio*⁷ again extended *Weingarten* to non-union employees.⁸ Four years later, the Board overturned *Epilepsy Foundation in IBM Corp.*⁹

IBM Corp. remains the law, despite signals and much speculation that the Board may change course again. In 2014 and 2016, the General Counsel directed the Regions to submit to the Division of Advice “[c]ases involving the applicability of *Weingarten* principles in non-union settings as enunciated in *IBM Corp.*”¹⁰ While not changing its position regarding non-union settings,¹¹ the Board has focused on applying *Weingarten* in other contexts. This article analyzes two prominent recent *Weingarten* cases.

In *E.I. Dupont de Nemours & Co., Inc.*,¹² the Board considered the appropriate remedy for cases in which, after an employer unlawfully denies union representation, the employee is terminated for misconduct during the subsequent employee interview.¹³ The Board held make-whole relief is appropriate if “(1) an employer, in discharging an employee, relies at least in part on the employee’s misconduct during an unlawful interview; and (2) the employer is unable to show it would have discharged the employee absent that purported misconduct.”¹⁴

Three months later, in *Manhattan Beer Distributors, LLC*,¹⁵ the Board held that a beer distributor violated the National Labor Relations Act by denying an employee union representation during a drug test.¹⁶ The Board also found that the employer unlawfully discharged the employee for refusing to take the test in the absence of his union steward.¹⁷

7. 331 N.L.R.B. 676 (2000), enforced in relevant part by *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095 (D.C. Cir. 2001).

8. *Id.* at 679.

9. 341 N.L.R.B. 1288, 1288 (2004) (*Weingarten* rights do not extend to non-union employees).

10. NLRB, Gen. Couns. Mem. 14-01, Mandatory Submissions to Advice (Feb. 25, 2014); NLRB, Gen. Couns. Mem. 16-01, Mandatory Submissions to the Division of Advice (Mar. 22, 2016).

11. In one recent *Weingarten* case, the Board dismissed a complaint in which an employer denied a represented employee’s request to have a co-worker witness (as opposed to a union representative) present at an investigatory interview. *Asset Prot. & Sec. Servs., L.P.*, 362 N.L.R.B. No. 72, slip op. at 1 (Apr. 22, 2015). In adopting the administrative law judge’s (ALJ) conclusions, the Board emphasized that it relied “solely” on the facts that the employee was “an experienced former union official”; that he represented, both to his co-worker and to management, that he intended to represent himself in the interview; that he wanted the co-worker present as a “witness”; and that the employer declined his request to have the co-worker present as a “witness.” *Id.*, slip op. at 1 n.1.

12. 362 N.L.R.B. No. 98 (May 29, 2015).

13. *Id.*, slip op. at 1.

14. *Id.*, slip op. at 4.

15. 362 N.L.R.B. No. 192 (Aug. 27, 2015).

16. *Id.*, slip op. at 1.

17. *Id.*, slip op. at 4. The U.S. Court of Appeals for the Second Circuit denied review in November 2016. See *Manhattan Beer Distribs., LLC v. NLRB*, 362 N.L.R.B. No. 192

Some have assailed these two decisions as dramatic and unwarranted extensions of *Weingarten*.¹⁸ In reality, *E.I. Dupont* and *Manhattan Beer* are reasonable and logical applications of *Weingarten* and promote a robust and meaningful protection of rights guaranteed by section 7 of the Act.¹⁹

This article discusses *E.I. Dupont*, *Manhattan Beer*, and other recent *Weingarten* cases from a union perspective and examines the implications raised by their intersection. Part I describes *E.I. Dupont*'s facts. Part II discusses *E.I. Dupont*'s majority and dissenting opinions, and Part III provides a union perspective on the case. Part IV details *Manhattan Beer*'s facts. Part V examines *Manhattan Beer*'s majority and dissenting opinions, and Part VI presents a union perspective on the case.

I. Background of *E.I. Dupont*

A. Facts

While working in May 2011, special projects operator Joel Smith was injured when he slipped on a wet floor.²⁰ Smith reported the injury and the employer investigated.²¹ Thereafter, the employer issued Smith a corrective action document stating, among other things, that he had been dishonest in an interview; hindered the investigation by claiming he spilled only a small amount of solvent on the floor but later admitting that he spilled a gallon or two; and failed to report his injury immediately, as the employer required.²² Smith did not file a workers' compensation claim and lost no time at work.²³

Smith was involved in another reported accident about a year later at around midnight on May 24, 2012, while working as a wind-up operator.²⁴ When he fell while climbing stairs out of the pit in response to an alarm,²⁵ he broke his fall with his arms and hit his knee against the stairs.²⁶ He noticed that his arm was bleeding and applied a bandage.²⁷ Smith then told his supervisor, Mike Szymanski,

(Aug. 27, 2015), *review denied*, Nos. 15-2845, 15-3099, 2016 WL 6787873 (2d Cir. Nov. 16, 2016).

18. See, e.g., Patrick Sully, *The NLRB Reinstates Liar*, SHERMAN & HOWARD (June 2, 2015), <http://shermanhoward.com/the-nlrb-reinstates-liar/>.

19. National Labor Relations Act (NLRA) § 7, 29 U.S.C. § 157 (2012).

20. *E.I. Dupont de Nemours & Co., Inc.*, 362 N.L.R.B. No. 98, slip op. at 8 (May 29, 2015).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*, slip op. at 8–9. Smith regularly worked as a special projects operator and only worked as a wind-up operator sporadically.

25. *Id.*

26. *E.I. Dupont de Nemours & Co., Inc.*, 362 N.L.R.B. No. 98, slip op. at 9 (May 29, 2015).

