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IBM Corp., 341 NLRB No. 148 (06/09/2004)

***Epilepsy Foundation* overruled; Non-unionized workers not entitled to representation at disciplinary interview**

- [Article - NLRB Reversals During the Bush Administration](#)

IBM Corporation *and* Kenneth Paul Schult, Robert William Bannon, *and* Steven Parsley. Cases 11-CA-19324, 11-CA-19329, and 11-CA-19334

June 9, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, WALSH, AND MEISBURG

The sole issue in this case is whether the Respondent, whose employees are not represented by a union, violated Section 8(a)(1) of the Act by denying the Charging Parties' requests to have a coworker present during investigatory interviews.^[1] The judge, applying the Board's decision in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), *enfd.* in relevant part, 268 F.3d 1095 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 904 (2002), found that the Respondent violated the Act by denying the Charging Parties' requests for the presence of a coworker.

The Respondent urges the Board to overrule *Epilepsy Foundation* and return to the principles of *E. I. DuPont & Co.*, 289 NLRB 627 (1988). In that case, the Board refused to apply the principles of *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), in a nonunionized setting to permit an employee to have a coworker present at an investigatory interview that the employee reasonably believed might result in discipline. The various amici curiae join in the Respondent's request.

Having carefully considered the entire record in this proceeding, including the briefs of the Respondent and the various amici curiae, we have decided, for the reasons set forth below, to overrule *Epilepsy Foundation* and to return to earlier Board precedent holding that the *Weingarten* right does not extend to a workplace where, as here, the employees are not represented by a union. Accordingly, we have decided to affirm the judge's rulings, findings,^[2]

and conclusions only to the extent consistent herewith and to dismiss the complaint in its entirety.

Facts

On October 15, 2001,^[3] the Respondent, prompted by allegations of harassment contained in a letter it received from a former employee, interviewed each of the Charging Parties. None of them requested the presence of a witness during the October 15 interviews. On October 22, the Respondent's manager, Nels Maine, denied Charging Party Bannon's request to have a coworker or an attorney present at an interview scheduled for the next day. On October 23, Maine interviewed each of the Charging Parties individually after denying each employee's request to have a coworker present during the interview. All three employees were discharged approximately a month after the interviews.^[4]

Judge's Decision

The judge found, on the basis of credited testimony, that Bannon, Schult, and Parsley each asked to have a coworker present during their October 23 interviews and that the Respondent denied their requests. The judge next observed that the Board, in *Epilepsy Foundation*, had extended to unrepresented employees the *Weingarten* right to have a witness present during an investigatory interview that the employees reasonably believed might result in discipline. Applying *Epilepsy Foundation*, the judge concluded that the Respondent violated Section 8(a) (1) of the Act by denying the Charging Parties' requests to have a coworker present during their October 23 interviews.

Contentions of the Respondent and Amici Curiae

The Respondent requests that the Board overrule *Epilepsy Foundation* and return to prior Board precedent that *Weingarten* rights apply only to unionized employees. The Respondent asserts that the Board's decision in *DuPont* made clear that the considerations supporting application of the *Weingarten* right in a unionized setting do not exist in a nonunion setting. The Respondent points out that coworkers, unlike union representatives, do not represent the interests of the entire work force; cannot redress the perceived imbalance of power between an employer and its employees; and cannot facilitate the interview process in the same way as a union representative. The Respondent further asserts that extending the *Weingarten* right to a nonunion setting may compromise the confidentiality of sensitive employment information obtained during an interview, as well as interfere with an employer's ability to conduct an effective fact-finding investigation.

The joint amici curiae contend that the *Epilepsy Foundation* rule is an impediment to an employer's ability to conduct an effective internal workplace investigation. The joint amici curiae specifically assert that, in addition to confidentiality issues, the presence of a coworker during an investigatory interview reduces the chance that the worker being interviewed will tell the truth. COLLE, in its amicus brief, agrees with the contentions of the Respondent and the joint amici curiae, and further asserts that neither Section 7 nor Section 9(a) of the Act permit the extension of the *Weingarten* right to the nonunionized workplace.

Analysis and Conclusions

After careful reexamination of the rationale of *Epilepsy Foundation*, we find that national labor

relations policy will be best served by overruling existing precedent and returning to the earlier precedent of *DuPont*, which holds that *Weingarten* rights do not apply in a nonunion setting.

A. The Issue of Whether to hold that Weingarten Rights Apply or do not Apply in a Nonunionized Workplace Requires the Board to Choose Between two Permissible Interpretations of the Act

We agree with the Board's conclusion in *DuPont*, on remand from the Court of Appeals for the Third Circuit, that a holding that *Weingarten* rights do not apply in a nonunionized workplace involves a permissible construction of the Act, and that a holding that they do apply is also a permissible construction. In its decision remanding the case to the Board, the Third Circuit rejected the Board's conclusion in *DuPont I*, 274 NLRB 1104 (1985) and *Sears, Roebuck & Co.*, 274 NLRB 230 (1985), that the Act *compelled* the finding that *Weingarten* rights do not extend to the nonunionized workplace. *Slaughter v. NLRB*, 794 F.2d 120 (1986). The court found that the Board had erred in reasoning that the right to have a representative at an investigatory interview is rooted in Section 8(a)(5) of the Act, rather than Section 7, and had misinterpreted the Supreme Court's decision in *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975), as standing for the proposition that Section 7 rights are circumscribed by the exclusivity principle of Section 9(a).^[5] With respect to the source of the *Weingarten* right, the court concluded: "We think it is plain beyond cavil that the *Weingarten* right is rooted in Section 7's protection of concerted activity, not Section 8(a)(5)'s guarantee of the right to bargain collectively." *Slaughter*, 794 F.2d at 126. The court further stated that the *Emporium Capwell* decision "was grounded in the need to protect the union's Section 9(a) status as the majority-elected, exclusive-bargaining representative, so to assure orderly collective bargaining. It cannot, therefore, be read to hold that the Section 9(a) exclusive representation rule limits the Section 7 rights of non-unionized employees." *Id.* at 127. The court concluded that under the reasoning of *Weingarten*, "it is at least permissible to interpret Section 7 as guaranteeing union members and unorganized employees alike the right to a representative at investigatory interviews." *Id.* at 127. The court remanded the case to the Board for further consideration of alternative grounds for its position.

On remand in *DuPont*, the Board adopted the court's view that the statute did not *compel* the conclusion that *Weingarten* rights do not apply in a nonunionized workplace, and overruled precedent to the contrary.^[6] The Board further concluded, consistent with the court's holding, that the refusal to extend *Weingarten* to the nonunionized workplace was a permissible interpretation of the Act, and that adopting this interpretation was supported by significant policy considerations.

We agree with the Board's position on remand in *DuPont*, and find that the Board's decision in that case is a permissible interpretation of the Act. By the same token, we acknowledge that the Board's decision in *Epilepsy Foundation* extending the *Weingarten* right to the nonunionized workplace is also a permissible interpretation of the Act. 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 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." *Slaughter*, 794 F.2d at 125.

B. The Reexamination of Epilepsy Foundation is a Proper Exercise of the Board's Adjudicative Authority

In choosing today to return to the permissible interpretation set out in *DuPont*, we engage in a process both anticipated and approved by the Supreme Court in *Weingarten*. There, the Court noted that the Board had overruled its earlier precedent by recognizing the right of an employee to refuse to submit, without union representation, to an investigatory interview that the employee reasonably believes may result in disciplinary action. The Court approved the Board's action, finding that the Board was free to reexamine past constructions of the Act. Indeed, the Court observed that it was in the nature of administrative decision-making to do so. Thus the Court stated:

'Cumulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process. *Weingarten*, supra, 420 U.S. at 265–266, quoting *NLRB v. Seven-Up Co.*, 344 U.S. 344, 349 (1953).

Our reexamination of *Epilepsy Foundation* leads us to conclude that the policy considerations supporting that decision do not warrant, particularly at this time, adherence to the holding in *Epilepsy Foundation*. In recent years, there have been many changes in the workplace environment, including ever-increasing requirements to conduct workplace investigations, as well as new security concerns raised by incidents of national and workplace violence.

Our consideration of these features of the contemporary workplace leads us to conclude that an employer must be allowed to conduct its required investigations in a thorough, sensitive, and confidential manner. This can best be accomplished by permitting an employer in a nonunion setting to investigate an employee without the presence of a coworker.

C. Policy Considerations Underlying Board Precedent Concerning Application of the *Weingarten* Right

The history of an employee's right to have a representative present during an investigatory interview begins with the Supreme Court's decision in *Weingarten*. The Supreme Court there held that an employer violates Section 8(a)(1) of the Act by denying an employee's request to have a union representative present at an investigatory interview which the employee reasonably believes might result in disciplinary action. The Court explained that the right to the presence of a representative is derived from Section 7 of the Act giving employees the right to engage in concerted activities for mutual aid or protection. The Court stated that the union representative whom an employee seeks to include in an interview "safeguard[s] not only the particular employee's interest, but also the interests of the entire bargaining unit" *Weingarten*, 420 U.S. at 260. The Court also recognized that the Act was designed to eliminate a perceived imbalance of power between labor and management and that "[r]equiring a lone employee to attend an investigatory interview . . . perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided. . . ." *Weingarten*, 420 U.S. at 262. Additionally, the Court observed that because an employee attending an interview by himself may not have the wherewithal to protect or defend himself, 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." *Weingarten*, 420 U.S. at 263. The Court concluded that the right to the presence of a union representative comported with actual industrial practice, noting that collective-

bargaining contracts often contained provisions affording the right of union representation at interviews.

Weingarten did not address the situation in which an employee of a nonunionized employer asks for a coworker to be present as his representative at an investigatory interview. The Board first considered this issue in *Materials Research Corp.*, 262 NLRB 1010 (1982), and decided that the *Weingarten* right encompasses the right of an employee to request the presence of a coworker in a nonunionized setting. The Board stressed that the right to representation derives from the Section 7 right of employees to engage in concerted activity for mutual aid or protection, i.e., two employees acting together, rather than the Section 9 right of a union to act as an employee's collective-bargaining representative. Thus, the Board concluded that the *Weingarten* right does not depend on whether the employees are represented by a union.

The Board abandoned that position in *Sears, Roebuck & Co.*, 274 NLRB 230 (1985), finding instead that *Weingarten* rights do not apply in the absence of a certified or recognized union. The Board rejected the *Materials Research* position that *Weingarten* rights are based on Section 7 of the Act and concluded that to award unrepresented employees the right to the presence of a coworker is inconsistent with the statutory right of an employer, in the absence of a union, to deal with its employees on an individual basis.

The *Sears* rationale was modified on remand from the Court of Appeals for the Third Circuit in *E. I. DuPont & Co.*, 289 NLRB 627 (1988), where the Board, although reaffirming its view that *Weingarten* rights apply only in a union setting, acknowledged that this view was a "permissible" rather than "mandatory" interpretation of the Act as it had stated in *Sears*. The Board maintained its position that unrepresented employees do not possess a Section 7 right to the presence of a fellow employee in an investigatory interview, and specifically pointed to at least three factors supporting its decision. First, the Board noted that because the employee representative in a nonunion setting has no obligation to represent the entire work force as does a union representative, he is less likely to "safeguard" the interests of the entire workforce. Second, the Board noted that an employee representative, as compared to a union representative, is less likely to have the skills necessary to effectively represent the employee being interviewed. Third, the Board stated that if an employer decides, as it has the right to do under *Weingarten*, to dispense with an employee interview and go forward with disciplinary action, the employee loses what is most likely his only chance to tell his version of an incident. In a union setting, in contrast, the employee may have the chance to present his defense under the grievance resolution process set up by the collective-bargaining contract. The Board concluded that, on balance, the interests of labor and management were better served by "declining to extend" the *Weingarten* right to a nonunion setting. *DuPont*, 289 NLRB at 629–630.

DuPont remained the law for 12 years until it was overruled in *Epilepsy Foundation*. The Board in *Epilepsy Foundation* emphasized that the right to representation is grounded in Section 7 of the Act which protects the right of employees to engage in concerted activities for mutual aid or protection, and that "Section 7 rights are enjoyed by all employees and are in no wise dependent on union representation for their implementation." *Epilepsy Foundation*, 331 NLRB at 678, quoting *Glomac Plastics, Inc.*, 234 NLRB 1309, 1311 (1978). The Board also rejected, as "wholly speculative," the claims, stated in *DuPont*, that coworker representatives do not represent the interests of the whole work force, or that they lack the ability to provide effective representation, or that an employee whose employer decides to forego an interview is

left without a chance to tell his story.