27. *Id.*

that he had injured his knee and was bleeding.²⁸ Szymanski did not see any swelling, but gave Smith an icepack.²⁹ Smith told Szymanski that he felt severe shoulder pain.³⁰ Szymanski drove Smith to a hospital where a doctor took x-rays and advised Smith to see an orthopedist.³¹ Szymanski then drove Smith back to the plant.³²

After returning to the plant, Szymanski questioned Smith about the accident.³³ Smith told Szymanski that he had been working with a vacuum roll while standing on wet film when he slipped on a stair and fell.³⁴ Smith then went to the employer's medical department to answer its questions about the accident.³⁵

At about 8:30 a.m. on May 24,³⁶ Smith was called into an interview with Szymanski, a superintendent, and the employer's safety specialist.³⁷ Smith later testified that he immediately requested a union representative; the employer claimed that Smith only asked whether a representative would be necessary.³⁸ The employer told Smith that no representation was necessary and denied him representation.³⁹

During the interview, the employer asked Smith several questions, including how he fell, whether the floor was wet at the time, and whether he was wearing his personal protective equipment.⁴⁰ Smith said that the floor was wet at times during his shift, but that he could not recall whether it was wet at the time of the accident.⁴¹ The meeting ended when Smith said his shoulder was causing him severe pain and he wanted to go home.⁴² At the hearing, Szymanski testified that Smith's answers during the May 24 interview were consistent with Smith's initial report to him.⁴³

The employer submitted a transcript of Smith's interview answers and a report of his injuries from its medical department to the employ-

28. *Id.*

29. *Id.*

30. *Id.*

31. E.I. Dupont de Nemours & Co., Inc., 362 N.L.R.B. No. 98, slip op. at 9 (May 29, 2015).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. The interview occurred approximately one hour after the end of Smith's twelve-hour shift at a time when he would normally take his diabetes medication. *Id.* at 1. The timing caused Smith to miss his medication. *Id.*

37. E.I. Dupont de Nemours & Co., Inc., 362 N.L.R.B. No. 98, slip op. at 9 (May 29, 2015).

38. *Id.* Smith testified that he requested a union representative because his employee interview after the 2011 accident "contributed" to his discipline. *Id.*

39. *Id.* at 9-10.

40. *Id.* at 10.

41. *Id.*

42. *Id.*

43. E.I. Dupont de Nemours & Co., Inc., 362 N.L.R.B. No. 98, slip op. at 10 (May 29, 2015).

er's safety manager for review.⁴⁴ The manager suggested follow-up questions, including why Smith had not reported the accident when he saw blood;⁴⁵ whether water was "everywhere" (as Smith had allegedly told the employer's medical department); whether Smith had bandages on his arm before the accident; and whether he had been wearing personal protective equipment.⁴⁶

On June 1, the employer told Smith to attend another meeting.⁴⁷ Smith feared that the June 1 interview could result in discipline, but did not ask for union representation because the employer had denied representation at the May 24 meeting.⁴⁸

During the June 1 interview, the employer's safety manager questioned Smith.⁴⁹ In her notes from the interview, the manager wrote that Smith did not offer that his arms were extended when he fell or that he otherwise caught himself.⁵⁰ She also wrote that Smith "confirmed" the floor was not wet from water and said that something cut through the protective rubber sleeve he was wearing when the accident occurred, but he did not know where the sleeve was.⁵¹ The manager emailed this information to the superintendent. The superintendent identified what she considered as "oddities" in the notes, such as the fact that Smith had not mentioned before the meeting that he was wearing rubber sleeves or that one had been torn. The superintendent also observed that Smith had stated on May 24 that he was injured while removing a wrap from the vacuum roll, but now claimed he had been pulling bad film from a good roll.⁵² The superintendent "questioned why Smith would have been wearing rubber sleeves for either task."⁵³

On June 11, the employer called another meeting.⁵⁴ This time Smith was permitted to bring a union representative.⁵⁵ During the meeting, the employer challenged what it perceived as discrepancies in Smith's accounts.⁵⁶ The employer then prepared a personnel review setting forth these inconsistencies.⁵⁷ The report also mentioned Smith's

44. *Id.*

45. According to the timeline created at the May 24 meeting, Smith fell at 12:35 a.m., but did not report his injury until 12:45 a.m. *Id.*

46. *Id.* at 10.

47. *Id.*

48. E.I. Dupont de Nemours & Co., Inc., 362 N.L.R.B. No. 98, slip op. at 10–11 (May 29, 2015).

49. *Id.* at 11.

50. *Id.*

51. *Id.*

52. *Id.*

53. E.I. Dupont de Nemours & Co., Inc., 362 N.L.R.B. No. 98, slip op. at 11 (May 29, 2015).

54. *Id.*

55. *Id.*

56. *Id.*, slip op. at 11–12.

57. *Id.* at 12.

“history of dishonesty” (namely, his interview statements about the 2011 accident) and his failure to report the accident immediately.⁵⁸

The employer terminated Smith for misconduct, specifically “[f]alsification of records, data, documents, or other information . . . in connection with management investigations.”⁵⁹

B. Procedural History

On August 26, 2013, administrative law judge (ALJ) Steven Davis issued a decision and recommended order, concluding the employer had violated Smith’s *Weingarten* rights by denying his request for union representation during the May 24 interview.⁶⁰ The ALJ found that the June 1 meeting was a continuation of the investigative process begun at the May 24 meeting and that Smith’s request for union representation on May 24 was sufficient to require the employer to allow representation at later meetings.⁶¹

On the issue of remedy, however, the ALJ concluded that the General Counsel’s requested make-whole remedy was inappropriate and contrary to Board law.⁶² The ALJ relied on *Taracorp, Inc.*,⁶³ in which the Board held that an employee discharged for misconduct, or any other nondiscriminatory reason, is not entitled to make-whole relief simply because that employee’s section 7 rights were violated in a context unrelated to the discharge.⁶⁴ The ALJ also relied on *Anheuser-Busch, Inc.*⁶⁵ for the proposition that section 10(c) of the Act⁶⁶ precludes the Board “from granting a make-whole remedy where the employees were disciplined for cause, even if the employer learns of the misconduct through unlawful means.”⁶⁷

58. E.I. Dupont de Nemours & Co., Inc., 362 N.L.R.B. No. 98, slip op. at 12–13 (May 29, 2015).

59. *Id.*, slip op. at 13.