D. Policy Considerations Support the Denial of the *Weingarten* Right in the Nonunionized Workplace

In reviewing the policy considerations underlying the application of the *Weingarten* right, we follow the teaching of the *Weingarten* Court that the Board has a duty “to adapt the Act to changing patterns of industrial life. . . . [T]he Board has the ‘special function of applying the general provisions of the Act to the complexities of industrial life.’” *Weingarten*, 420 U.S. at 266. The years after the issuance of *Weingarten* have seen a rise in the need for investigatory interviews, both in response to new statutes governing the workplace and as a response to new security concerns raised by terrorist attacks on our country. Employers face ever-increasing requirements to conduct workplace investigations pursuant to federal, state, and local laws, particularly laws addressing workplace discrimination and sexual harassment. We are especially cognizant of the rise in the number of instances of workplace violence, as well as the increase in the number of incidents of corporate abuse and fiduciary lapses. Further, because of the events of September 11, 2001 and their aftermath, we must now take into account the presence of both real and threatened terrorist attacks. Because of these events, the policy considerations expressed in *DuPont* have taken on a new vitality. Thus, for the reasons set forth below, we reaffirm, and find even more forceful, the result and the rationale of *DuPont*. We hold that the *Weingarten* right does not extend to the nonunion workplace.

1. *Coworkers do not represent the interests of the entire work force.* In *Weingarten*, the Supreme Court emphasized that a union representative accompanying a unit employee to an investigatory interview represents and “safeguards” the interests of the entire bargaining unit. *Weingarten*, 420 U.S. at 260. This is so because the unit employees have selected a union as their bargaining representative and the union has delegated to its officials the authority to act on its behalf for the entire unit. The union’s officials are bound by the duty of fair representation to represent the entire unit. Whatever the union representative accomplishes inures to the benefit of the entire unit, not just to the individual employee.

A coworker in a nonunion setting, on the other hand, has no such obligation to represent the entire work force. There is no legally defined collective interest to represent, because there is no defined group, i.e., a bargaining unit, with common interests defined by a collective-bargaining contract. Additionally, because there is no group to represent, there is typically no designated representative. Rather, the choice of a representative is done on an ad hoc basis and the identity of the representative may change from one employee interview to the next. Moreover, a coworker does not have the same incentive to serve the interests of the group as does a union representative. The coworker is present to act as a witness for and to lend support to the employee being interviewed. It is speculative to find that a coworker would think beyond the immediate situation in which he has been asked to participate and look to set precedent. A coworker has neither the legal duty nor the personal incentive to act in the same manner as a union representative.

2. *Coworkers cannot redress the imbalance of power between employers and employees.* In *Weingarten*, the Supreme Court recognized that one of the purposes of the Act is to protect workers in the exercise of concerted activities for their mutual aid or protection. The presence of a union representative at a meeting with an employer puts both parties on a level playing field inasmuch as the union representative has the full collective force of the bargaining unit

behind him.

Additionally, a union representative has a different status in his relationship with an employer than does a coworker. The union representative typically is accustomed to dealing with the employer on a regular basis concerning matters other than those prompting the interview. Their ongoing relationship has the benefit of aiding in the development of a body of consistent practices concerning workplace issues and contributes to a speedier and more efficient resolution of the problem requiring the investigation.

This is not true in a nonunion setting. Unlike a union representative, a coworker chosen on an ad hoc basis does not have the force of the bargaining unit behind him. A coworker does not usually have a union representative's knowledge of the workplace and its politics. Because the coworker typically is chosen on an ad hoc basis, he has no "official status" that he can bring to the interview. In other words, a coworker is far less able to "level the playing field," for there is no contract from which he derives his authority and he typically has no other matters to discuss with an employer.

3. Coworkers do not have the same skills as a union representative. The Supreme Court in *Weingarten* recognized the unique skills that a union representative brings to an investigatory interview: a "knowledgeable" union representative can facilitate the interview by "eliciting favorable facts," clarifying issues, and eliminating extraneous material, all of which save the employer valuable production time. *Weingarten*, 420 U.S. at 263. A union representative is accustomed to administering collective-bargaining agreements and is familiar with the "law of the shop," both of which provide the framework for any disciplinary action an employer might take against a unit member. A union representative's experience allows him to propose solutions to workplace issues and thus try to avoid the filing of a grievance by an aggrieved employee.

A coworker is unlikely to bring such skills to an interview primarily because he has no experience as the statutory representative of a group of employees. It is likely that a coworker is chosen out of some personal connection with the employee undergoing the interview and while that coworker may provide moral and emotional support, it should not be expected that he could skillfully assist in facilitating the interview or resolving the issues. Moreover, it is possible that a coworker, with enthusiasm but with no training or experience in labor relations matters, could actually frustrate or impede the employer's investigation because of his personal or emotional connection to the employee being interviewed.

Finally, an employee being interviewed may request as his representative a coworker who may, in fact, be a participant in the incident requiring the investigation, as a "coconspirator."^[7] It can hardly be gainsaid that it is more difficult to arrive at the truth when employees involved in the same incident represent each other. By contrast, the union representative in a unionized setting can offer more objective assistance. The *Epilepsy* result does not take into account the significant policy considerations relevant to a nonunion work force. The critical difference between a unionized work force and a nonunion work force is that the employer in the latter situation can deal with employees on an individual basis. The Board's decision in *Epilepsy* does not take cognizance of that distinction. It forbids the employer from dealing with the employee on an individual basis. Thus, for this reason as well, grounded in national labor policy, we choose not to follow *Epilepsy*. Further in this regard, our colleagues suggest that the term "dealing" is confined to the Section 2(5) definition of "labor organization." That is not true. The Board uses the phrase "dealing" to condemn direct contacts between a unionized

employer and employees.[8] Our point is that, prior to *Epilepsy*, a nonunion employer could have such contacts with individual employees. Today we return to that doctrine.

4. *The presence of a coworker may compromise the confidentiality of information.* Employers have the legal obligation, pursuant to a variety of federal, state, and local laws, administrative requirements, and court decisions, to provide their workers with safe and secure workplace environments. A relatively new fact of industrial life is the need for employers to conduct all kinds of investigations of matters occurring in the workplace to ensure compliance with these legal requirements. An employer must take steps to prevent sexual and racial harassment, to avoid the use of toxic chemicals, to provide a drug-free and violence-free workplace, to resolve issues involving employee health matters, and the like. Employers may have to investigate employees because of substance abuse allegations, improper computer and internet usage, and allegations of theft, violence, sabotage, and embezzlement.

Employer investigations into these matters require discretion and confidentiality.[9] The guarantee of confidentiality helps an employer resolve challenging issues of credibility involving these sensitive, often personal, subjects. The effectiveness of a fact-finding interview in sensitive situations often depends on whether an employee is alone. If information obtained during an interview is later divulged, even inadvertently, the employee involved could suffer serious embarrassment and damage to his reputation and/or personal relationships and the employer's investigation could be compromised by inability to get the truth about workplace incidents.