60. *Id.*, slip op. at 1.

61. *Id.*, slip op. at 14.

62. *Id.*, slip op. at 15.

63. 273 N.L.R.B. 221 (1984).

64. *Id.* at 221. In *Taracorp*, an employee responsible for feeding used batteries into a moving belt refused a supervisor’s directive to pull the belt after it jammed, stating that it was not his job. *Id.* The employee was subjected to an unlawful *Weingarten* interview in which he stated that he had told the supervisor that pulling the belt was unsafe, in addition to saying that it was not his job. *Id.* The employer next interviewed the supervisor, who denied the employee had said anything about safety. *Id.* The employer discharged the employee for insubordination, not for lying in the interview. *Id.* The ALJ ordered the employee’s reinstatement with back pay. *Id.* The Board reversed the ALJ on the issue of remedy, finding that the employee had been discharged for cause. *Id.*

65. 351 N.L.R.B. 644, 646 (2007).

66. Section 10(c) of the Act provides, “No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.” 29 U.S.C. § 160(c) (2012).

67. *Anheuser-Busch*, 351 N.L.R.B. at 650. In *Anheuser-Busch*, the employer unlawfully installed hidden surveillance cameras through which it determined that several employees had engaged in misconduct. *Id.* at 644. The employer discharged the employ-

The ALJ rejected the position taken in three General Counsel Advice Memoranda,⁶⁸ that if an employer discharges an employee for misconduct during an unlawful *Weingarten* interview, make-whole relief is warranted unless the employer shows that it would have discharged the employee regardless of the interview misconduct.⁶⁹ The ALJ noted that Advice Memoranda lack precedential weight.⁷⁰

II. The Majority Decision and Dissent in *E.I. Dupont*

A. *The Majority Decision*

The majority of the Board agreed with the ALJ that the employer unlawfully denied Smith's request for a union representative at the May 24 and June 1 interviews.⁷¹ The Board remanded to the ALJ for further findings and analysis⁷² to determine the appropriateness of a make-whole remedy.⁷³

The Board saw the case as one of first impression post-*Taracorp*: is make-whole relief appropriate for an employee discharged for misconduct precipitated by and occurring during an unlawful interview?⁷⁴ Applying the rationale from the General Counsel's three Advice Memoranda, the Board distinguished *Taracorp* because the "misconduct" giving rise to Smith's discharge (his alleged dishonesty) occurred after denial of *Weingarten* rights and during the unlawful interview, not before.⁷⁵ While acknowledging that make-whole relief is inappro-

ees. *Id.* In its initial decision, the Board declined to order reinstatement or back pay because the employees were disciplined for cause, even though the employer learned of the misconduct through unlawful means. *Id.* at 568. On petition for review, the U.S. Court of Appeals for the D.C. Circuit observed that section 10(c) did not "expressly address whether the Board shall or shall not deny make-whole relief where an employer would not have discovered its employees' misconduct but for its own unlawful action." *Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 46–47 (D.C. Cir. 2005). It acknowledged that the Board could therefore "fill [the statutory] interstices with a reasoned approach," but found the Board's decision to withhold a make-whole remedy was inconsistent with existing case law. *Brewers & Maltsters*, 414 F.3d at 46–47. On remand, the Board majority determined that section 10(c) precluded a make-whole remedy, even in the absence of a *Weingarten* violation. *Anheuser-Busch*, 351 N.L.R.B. at 647–48 (alteration in original). In dissent, Members Wilma Liebman and Dennis Walsh applied *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984), arguing that the majority's analysis relied on a construction of section 10(c) that the Court of Appeals had rejected. *Anheuser-Busch*, 351 N.L.R.B. at 652–53.

68. *E.I. Dupont de Nemours & Co.*, 362 N.L.R.B. No. 98, slip op. at 15 (May 29, 2015).

69. NLRB, Gen. Couns. Adv. Mem., Case 03-CA-026833, at 3 (Feb. 3, 2010); NLRB, Gen. Couns. Adv. Mem., Case 19-CA-026979, at 2 (Sept. 8, 2000); NLRB, Gen. Couns. Adv. Mem., Case 05-CA-024870, at 3–4 (Feb. 28, 1995).

70. *E.I. Dupont*, slip op. at 15. (Davis, ALJ, opinion).

71. *Id.*, slip op. at 5 (majority opinion) (Pearce, Chairman, and Hirozawa, Member).

72. The ALJ did not identify which of the interviews gave rise to the "misconduct" for which Smith was discharged. *Id.*

73. *Id.*

74. *Id.*, slip op. at 3–4.

75. *Id.*, slip op. at 4.

priate if an employer discharges an employee for cause, the Board, relying on *Anheuser-Busch*, noted that this rule does not apply if there is a nexus between an employee's misconduct and an employer's unlawful actions.⁷⁶ In *Anheuser-Busch*, the Board said:

The dissent cites several situations where the Board has granted a make-whole remedy to employees who have committed arguably wrongful actions. These cases are distinguishable because it is not clear whether the employees' actions would have been wrongful or would have merited the discipline imposed—that is, whether the employees' actions would have constituted “cause” for discipline—if the employer had not committed the unfair labor practices.⁷⁷

The Board found that a make-whole remedy is appropriate when (1) an employer, in discharging an employee, relies at least in part on the employee's misconduct during an unlawful interview; and (2) the employer is unable to show that it would have discharged the employee absent the purported misconduct.⁷⁸ It noted that this rule does not prevent employers from taking action against employees based on preexisting misconduct brought to light only through an unlawful interview; nor does the rule apply to conduct objectively “so egregious as to take it outside the protection of the Act, or . . . render the employee unfit for further service.”⁷⁹

B. *The Dissent*

Dissenting Member Harry Johnson agreed with the majority that the employer had violated Smith's *Weingarten* rights at the May 24 and June 1 interviews, but disagreed that a make-whole remedy was appropriate.⁸⁰ He asserted that the Board's new rule and remand were irreconcilable with *Taracorp*, contending that whether conduct occurred before or after unlawful denial of *Weingarten* rights was “without legal significance.”⁸¹ He also relied on *Taracorp* to contend that the ap-

76. *Id.*

77. *Anheuser-Busch, Inc.*, 351 N.L.R.B. 644, 649 (2007). See also *Kolkka*, 335 N.L.R.B. 844, 849–51 (2001) (discipline for employee actions provoked by employer's unfair labor practices); *Consec Sec.*, 328 N.L.R.B. 1201, 1203–04 (1999) (discipline for employee action would have been acceptable absent employer's unlawful unilateral change in conduct rules); *Bus. Prods.-Div. of Kidde, Inc.*, 294 N.L.R.B. 840, 840 n.3, 852 (1989) (discipline for employee action that employer did not find worthy of investigation until employees began union activities and employer responded with unlawfully motivated examinations).

78. *E.I. DuPont de Nemours & Co.*, 362 N.L.R.B. No. 98, slip op. at 4 (May 29, 2015).

79. *Id.*, slip op. at 5 (quoting *Richmond Dist. Neighborhood Ctr.*, 361 N.L.R.B. No. 74, slip op. at 2 (Oct. 28, 2014) (internal quotation marks and citations omitted)).

80. *Id.*, slip op. at 6 (Johnson, Member, dissenting).

81. *Id.* For this proposition, the dissent cited *Illinois Bell Telephone Co.*, in which an employee informed her employer, during an interview in which the employer unlawfully denied her *Weingarten* representation, that she had made personal phone calls. 275 N.L.R.B. 148, 148 (1985). The employer discharged the employee for this misconduct. *Id.* The ALJ initially provided a make-whole remedy under *Kraft Foods, Inc.*, 251 N.L.R.B. 598 (1980), but because the Board overruled *Kraft Foods* in *Taracorp*, it found that the

propriate remedy for *Weingarten* violations is a cease and desist order and a notice posting and that a make-whole remedy is appropriate only if the General Counsel can prove an additional violation.⁸²

III. A Union Perspective on *E.I. Dupont*

The Board's new rule applies only to limited factual circumstances in which the employee says or does something in an unlawful interview that the employer relies upon in disciplining or discharging the employee, and the employer cannot show that it would have made the same decision without the employee's admission.⁸³ The fact that *E.I. Dupont* was the first case to present this issue since 1984⁸⁴ demonstrates the rarity of this circumstance.

The first scenario in which the new rule would apply is when an employee makes inconsistent or inaccurate statements during an unlawful interview, as described in *E.I. Dupont*. This situation happened in *Birds Eye Foods*⁸⁵ when an employer discovered, through lawful video surveillance, that an employee had tossed a cup of coffee into a supervisor's office.⁸⁶ In an unlawful *Weingarten* interview, the employee lied to the employer about throwing the coffee.⁸⁷ The employer subsequently discharged the employee, citing both the coffee throwing and the employee's dishonesty during the interview.⁸⁸

The second scenario in which the new rule would apply is when an employee speaks or behaves intemperately during an unlawful *Weingarten* interview. This happened in *The Lusty Lady*⁸⁹ and *National Rehabilitation Hospital*.⁹⁰ In *The Lusty Lady*, the employer cited the employee's unspecified "conduct" during the meeting as a reason for discharge.⁹¹ In

employee was no longer entitled to make-whole relief due to an insufficient nexus between the employer's denial of the *Weingarten* request and the reason for discharge. *Illinois Bell*, 275 N.L.R.B. at 148–49.

82. *E.I. Dupont*, slip op. at 7 (Johnson, Member, dissenting). See also *Taracorp Indus.*, 272 N.L.R.B. 221, 223 n.12 (1984) ("A make-whole remedy can be appropriate in a *Weingarten* setting if, but only if, an employee is discharged or disciplined for asserting the right to representation.")

83. See *E.I. DuPont de Nemours & Co.*, 362 N.L.R.B. No. 98, slip op. at 5 (May 29, 2015).

84. *Id.*, slip op. at 3. The dissent did not believe the case presented an issue of first impression and asserted that *Taracorp* addressed the factual situation presented in *E.I. Dupont*. See *id.*, slip op. at 7 (Johnson, Member, dissenting). The dissent did not dispute, however, that the employee in *Taracorp* was discharged for conduct that occurred before the *Weingarten* violation. See *id.*, slip op. at 6. See also *Taracorp*, 272 N.L.R.B. 221.

85. NLRB, Gen. Couns. Adv. Mem., Case 03-CA-026833 (Feb. 3, 2010).

86. *Id.* at 2; *Taracorp*, slip op. at 3 (discussing *Birds Eye Foods*).

87. *Birds Eye Foods*, slip op. at 2; *Taracorp*, slip op. at 3.

88. *Birds Eye Foods*, slip op. at 2; *Taracorp*, slip op. at 3.

89. NLRB, Gen. Couns. Adv. Mem., Case 19-CA-026979 (Sept. 8, 2000).

90. NLRB, Gen. Couns. Adv. Mem., Case 5-CA-24870 (Feb. 28, 1995).

91. See *The Lusty Lady*, slip op. at 3; *E.I. Dupont de Nemours & Co., Inc.*, 362 N.L.R.B. No. 98, slip op. at 3 n.7 (May 29, 2015) (employee discharged for "misconduct occurring, at least in part, during an unlawful *Weingarten* interview").

National Rehabilitation Hospital, the employee lost his temper during the interview after being accused of improper conduct, and the employer cited the employee's behavior as the reason for discharge.⁹² Although these examples show that the *E.I. Dupont* rule may protect an employee whose speech or behavior is intemperate, it is not to say, as the dissent suggests,⁹³ that an employee who punches a supervisor or engages in similar physical misconduct would receive make-whole relief under the Board's new rule.