Union representatives, by virtue of their legal duty of fair representation, may not, in bad faith, reveal or misuse the information obtained in an employee interview.[10] A union representative's fiduciary duty to all unit employees helps to assure confidentiality for the employer.

A coworker, however, is under no similar legal constraint. A coworker representative has no fiduciary duty to the employee being questioned or to the workplace as a whole. Further, it is more likely that a coworker representative in casual conversation among other coworkers and friends in the workplace, could inadvertently "let slip" confidential, sensitive, or embarrassing information. Not only is this upsetting to the employee directly affected, it also interferes with an employer's ability to conduct an effective internal investigation. The possibility that information will not be kept confidential greatly reduces the chance that the employer will get the whole truth about a workplace event. It also increases the likelihood that employees with information about sensitive subjects will not come forward.

To be sure, under *Weingarten* and *Epilepsy*, the employer can conduct the investigation without the presence of the employee. However, in many situations, the employer will want to hear the story "from the horse's mouth", i.e., directly from the employee. *Weingarten* and *Epilepsy* foreclose that approach unless the employee is granted the presence of another employee.

The presence of the other employee causes its own problems. As discussed above, the presence of the other employee may well inhibit the targeted employee from candidly answering the questions posed by the employer. And, if he does candidly respond, there is a concern that the assisting employee will reveal to others what was said. Finally, the employer may have an interest in keeping quiet the fact of the inquiry and the substance of the questions asked. There is a danger that an assisting employee will spread the word about the inquiry

and reveal the questions, thereby undermining that employer interest.

We recognize that many of these same concerns exist in a unionized setting as well. However, the dangers are far less when the assisting person is an experienced union representative with fiduciary obligations and a continuing interest in having an amicable relationship with the employer. Further, there is no merit to the dissent's reasoning that the existence of these concerns in the unionized setting necessarily means that the *Weingarten* right must either be available in both unionized and nonunionized workplaces, or it must be foreclosed in both workplaces. Such reasoning is contrary to the conclusions of the Third Circuit in *Slaughter*, the D.C. Circuit in *Epilepsy*, and the Board's decision in *DuPont* (to which we return today), which all concluded that *both* limiting the *Weingarten* right to unionized employees and extending it to all employees are permissible interpretations of the Act.

E. On Balance, Policy Considerations Favor Overruling *Epilepsy Foundation*

In reaching our decision today to overrule *Epilepsy Foundation* and return to previous Board precedent which does not favor extending the *Weingarten* right to the nonunion workplace, we are mindful of our obligation to construe the Act in a manner which best effectuates the policies of the Act. With that responsibility in mind, we have considered the entire record in this proceeding, including the briefs filed by the Respondent and the amici curiae. We have also carefully examined, as discussed above, Board precedent presenting reasons both for and against permitting the *Weingarten* right to be exercised in a nonunion setting. Finally, we have assessed the "changing patterns" and "complexities" of industrial life.

Our examination and analysis of all these factors lead us to conclude that, on balance, the right of an employee to a coworker's presence in the absence of a union is outweighed by an employer's right to conduct prompt, efficient, thorough, and confidential workplace investigations. It is our opinion that limiting this right to employees in unionized workplaces strikes the proper balance between the competing interests of the employer and employees.

We recognize, as did the *DuPont* Board, that the parties to a workplace investigation have the option to forego an interview, which allows the employer to reach a conclusion and impose discipline based on its independent findings. We further recognize, however, that this approach is not optimal for either side and forces what could be an unsatisfactory conclusion based on something less than the whole truth. Further, under today's statutory schemes, foregoing the employee interview leaves an employer open to charges that it did not conduct a fair and thorough investigation, which in turn exposes the employer to possible legal liability based on a claim that unfair discipline was imposed based on incomplete information. As for the employee involved, if the interview is not held, he loses the chance to tell his version of the incident under investigation because there typically is no grievance procedure in a nonunion setting to provide an alternative forum. This, in essence, forces the employer to act on what may possibly be, at best, incomplete information and, at worst, erroneous information.

As we stated in *DuPont*, we do not deny that "an employee in a workplace without union representation might welcome the support of a fellow employee . . . [and] that, in some circumstances, the presence of such a person might aid the employee or both the employee and the employer." *DuPont*, 289 NLRB at 630. Our decision today, however, does not leave employees without recourse to other procedures which provide a measure of due process in the nonunionized workplace. For example, there are a variety of alternative dispute resolution processes available, such as peer mediation. Employees also may seek the presence of an

ombudsman in their workplace to investigate complaints and help achieve an equitable solution. Finally, there are “whistleblower” statutes, which protect employees from employer retribution.

We reaffirm what the Board stated earlier in *DuPont* when it declined to extend the *Weingarten* right to nonunionized employees:

[W]hile nothing in *Weingarten* inexorably precludes us from extending the right, we are confident that in carrying out our responsibility here—defined by the Court as achieving a “fair and reasoned” balance between the conflicting interests of labor and management—we best effectuate the purposes of the Act by limiting the right of representation in investigatory interviews to employees in unionized workplaces who request the presence of a union representative. *DuPont*, 289 NLRB at 630–631.

Our dissenting colleagues launch an attack on what *they perceive* to be our position. However, the dissenters’ attack is on a position that we do not hold. We are *not* saying that a nonunion employee lacks a Section 7 right to seek mutual aid and assistance from a fellow employee. We are *not* saying that a nonunion employee is incapable of representing a fellow employee. We are *not* saying that nonunion employees lack the legal right to seek to stand up for each other. We are *not* saying that nonunion employees lack the protection of the Act or that such protection is endangered.

In sum, employees have the right to seek such representation; they cannot be disciplined for asserting those rights. *Electrical Workers Local 236*, 339 NLRB No. 156, slip op. at 2 (2003). See also *E. I. DuPont & Co.*, 289 NLRB 627, 630 fn. 15 (1988). Our only holding is that the nonunion employer has no obligation to *accede* to the request, i.e., to deal collectively with the employees.

As shown, our colleagues misunderstand our position. Most assuredly, we do not seek to turn the American workplace into “a new front in the war on terrorism,” and we do not seek to have the Board lead the charge in any such war. With all respect, that language does not further a reasonable analysis of the issue before us. We will nonetheless respond. We simply observe that some employers, faced with security concerns that are an outgrowth of the troubled times in which we live, may seek to question employees on a private basis for a host of legitimate reasons. Those employers start no war, and the Board does not encourage them, or discourage them, from having such private inquiries. The Board simply refrains from forbidding employers to hold such private inquiries.