Contrary to the dissent, it is highly relevant if the misconduct for which the employee is disciplined or discharged occurred prior to or during the unlawful interview. In this regard, it is useful to analyze the facts of *E.I. Dupont*. The employer there apparently believed that Smith was injured off the job but faked the accident to get workers' compensation. Because there were no witnesses to the accident, the employer could not prove this suspicion. The employer evidently believed that if it fired Smith, the union would have filed a grievance and the employer would not have prevailed in arbitration. Aware of this problem, the employer interviewed Smith and repeatedly asked the same questions, hoping to get inconsistent answers so that it could fire Smith for interfering with the investigation or giving false statements. Regardless of whether Smith faked an accident (although the facts suggest he did not), the employer apparently believed it did not have good cause to fire Smith before the interview. Instead, the employer created a situation it hoped would manufacture "good cause." It did so, not coincidentally, by denying Smith his *Weingarten* rights. As argued by the General Counsel, had Smith's request for a union representative been granted, the representative might have counseled Smith not to answer questions due to his physical condition or to provide only answers of which he was certain. As noted by the Supreme Court in *Weingarten*: "A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors."⁹⁴

92. *Nat'l Rehab. Hosp.*, slip op. at 2; *E.I. Dupont*, slip op. at 3 (discussing *Nat'l Rehab. Hosp.*).

93. *E.I. Dupont*, slip op. at 7 n.11 (Johnson, Member, dissenting) (citing Pier Sixty, LLC, 362 N.L.R.B. No. 59, slip op. at 4 (Mar. 31, 2015) (Johnson, Member, dissenting) (profane Facebook post directed at supervisor did not lose the protection of the Act); Mik-Lin Enter., 361 N.L.R.B. No. 27, slip op. at 10, 13 (Aug. 21, 2014) (Johnson, Member, dissenting) (sick day campaign poster advising customers "WE HOPE YOUR IMMUNE SYSTEM IS READY BECAUSE YOU'RE ABOUT TO TAKE THE SANDWICH TEST" did not lose the protection of the Act); and Plaza Auto Center, Inc., 360 N.L.R.B. No. 117, slip op. at 15 (May 28, 2014) (Johnson, Member, dissenting) (employee's obscene and denigrating comments to manager did not lose the protection of the Act)).

94. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 262-63 (1975).

The Board's new rule protects employees like Smith who are coerced to attend interviews without representation.⁹⁵ It offers a robust remedy for violation of *Weingarten* rights that validates for employees the significance of these rights.

IV. The Background of *Manhattan Beer*

A. Facts

While working on June 7, 2013, driver helper Joe Garcia Diaz was injured and filed an incident report.⁹⁶ When he reported to work the next day, he discovered he was not scheduled for any routes.⁹⁷ Diaz went to the office area and spoke to the delivery manager, Roy Small, about the schedule.⁹⁸ Small observed that Diaz “reeked of the smell of marijuana” and that his eyes were “glassy” and “bloodshot.”⁹⁹ Tony Wetherell, the facility manager, asked Diaz how he was feeling and whether he had “been doing anything stupid.”¹⁰⁰ When Diaz asked why he wanted to know, Wetherell told Diaz he smelled “a little funny.”¹⁰¹

According to his testimony, Diaz then waited over an hour for a route, during which Small repeatedly told him that he was trying to find him an assignment.¹⁰² Diaz said he eventually asked Small if he should just go home.¹⁰³ Small told Diaz that he had a route for him, but that he would have to take a drug test first because he smelled like marijuana.¹⁰⁴ Wetherell also implied to Diaz that he smelled like marijuana.¹⁰⁵ Diaz told Small that he did not have a problem taking a drug test, but that he wanted his shop steward to be present.¹⁰⁶ Small said that it was a “company issue” and that “shop stewards have nothing to do with it.”¹⁰⁷ Diaz replied that he did not think

95. The Board's new rule could also apply to a case in which an employer denies an employee's request for union representation at drug or alcohol testing and compels the employee to submit to the testing unrepresented—a twist on *Manhattan Beer Distributors, LLC*, 362 N.L.R.B. No. 192 (Aug. 27, 2015), discussed below. If the test were positive and the employer elected to discipline or discharge the employee on the basis of the test result, presumably the employee would not be entitled to a make-whole remedy under the new rule, because the misconduct—the alcohol or drug use—would have occurred before denial of *Weingarten* rights.

96. *Manhattan Beer*, slip op. at 1.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Manhattan Beer Distribs., LLC*, 362 N.L.R.B. No. 192, slip op. at 1 (Aug. 27, 2015).

102. *Id.*, slip op. at 11 (Davis, ALJ, opinion).

103. *Id.*

104. *Id.*, slip op. at 1 (majority opinion).

105. *Id.*

106. *Manhattan Beer Distribs., LLC*, 362 N.L.R.B. No. 192, slip op. at 1 (Aug. 27, 2015).

107. *Id.*, slip op. at 11 (Davis, ALJ, opinion).

that was correct because when he had been a steward, he had to “be there for everything that was going on between workers and management.”¹⁰⁸ Small told him, “you just have to take the test.”¹⁰⁹

Diaz left the office area to call the assistant shop steward but could not reach him.¹¹⁰ Diaz then called the shop steward, who told Diaz it was his day off and that he could not accompany him to the drug test.¹¹¹ While Diaz was on the phone with the steward, Wetherell drove up in his car and told Diaz to get in.¹¹² Diaz told Wetherell he would not take the drug test without a shop steward present.¹¹³ Wetherell then told Diaz to drive himself to the test and that they would “finish talking there.”¹¹⁴ Diaz replied, “Not without a shop steward.”¹¹⁵

When Diaz returned to the office, Small asked him what the steward had said.¹¹⁶ Diaz refused to tell Small.¹¹⁷ Small then called the steward and told him that Diaz smelled of marijuana, that his eyes were glassy and bloodshot, and that he was going to take him for a drug test because he had a reasonable suspicion he was under the influence of marijuana.¹¹⁸ The steward told Small to do what he had to do.¹¹⁹

Small again asked Diaz to take the drug test, telling him that, if he refused, it would be considered a positive test result and that he could be terminated.¹²⁰ Diaz again declined.¹²¹ A short time later, Small and Wetherell again asked Diaz what he was going to do.¹²² Diaz said that he felt as if his rights were being violated and that he did not have a problem taking the test, but that he wanted a steward present, and that, because a steward could not be present, he would not take the test.¹²³ Small told Diaz he should take the test and that, after he passed it, he could “come back, stick your nose up at us and tell us that we messed up.”¹²⁴ Diaz replied that he was “not

108. *Id.*

109. *Id.*

110. *Id.*, slip op. at 1 (majority opinion).

111. *Id.* According to Diaz’s hearing testimony, the steward told him that, if he felt “strongly enough” that his rights were being violated and that he needed a representative present, he should not take the test. *Id.*, slip op. at 11 (Davis, ALJ, opinion).

112. Manhattan Beer Distribs., LLC, 362 N.L.R.B. No. 192, slip op. at 1 (Aug. 27, 2015) (majority opinion).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*, slip op. at 11 (Davis, ALJ, opinion).

117. Manhattan Beer Distribs., LLC, 362 N.L.R.B. No. 192, slip op. at 11 (Aug. 27, 2015).

118. *Id.*

119. *Id.*

120. *Id.*, slip op. at 1 (majority opinion).

121. *Id.*, slip op. at 11 (Davis, ALJ, opinion).

122. *Id.*

123. *Id.*

124. Manhattan Beer Distribs., LLC, 362 N.L.R.B. No. 192, slip op. at 1 (Aug. 27, 2015).

that type of person.”¹²⁵ Small asked Diaz if he understood that, by refusing to take the drug test, he would be suspended.¹²⁶ Diaz said that he understood and repeated that he did not have a problem taking the test, but did not believe the employer had grounds “to do this.”¹²⁷

B. Procedural Background

On May 15, 2014, ALJ Steven Davis issued a decision and recommended order concluding that the employer had violated Diaz’s *Weingarten* rights by not giving Diaz a clear choice between having the interview (the drug test) without representation or ending the interview.¹²⁸ The ALJ, relying on *Safeway Stores*¹²⁹ and *System 99*,¹³⁰ found that *Weingarten* rights attached because Diaz reasonably believed the drug test would result in discipline and because the drug test was “an extension of, and a required part of its investigatory process to determine if [Diaz] was under the influence of drugs.”¹³¹ The ALJ concluded that Diaz’s phone conversation with the steward did not satisfy his right to union representation.¹³²

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*, slip op. at 15 (Davis, ALJ, opinion).

129. 303 N.L.R.B. 989, 989 (1991). In *Safeway Stores*, the employer investigated an employee’s absenteeism by directing the employee to take a drug test. The employer denied the employee’s request to consult with a union representative. When the employee refused to submit to the drug test on the spot, the employer discharged him. *Id.* at 990. As noted by the ALJ in *Safeway Stores*, the Board did “not pass on the administrative law judge’s apparent conclusion that a drug test, standing alone, would constitute an investigatory interview under *Weingarten*,” noting that the test was part of a wider inquiry into the dischargee’s absence record—a first step in determining whether his excessive absences were due to drug use.” *Manhattan Beer*, slip op. at 12 (referencing *Safeway Stores*).

130. 289 N.L.R.B. 723 (1988). In *System 99*, the employer interviewed an employee it believed had arrived at work intoxicated. *Id.* at 724. The employer asked the employee to take a sobriety test and advised him that, if he refused, he would be presumed intoxicated and fired. *Id.* The ALJ found that the employee had, in effect, been discharged as “punishment for his privileged silence after being denied *Weingarten* rights to consult” and ordered a make-whole remedy. *Id.* at 728.

131. *Manhattan Beer Distribs., LLC*, 362 N.L.R.B. No. 192, slip op. at 12 (Aug. 27, 2015) (alteration in original). The employer had a drug testing policy, which provided that “no employee shall report to work under the influence of such drugs. Employees who engage in such conduct will be subject to discipline up to and including discharge.” *Id.*, slip op. at 10. The collective-bargaining agreement (CBA) provided, in relevant part, that “any employee who . . . is impaired by . . . narcotics, illegal drugs, prescription drugs absent a prescription, controlled substances . . . when reporting for work . . . is subject to immediate disciplinary action, up to and including termination of employment.” *Id.* The CBA also stated that “employees other than drivers may be tested only when there is reasonable suspicion that the employee is working or has reported to work while impaired by drugs or alcohol.” *Id.* At the hearing, an employer witness testified that, notwithstanding the CBA’s provision that the employer has the right to fire an impaired employee immediately, the employer may not discipline employees without first affording them an opportunity to take a drug test. *Id.*

132. *Id.*, slip op. at 13.

The ALJ relied on *Weingarten*'s emphasis on "the importance of the physical presence of a union agent who 'is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them.'"¹³³ The ALJ also cited *Washoe Medical Center*,¹³⁴ in which the Board stated that "the union representative is entitled not only to attend the investigatory interview but to provide 'advice and assistance' to the employee."¹³⁵

The ALJ declined to reinstate Diaz.¹³⁶ The ALJ found that the employer had discharged Diaz because of his refusal to submit to a drug test, not for his refusal to submit to a drug test without a union representative being present.¹³⁷ Applying *Wright Line*,¹³⁸ the ALJ found no evidence of animus towards Diaz's protected activity, citing company documents suggesting that Diaz was fired for refusing to take the test.¹³⁹ The employer also presented testimony showing that refusal to take a drug test was considered a positive result.¹⁴⁰ Finding no nexus between the denial of Diaz's *Weingarten* rights and the discharge, the ALJ concluded that Diaz's refusal to take the test and the managers' "reasonable suspicion" that Diaz was under the influence of drugs properly led to Diaz's termination.¹⁴¹

V. The Majority Decision and Dissent in *Manhattan Beer*

A. The Majority Decision

The Board majority adopted the ALJ's finding that the employer violated Diaz's *Weingarten* rights by not giving him a clear choice between having the interview without representation or ending the interview.¹⁴² The Board also found that the employer violated Diaz's *Weingarten* rights by not affording him "a reasonable period of time to obtain union representation."¹⁴³ While conceding that "an employer cannot delay testing indefinitely while an employee seeks out an available union representative," the Board emphasized that it was required to "seek a reasonable accommodation of employers' legitimate management interests and employees' legitimate Section 7 interests, rather than serve one at the complete expense of the other."¹⁴⁴ The Board

133. *Id.*, slip op. at 14 (quoting *NLRB v. J. Weingarten*, 420 U.S. 251, 260 (1975)).