We recognize that, under *Epilepsy*, the nonunion employer is not required to “bargain” with the involved employees and his assisting employee. However, our point is a narrower one. Under that case, the nonunion employer is forbidden to speak individually with a solitary employee in connection with the employment-related matter of potential discipline. As we see it, nonunion employers are free to do so. Indeed, this is what distinguishes them from unionized employers. We would preserve the distinction. This is not to say that a contrary view would necessarily be contrary to the statute. It is simply to say that our view is in better harmony with the historic distinction between unionized and nonunion employers.

Our colleagues also say that the right given in *Epilepsy* could be limited rather than taken away. However, this approach puts the proverbial rabbit in the hat. The threshold issue is whether the right was prudently granted in *Epilepsy*. For the reasons set forth above, we believe that the right was not prudently granted.

Our colleagues argue for a case-by-case approach of whether employers should be obligated to grant an employee's request for assistance. Thus, there would be some cases where the employer's need for private investigation outweighs the employee's need for assistance, and some cases where the reverse would be true. In our judgment, this approach would lead to extensive litigation, uncertainty on the shop floor, and a general lack of federal guidance as to when the request can be granted and when it can be denied. We prefer to have a bright line, just as there is a bright line for *Weingarten* rights among unionized employees.

Our colleagues assert that the problems of permitting representation in the nonunion sector would also be present in the union sector. However, in a unionized setting, the employees have a Section 9 representative, and this consideration outweighs the employer's need for private inquiry. But, in the nonunion sector, this consideration is not present. Thus there is rationally a different result.

Our colleagues assert that alternative dispute resolution (ADR) mechanisms have become increasingly common. But, the significant point is that these mechanisms are established, and can succeed, only with the voluntary agreement of the parties. Our colleagues would impose, by governmental fiat, such a mechanism on all employers. Our colleagues have forgotten that voluntarism is the essential underlying premise of ADR.

Finally, our dissenting colleagues complain that we are overturning the precedent of *Epilepsy*. But *Epilepsy* itself overturned 15 years of solid precedent in *Sears* and *DuPont*. Today, we restore that precedent.

Applying the law we fashion today to the facts of the present case, we find that the Charging Parties were not entitled to the presence of a coworker during the interviews the Respondent conducted on October 23. Accordingly, we dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 9, 2004

Robert J. Battista,

Chairman

Ronald Meisburg,

Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, concurring.

INTRODUCTION

I join the majority in overruling *Epilepsy Foundation of Northeast Ohio*¹ (“*Epilepsy*”) and holding that the right recognized in *Weingarten*² of an employee to the presence of a union representative at certain predisciplinary interviews does not extend to nonunion workplaces. I fully concur with my colleagues in finding that the policy considerations advanced in the majority decision support such a limitation. In addition, and assuming without deciding that other interpretations of the National Labor Relations Act (“Act”) and the Supreme Court’s holding in *Weingarten* may be at least “permissible,” these policy considerations support my view, set out below, that the better construction and the one most consistent with the language and policies of the Act, is that the *Weingarten* right is unique to employees represented by a Section 9(a) bargaining representative.

The Board’s decision to the contrary in *Epilepsy* sheared *Weingarten* from its historical, factual and analytical roots; infringed upon recognized and fundamental common law management prerogatives; and ignored extant Board precedent that requires actual proof—rather than presuming its existence—of activity which is both “concerted” and “for mutual aid and protection” to qualify for protection under Section 7. Consequently, *Epilepsy* represented an abrupt and unwarranted departure from established law, an error we correct through our decision today.

I. THE RIGHT RECOGNIZED IN *WEINGARTEN* IS THE RIGHT TO THE PRESENCE OF AN EMPLOYEE’S SECTION 9(a) REPRESENTATIVE

Both the Board’s arguments to the Supreme Court in *Weingarten* and the language of the Court’s opinion demonstrate conclusively that the right recognized in *Weingarten* flows from, and is inexorably tied to, the presence of a collective-bargaining agreement and a Section 9(a) representative. Consequently, the *Epilepsy* Board majority’s assertion that the Board’s decisions in “*Sears*[³] and *DuPont*[⁴] misconstrue the language of *Weingarten* and erroneously limit its applicability to the unionized workplace” rings utterly hollow. 331 NLRB at 678.

In *Weingarten*, 202 NLRB 446 (1973), the Board broke from past precedent and held for the first time that an employer violates Section 8(a)(1) of the Act when it denies an employee’s request for the presence of a union representative at a predisciplinary investigatory interview. The Board premised its decision on an employee’s Section 7 right “to bargain collectively through representatives of [his or her] own choosing and to engage in other “concerted activities for the purpose of . . . mutual aid or protection.” 29 U.S.C. § 157. As the Board framed the precise issue presented on appeal to the Supreme Court:

Section 7 of the National Labor Relations Act guarantees to employees the right “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” All

agree that the imposition of discipline is a proper subject of a grievance and that Section 7 protects the right of employees to present grievances to the employer *through their union representative*. Indeed, the court below acknowledged that an employee is *entitled to union representation* when the employer has decided “to impose disciplinary measures upon the employee,” for otherwise “grievance hearings later on would merely put the seal on the employer’s prejudgment” (citation omitted). The issue here is whether Section 7 also *entitles the employee to union representation* at an investigatory interview which the employee reasonably believes may result in discipline against him.”

Brief at 14 (emphasis added).

The Court, with Chief Justice Burger and Justices Powell and Stewart dissenting, upheld the Board’s interpretation as “a *permissible* construction of ‘concerted activities for . . . mutual aid or protection’ by the agency charged by Congress with enforcement of the Act. . . .” *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975) (emphasis added). The Court summarized the Board’s “permissible construction” as follows: “[T]hat Section 7 creates a statutory right in an employee to refuse to submit without *union representation* to an interview which he reasonably fears may result in his discipline” 420 U.S. at 256 (emphasis added).⁵ The Court reasoned that the employee seeking union representation at a “confrontation with his employer” was engaging in “concerted activities for the purpose of . . . mutual aid or protection” because while only the employee has an

immediate stake in the [interview’s] outcome[,] . . . [t]he union representative whose participation he seeks is . . . safeguarding not only the particular employee’s interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. The representative’s presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview.

420 U.S. at 260–261 (emphasis added; footnote omitted). Thus, Section 7’s dual requirements of concerted activity for the purpose of mutual aid or protection are satisfied in the union context because by reaching out to the employees’ certified representative, the lone employee transforms an otherwise individual interest into a collective concern.