134. 348 N.L.R.B. 361 (2006).

135. *Id.* at 361 (citing *Barnard College*, 340 N.L.R.B. 934 (2003)).

136. *Manhattan Beer Distribs. LLC*, 362 N.L.R.B. No. 192, slip op. at 14 (Aug. 27, 2015).

137. *Id.*

138. 251 N.L.R.B. 1083, 1089 (1980).

139. *Manhattan Beer*, slip op. at 14.

140. *Id.*

141. *Id.*

142. *Manhattan Beer Distribs., LLC*, 362 N.L.R.B. No. 192, slip op. at 3 (Aug. 27, 2015) (*Hirozawa and McFerran, Members*).

143. *Id.*

144. *Id.*

did not clarify what it would consider “a reasonable period of time,” but noted that the employer had not allowed Diaz sufficient time to determine whether the assistant steward might become available, and that, according to one of the employer’s witnesses, marijuana stays in the body for three months.¹⁴⁵

Relying on *Ralphs Grocery*,¹⁴⁶ the Board reversed the ALJ with regard to reinstatement.¹⁴⁷ In *Ralphs Grocery*, the employer interviewed an employee it believed had arrived at work under the influence and demanded that the employee submit to drug and alcohol testing.¹⁴⁸ The employee refused, and the employer warned him that such refusal would be grounds for immediate termination.¹⁴⁹ The employee asked to contact a union representative; despite telling him he had no right to union representation, the employer nevertheless permitted him to try to contact a union representative.¹⁵⁰ The employee was unable to reach a representative, and after ten to fifteen minutes, the employer again demanded the employee take the test.¹⁵¹ Despite the employer’s warning that refusal would result in discharge, the employee refused to take the test and the employer terminated him.¹⁵² The Board agreed with the ALJ that the employee had been unlawfully discharged, finding that his termination was “inextricably linked” to his assertion of *Weingarten* rights, and thus ordered make-whole relief.¹⁵³ The Board observed: “By relying on [the employee’s] refusal to take the test as a basis for discipline, the [employer] penalized [the employee] for refusing to waive his right to representation, irrespective of whether it considered his refusal to be insubordination or an automatic positive test result.”¹⁵⁴

The Board noted in *Manhattan Beer* that the “facts of *Ralphs Grocery* are strikingly similar to those presented here.”¹⁵⁵ There, the employer told the employee that refusal to take a drug test would be considered a positive result that could possibly lead to suspension or termination.¹⁵⁶ In *Manhattan Beer*, after Diaz insisted upon exercising his *Weingarten* rights, the employer treated his refusal to take the drug test without the benefit of union representation as a positive test result

145. *Id.*

146. 361 N.L.R.B. No. 9 (July 31, 2014).

147. *Id.*, slip op. at 4.

148. *Id.*, slip op. at 5.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*, slip op. at 1.

154. *Manhattan Beer*, 362 N.L.R.B. No. 192, slip op. at 4 (Aug. 27, 2015) (quoting *Ralphs Grocery Co.*, 361 N.L.R.B. No. 9, slip op. at 1 (July 31, 2014)).

155. *Id.*, slip op. at 4.

156. *Id.*

and terminated him.¹⁵⁷ The Board held that here, as in *Ralphs Grocery*, the reason for the discharge was “inextricably linked” to the assertion of *Weingarten* rights, so make-whole relief was appropriate.¹⁵⁸

B. *The Dissent*

Dissenting Member Johnson disagreed with the majority’s conclusions that the employer had violated Diaz’s *Weingarten* rights and that the employer had discharged Diaz for exercising those rights.¹⁵⁹ While not disputing that an employee is entitled to “advice and active assistance” from a union representative “in a traditional investigatory interview,” Johnson concluded that “[a]s a matter of logic,” the role of a union representative in a drug or alcohol testing situation should be limited because of “increased risks of inaccuracy and adulteration” posed by the presence of another person during the physical test administration.¹⁶⁰ The dissent also believed that “the benefit of any kind of legitimate ‘advice and active assistance’ that would happen in that context is likely to be minimal.”¹⁶¹ The dissent found that *Weingarten* requires only that the employee have an opportunity to confer with a union representative prior to deciding whether to submit to a drug or alcohol test and that the need for an accurate and unadulterated test outweighs whatever “minimal benefit” might be provided by a union representative’s presence.¹⁶² The dissent also relied on the ALJ’s analysis in *System 99* (adopted without comment by the Board),¹⁶³ in saying that an employer should not be required to delay a drug or alcohol test if no union representative is available.¹⁶⁴

Member Johnson distinguished *Ralphs Grocery*, in which he had agreed with the majority that the employer unlawfully interfered with the employee’s *Weingarten* rights, but disagreed that the employee had been discharged for his assertion of those rights. In *Manhattan Beer*, he noted that Diaz was able to speak on the telephone with, and obtain advice from, the steward before deciding not to take the drug test.¹⁶⁵

The dissent opposed reinstatement, finding that, if an employee’s refusal to take a drug or alcohol test is treated by the employer’s pre-

157. *Id.*

158. *Id.*; see also *Ralphs Grocery*, slip op. at 6.

159. *Manhattan Beer*, slip op. at 6.

160. *Id.*

161. *Id.* (quoting Washoe Med. Ctr., 348 N.L.R.B. 361 (2006)).

162. *Id.*

163. *System 99*, 289 N.L.R.B. 723, 727 (1988). In *System 99*, involving an alcohol test, the ALJ doubted that the employee “had a *Weingarten* right to delay the interview until [the chief steward] returned, . . . considering that [he] was not expected back for perhaps an hour . . . and the passage of that much time has made the results of any sobriety test to which [the employee] might ultimately agree to submit largely useless.” *Id.* (alteration in original).

164. *Manhattan Beer Distribs. LLC*, 362 N.L.R.B. No. 192, slip op. at 6 (Aug. 27, 2015).

165. *Id.*

existing policy or practice as either a failure to overcome reasonable suspicion or an automatic positive test result, the employer is “really terminating the employee because of the preordained result under the policy.”¹⁶⁶ Thus, when the employee chooses to “forgo the interview,” the employer should be free to make its decision without information that could have been provided by the interview.¹⁶⁷

VI. A Union Perspective on *Manhattan Beer*

Why is a drug test like an investigative interview?¹⁶⁸ The dissent contended that it is not, claiming that the benefit of union representation during drug or alcohol testing is “minimal” and outweighed by increased risks of inaccuracy and adulteration posed by the presence of another person.¹⁶⁹

However, a union representative’s advice on whether to take a drug or alcohol test, after having the opportunity to observe and speak with the employee face-to-face, is not a “minimal” benefit.¹⁷⁰ Nor is the representative’s presence at the test to ensure proper procedures are followed.¹⁷¹ If there are irregularities, the representative can witness them, report them to the employer, and later raise them during the grievance and arbitration process.¹⁷² If the employer asks the employee questions during the administration of the test (or if the employee feels the urge to volunteer information), the representative can counsel the employee on whether and how to respond.¹⁷³ Additionally, a union representative’s presence during a drug or alcohol test reassures not only the tested employee, but others in the bargaining unit “that they, too, can obtain [the representative’s] aid and protection if called upon to attend a like interview.”¹⁷⁴

Reading between the lines of *Manhattan Beer*’s dissent, there seems to be an underlying presumption that if an employee were not using marijuana, he would submit to the test because the fear of losing the job would outweigh any injustice of denied union representation. Because applying this presumption means that the employee is necessarily “guilty,” it is perhaps not surprising that the dissent would be-

166. *Id.*, slip op. at 8.

167. *Id.*

168. See LEWIS CARROLL, *ALICE’S ADVENTURES IN WONDERLAND* 97 (VolumeOne Publishing 1998) (1865) (“Why is a raven like a writing desk?”).

169. *Manhattan Beer*, slip op. at 6.

170. See, e.g., *id.*, slip op. at 2–3 (“At the very least, the physical presence of a union representative to independently observe Diaz’s condition and potentially contest the grounds for the . . . suspicions.”).

171. *Id.*

172. *Id.*

173. *Id.*

174. *NLRB v. J. Weingarten*, 420 U.S. 251, 261 (1975) (alteration in original).

lieve that union representation in such circumstances would afford minimal benefit.¹⁷⁵

To understand why an employee might be hesitant to take a drug test without a union representative present, consider what a positive drug test actually means. Some employer policies, as in *Manhattan Beer*, prohibit an employee from being under the influence of drugs or alcohol while on duty, but do not address an employee's off-duty conduct.¹⁷⁶ A marijuana test will show whether the employee has used the drug in the recent past, but will not indicate whether the employee is presently under the influence of the drug.¹⁷⁷ So, while an employee currently under the influence of marijuana would be understandably reluctant to take a drug test, so would an employee who used marijuana on a day off, but is not under the influence at the time of the test. In fact, in such circumstances, discharge could be the last thing on an employee's mind—the employee might fear that positive test results could result in criminal prosecution or impact such things as parental rights in a custodial hearing.

Consider also the application of a “reasonable suspicion” clause. What if a supervisor disliked a particular employee and used drug testing as harassment? What if the employer applied reasonable suspicion only to minority employees or to union activists? If an employee believed that the employer had improperly applied “reasonable suspicion,” it is especially understandable why the employee would want union representation.

Finally, a recent Board decision could bring into question the lawfulness of asking an employee to submit to drug or alcohol testing following an employer's denial of a request for *Weingarten* representation in a traditional investigatory interview. In *Bellagio, LLC*,¹⁷⁸ the Board majority concluded that the employer violated the Act by issuing an employee a suspension pending investigation (SPI) because he requested *Weingarten* representation.¹⁷⁹ The Board reached this conclusion although the employee suffered no loss of pay because of the SPI, noting that the SPI had a “chilling” effect on the exercise of *Weingarten* rights because it could result in suspension or discharge.¹⁸⁰ Similarly, a drug or alcohol test could have a chilling effect because a positive test could result in suspension or discharge.

175. Unless, as the dissent suggested, the union representative supplied the employee with clean urine or a detox kit that enabled the employee to pass the drug test. See *Manhattan Beer Distribs. LLC*, 362 N.L.R.B. No. 192, slip op. at 7 (Aug. 27, 2015).

176. *Id.*, slip op. at 3.

177. *Id.*

178. 362 N.L.R.B. No. 175 (Aug. 20, 2015).

179. *Id.*, slip op. at 3 (Pearce, Chairman, and McFerran, Member).

180. *Id.*

Conclusion

E.I. Dupont and *Manhattan Beer* promote a robust protection of section 7 rights wholly consistent with the purposes of the Act. *E.I. Dupont* immunizes employees forced to attend interviews without union representation from the adverse consequences of that lack of representation. *Manhattan Beer* affirms, both to the employee under the microscope and to others in the bargaining unit, that the presence of a union representative at a *Weingarten* interview is meaningful, even when that interview is not an investigatory interview in the traditional sense. Together, these cases ensure that the protections guaranteed to workers for the past forty years continue to be relevant.

It remains to be seen if the Board will overturn *IBM Corp.* and extend *Weingarten* protections to employees not represented by a union. In the meantime, the application of *Weingarten* to other contexts and the intersection of *E.I. Dupont*, *Manhattan Beer*, and other recent *Weingarten* cases will continue to raise intriguing issues for employees, unions, employers, and attorneys.