The Board’s argument and the Court’s analysis parallel the Board’s earlier adopted *Interboro*⁶ doctrine, which deems a lone employee’s reasonable and honest invocation of a right contained in a collective-bargaining agreement to be concerted activity for mutual aid or protection. The Supreme Court affirmed the *Interboro* doctrine in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), finding both collectivity and mutuality in the collective-bargaining agreement, which is itself the product of collective action. The Court explained:

The invocation of a right rooted in a collective-bargaining agreement is unquestionably an

integral part of the process that gave rise to the agreement. That process—beginning with the organization of a union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement—is a single, collective activity. Obviously, an employee could not invoke a right grounded in a collective-bargaining agreement were it not for the prior negotiating activities of his fellow employees. . . . Moreover, when an employee invokes a right grounded in the collective-bargaining agreement, he does not stand alone. Instead, he brings to bear on his employer the power and resolve of all his fellow employees.

Id. at 831–832 (footnote omitted).

When the *Weingarten* Court said that to require a lone employee to attend a predisciplinary investigatory interview “perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided ‘to redress the perceived imbalance of economic power between labor and management,’” 420 U.S. at 262 (quoting *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965)), the Court was referring to the Act’s protection of employees’ right to organize, elect a union representation of their choosing, and invoke the assistance of that collective representative in addressing potential grievances—nothing more. Indeed, this was the very argument made by the Board to the Court in its brief:

The Act rests on the reality that “[a] single employee was helpless in dealing with an employer” and that “[u]nion was essential to give laborers opportunity to deal on equality with their employer.” *American Steel Foundries v. Tri-City Trades Council*, 257 U.S. 184, 209 [1921]. Its design is to establish the conditions of equality by protecting recourse to collective action and thereby to overcome the “relative weakness of the isolated wage earner caught in the complex of modern industrialism. . . .” S. Rep. No. 573, 74th Cong. 1st Sess. 3. *To compel the employee without the aid of union representation to submit to an interview which may lead to his discipline, tends to perpetuate the very inequality which the Act denounces, and to bar recourse to the very means which the Act safeguards to overcome that inequality. The Board’s interpretation of Section 7 avoids this anomalous result.*

Brief at 18 (emphasis added).

In its decision, the Supreme Court emphasized the nature of the employee representative to which the *Weingarten* right guarantees access. According to the Court, “a knowledgeable union representative” intimately familiar with the terms of the collective-bargaining agreement, the law of the shop, and the grievance and arbitration process facilitates dispute resolution and filters out potentially frivolous grievances at an early stage. 420 U.S. at 263–264. Quoting approvingly from arbitrators’ decisions in *Independent Lock Company*,⁷ and *Caterpillar Tractor Co.*,⁸ the Court found the Board’s construction of Section 7 in this manner thus gives

“recognition to the right when it is most useful to both employee and employer.” *Id.* at 262 (footnote omitted).

In addition, the Court made clear its view that in the context of a union facility, the Board’s interpretation of Section 7 was not breaking new ground; rather, the statutory right the Board articulated and the Court affirmed was “in full harmony with actual industrial practice.” *Id.* at 267. The Court pointed out that many modern collective-bargaining agreements accord employees the “rights of union representation at investigatory interviews,” and such a right has been sustained by a “well-established current of arbitral authority” independent of its inclusion in the collective-bargaining agreement. *Id.* (citation and footnotes omitted).

Given the *Weingarten* Court’s obvious focus on industrial practices extant in union settings, its repeated references to the role of the 9(a) representative in protecting the interests of the entire bargaining unit, and its discussion of the rights flowing from collective bargaining, it is difficult to reconcile the Court’s decision with the *Epilepsy* Board majority’s claim that the language of *Weingarten* is misconstrued if restricted to the unionized workplace. The majority opinion in *Epilepsy*, however, brushes past the language and context of the Supreme Court’s decision, and, as shown below, conflicts with established court and Board precedent recognizing the inherent right of management in a nonunion setting to deal individually with its employees and requiring a case-by-case, factual analysis of whether conduct is concerted and for mutual aid or protection.

II. UNLIKE AN EMPLOYEE IN A UNION SETTING, AN EMPLOYEE IN A NONUNION SETTING CANNOT REFUSE TO PARTICIPATE IN A PREDISCIPLINARY INVESTIGATORY INTERVIEW WITHOUT INFRINGING ON A MANAGEMENT RIGHT

In a collective-bargaining agreement, management recognizes the employees’ chosen Section 9(a) representative as the representative of all bargaining unit members, and contracts away certain of its rights, including its right to deal with employees on an individual basis. According to the Supreme Court, the collective-bargaining agreement thus “calls into being a new common law—the common law of a particular industry or of a particular plant.” *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 579 (1960). In the absence of a collective-bargaining agreement, however, an employer’s common law right to manage its business and deal with its employees “may be exercised freely except as limited by public law and by the willingness of employees to work under the particular, unilaterally imposed conditions.” *Id.* at 583. As the Sixth Circuit explained:

The relationship of master and servant or employer and employee is not dependent upon a collective-bargaining contract. It has existed for innumerable years, long before the origin of the modern-day collective-bargaining agreements as provided and made effective by the National Labor Relations Act. The common law rights inherent in such relationship still exist except to the extent that they may be modified by legislation or by the specific contract between the employer and the employee.

United States Steel Corp. v. Nichols, 229 F.2d 396, 399 (6th Cir. 1956).

The Board has often recognized and affirmed the common-law prerogatives of management in nonunion settings, including management’s right to deal with its employees on an individual

basis, the right that was implicated in *Epilepsy* and in the case under consideration. In *Charleston Nursing Center*, 257 NLRB 554, 555 (1981)(emphasis added), for example, the Board said:

While it is clear that Section 8(a)(1) prohibits an employer from retaliating against employees for engaging in protected concerted activities such as the presentation of grievances, it is also clear that generally an employer is under no obligation to meet with employees or entertain their grievances upon request where there is no collective-bargaining agreement with an exclusive bargaining representative requiring it to do so. *Swearingen Aviation Corporation*, 227 NLRB 228, 236 (1976), enfd. in pertinent part 568 F.2d 458 (5th Cir. 1978). Furthermore, it is not illegal for an employer in such circumstances to refuse to deal with the employees except on an individual basis. *Pennypower Shopping News, Inc.*, 244 NLRB 536, [537] fn. 4 (1979).

Extending to nonunion employees a *Weingarten*-styled right to refuse to participate in a predisciplinary investigatory interview unless management accedes to the employee's insistence upon the presence of a coworker contravenes this established law.⁹ Such an extension of *Weingarten* also conflicts with settled Board precedent that employees cannot unilaterally dictate a term or condition of employment and that an employee who attempts to do so is engaged in unprotected insubordination.

In *Valley City Furniture*, 110 NLRB 1589 (1954), enfd. 230 F.2d 947 (6th Cir. 1956), the employer unilaterally placed the company on a 9-hour workday. In response, the union resorted to self-help by having the employees stop work at 3:30 p.m. instead of at 4:30 p.m., as scheduled by the company. The Board found that the union's activities, although concerted, were not entitled to the protection of the Act any more than if the employees had engaged in a sit-down or slowdown. The Board explained:

The vice in such a strike derives from two sources. First, the Union sought to bring about a condition that would be neither strike nor work. And, second, in doing so, the Union, in effect was attempting to dictate the terms and conditions of employment. Were we to countenance such a strike, we would be allowing a union to do what we would not allow any employer to do, that is to unilaterally determine conditions of employment. Such a result would be foreign to the policy objectives of the Act.

110 NLRB at 1594–1595.

Similarly, in *Bird Engineering*, 270 NLRB 1415 (1984), the Board held that several employees who directly defied management's warnings and direction by ignoring the employer's lunchbreak rule were engaged in unprotected insubordination, despite the "concerted element"

in their actions. *Id.* at 1415. As the Board explained: “These employees were attempting both to remain on the job and to determine for themselves which terms and conditions of employment they would observe.” *Id.*

A nonunion employee’s refusal to participate in a predisciplinary investigatory interview without the presence of a coworker constitutes an attempt to dictate a term and condition of employment. Consequently, the insistence upon the coworker’s presence is unprotected insubordination for which the employee may be disciplined. This is so because in a union shop, the successful election and subsequent collective-bargaining agreement “call into being a new common law” of the shop under which management rights are modified or contracted away. Thus, in the union setting in *Weingarten*, it was unnecessary for the Supreme Court to address whether an employee’s insistence on the presence of his representative amounted to an unprotected attempt to dictate a term and condition of employment. That issue, however, is presented when an employee is working in a nonunion setting governed by the “old” common law.

III. *EPILEPSY* ERRS BY PRESUMING THAT THE *WEINGARTEN* RIGHT EXTENDS TO THE NONUNION SETTING

A. Epilepsy Analysis

In finding that nonunion employees have “the right to have a coworker present at an investigatory interview,”¹⁰ the *Epilepsy* Board majority lifted out of context a portion of the *Weingarten* rationale and found it dispositive of the issue. The *Epilepsy* Board:

ached much significance to the fact that the Court’s *Weingarten* decision found that the right was grounded in the language of Section 7 of the Act, specifically the right to engage in “concerted activities for the purpose of mutual aid or protection.” This rationale is equally applicable in circumstances where employees are not represented by a union for in these circumstances the right to have a coworker present at an investigatory interview also greatly enhances the employees’ opportunities to act in concert to address their concern “that the employer does not initiate or continue a practice of imposing punishment unjustly.”

331 NLRB at 678 (footnote omitted). However, as discussed above, the *Weingarten* Court’s analysis was set in the context of a unionized shop and the existence of a collective-bargaining agreement and the employee’s Section 9(a) representative. For the Court, the nature of the 9(a) representative—as the product of collective action and the link to “the interests of the entire bargaining group”—made the employee’s insistence upon the presence of a coworker at an investigatory interview “concerted activit[y] for the purpose of . . . mutual aid or protection” within the meaning of Section 7. 420 U.S. at 260.

The same cannot be said when a lone employee in a nonunion setting, that is, in the absence of a collective-bargaining agreement and a 9(a) representative, insists upon the presence of a coworker at an investigatory interview. The evidentiary requisites of concertedness and mutuality simply cannot be satisfied under the presumptive *Epilepsy* rationale that the right “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.” Indeed, the *Epilepsy* Board never explained how, in the absence of a collective-bargaining agreement, an individual employee’s insistence upon the presence of a coworker necessarily constitutes concerted activity for mutual aid and protection. It never addressed the inconsistency of the presumption it was adopting with extant Board law. *Meyers I* and *Meyers II* (see Section III.B below). Additionally, the *Epilepsy* Board never explained why in the absence of a collective-bargaining agreement creating a “new common law” of the shop, a nonunionized employer forfeits its common law right to deal with its employees on its own terms and on an individual basis.

The *Epilepsy* Board majority seems to have excused the need for such explanations by claiming the *Weingarten* Court did not address the situation of a lone employee’s insistence on the presence of a coworker in a nonunion setting because the issue was not before it. 331 NLRB at 677. While the issue was not before the Court in *Weingarten*, and the Board certainly did not raise it, Justice Powell’s dissent recognized the specter of the *Weingarten* rule’s application in a nonunion work environment. *NLRB v. Weingarten*, 420 U.S. at 270 fn. 1 (Powell, J., dissenting). The Court’s failure to address the issue cannot, therefore, be ascribed to the dictates of the facts presented. By applying the Supreme Court’s *Weingarten* rationale to the nonunion setting and to an employee’s coworker on the basis that the *Weingarten* right was grounded in Section 7, and “Section 7 rights are enjoyed by all employees and are in no wise dependent on union representation for their implementation,” the *Epilepsy* Board simply presumed what it had to prove. 331 NLRB at 678.11 Our duty to apply the Act is not fulfilled when controlling law and evidentiary requirements are ignored because “the purpose of the activity [is] one [the Board] wishe[s] to protect.” *Meyers I*, 268 NLRB 493, 495 (1984).

B. *Epilepsy*’s Presumption of Concerted Activity Conflicts with Board Law

Under the Supreme Court’s *Weingarten* analysis, the nature of the 9(a) representative as the product of collective action and link to “the interests of the entire bargaining group” converted an otherwise individualized concern of a single employee into concerted activity for the purpose of mutual aid and protection within the meaning of Section 7. The Second Circuit emphasized this point in *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 844 (1980) (emphasis added), when it observed that “[i]mplicit, of course, in the Court’s decision in *Weingarten* is that the action of an individual in requesting the assistance of a *union steward* met § 7’s requirement of concertedness[.]”12

In the absence of a collective-bargaining agreement and a 9(a) representative, controlling Board precedent makes clear that Section 7’s requirement of concerted activity may not be presumed but must be demonstrated. As explained below, by extending a *Weingarten*-styled right to the nonunion setting without requiring such a demonstration, the *Epilepsy* majority was acting contrary to extant Board law.

When the Board issued its *Materials Research* decision (262 NLRB 1010) in 1982, in which it extended *Weingarten* rights to the nonunion setting for the first time, the Board still applied the discredited theory of presumed concerted activity set out in *Alleluia Cushion*, 221 NLRB 999 (1975).13 Under that theory, the Board found, broadly speaking, that an individual employee’s conduct purposed to benefit all employees would be “deemed” concerted “in the absence of any evidence that fellow employees disavow[ed] such representation.” 221 NLRB at 1000. Ironically, the dissent, while relying on this doctrine to find an individual employee’s insistence on the presence of a coworker at an investigatory interview constitutes protected concerted

activity, asserts, at fn. 18, that the “doctrine” of *Alleluia Cushion* “simply has no bearing on the situation implicated in this case.” The dissent can only make this assertion by limiting the *Alleluia Cushion* “doctrine” to the facts of that case. But the doctrine of *Alleluia Cushion* cannot be so limited. See, e.g., *Air Surrey Corp.*, 229 NLRB 1064, 1064 (1977) (emphasis added), enf. denied on other grounds 601 F.2d 256 (6th Cir. 1979), where the Board explained:

In our judgment, [the *Alleluia Cushion*] decision rests not only on the statutorily expressed concern of the Federal and state governments with respect to safety conditions and a corresponding accommodation of the principles embodied within that legislation with the principles of our own Act, *but also on the premise that an individual’s actions may be considered to be concerted in nature if they relate to conditions of employment that are matters of mutual concern to all the affected employees.*¹⁴

Plainly, the Board was applying this expansive definition of “concerted activity” in *Materials Research* when it stated that “a request for the assistance of a fellow employee [in the nonunion setting] is also concerted activity—in the most basic and obvious form—since employees are seeking to act together [for mutual aid or protection].” *Materials Research*, 262 NLRB at 1015.¹⁵

Alleluia Cushion’s expansive definition of concerted activity, however, was not well-received by various courts of appeals. The Ninth Circuit, for example, in *NLRB v. Bighorn Beverage*, 614 F.2d 1238, 1239 (1980), expressly refused to extend the *Interboro* doctrine of presumed concerted activity (see fn. 6 above and accompanying text) to the nonunion setting on the ground that the presence of a collective-bargaining agreement was “essential because it is the source of the employee’s claimed rights.”¹⁶

In *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304 (1980), the Fourth Circuit also rejected the Board’s attempt to extend the doctrine of presumed concerted activity to the nonunion setting. In that case, the court considered the issue of whether “as a matter of law under the Act, discharge of an individual employee for refusing to forego a workmen’s compensation claim constitutes protected ‘concerted activity’[.]” *Id.* at 306. Reversing the Board,¹⁷ the court found that it did not. In reaching this conclusion, the court observed:

The Board cites no circuit decision supporting its theory of presumed “concerted activity” in this case. The only courts which have considered it have flatly rejected any rule that where the complaint of a single employee relates to an alleged violation of federal or state safety laws and *there is no proof of a purpose enlisting group action in support of the complaint*, there is “constructive concerted action” meeting the threshold requirement under Section 7.

Id. at 309 (emphasis added).

Responding to such criticism from the circuit courts, the Board, in *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 971 (1985), decision on remand sub nom. *Meyers Industries, Inc.*, 281 NLRB 882 (1986) (*Meyers II*), aff'd sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988), abandoned the theory of presumed concerted activity adopted in *Alleluia Cushion*, supra, and properly and substantially narrowed the definition of “concerted activity” by centering the analysis not on the purpose of the conduct alleged to be concerted, but on the nature of the conduct itself. In affirming the *Meyers I* definition of “concerted activities,” the Board in *Meyers II* stated that it would require an employee’s activity to “be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself” in order to qualify for protection under Section 7. 281 NLRB at 884.

In overruling *Alleluia Cushion*, the Board, consistent with the mainstream view of circuit courts, determined that an activity when engaged in by two employees will be found concerted and therefore protected if for mutual aid or protection but that the same activity when engaged in by a single employee will not constitute concerted activity and will therefore not be protected. Thus, except for its brief detour in applying the *Alleluia Cushion* doctrine, the Board has properly recognized that Section 7 requirements of “concertedness” and “mutual aid or protection” are separate and distinct and that proof of one is not proof of the other. While my dissenting colleagues may disagree with this distinction, it is extant Board law which has been enforced by the circuit courts.

The dissent cannot avoid this distinction by asserting, as it does at fn. 17 and accompanying text, that in its *Meyers II* decision, “the Board reiterated that the ‘definition of concerted activity . . . encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action.’ Id. at 887.” Although the dissent would read this statement literally as applying to a lone employee, the context of the statement clarifies its meaning. By this statement, the *Meyers II* Board was only confirming its view that the definition of concerted activity set out in *Meyers I*, and confirmed in *Meyers II*, “fully embrac[ed] the view of concertedness exemplified by the *Mushroom Transportation* [330 F.2d 683 (3d Cir. 1964)] line of cases.” *Meyers II*, 281 NLRB at 887.

But in *Mushroom Transportation*, supra, the issue was whether a *conversation between employees* could constitute concerted activity “although it involves only a speaker and a listener[.]” *Mushroom Transportation*, 330 F.2d at 685. As Judge Bork explained in his dissenting opinion in *Prill v. NLRB*, 755 F.2d 941, 965 (D.C. Cir. 1985) (emphasis added):

Indeed, any fair reading of the *Meyers* opinion would treat it as incorporating the *Mushroom Transportation* standard, at least as applied by the court that framed it. It was precisely because the “*interaction*” among employees present in the conversation in *Root-Carlin, Inc.* [92 NLRB 1313 (1951)] was absent in *Mushroom Transportation* that the court in the latter case found that the individual employee’s conduct was not concerted.

Suffice it to say that a lone employee’s insistence to his *employer* on the presence of a coworker at an investigatory interview is neither an “‘interaction’ among employees” nor a “conversation” between two (or more) employees. Therefore, this argument of the dissent is

essentially irrelevant to the issue presented.

Although the Board decided *Meyers I* and *II* well before its *Epilepsy* decision, the *Epilepsy* Board nevertheless applied the discredited *Alleluia Cushion* definition of concerted activity in that case. As explained above, the *Epilepsy* Board found a right to have a coworker present at an investigatory interview based on its belief that this right “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.’” *Epilepsy Foundation*, 331 NLRB at 678, quoting *Weingarten*, 420 U.S. at 260. From the purpose of the right, i.e., enhancement of employees’ opportunities to act in concert, the *Epilepsy* Board presumed the right concerted. The *Epilepsy* Board erred by doing so.¹⁸ As the Board made clear in *Meyers I* and *II*, the determination of whether an employee has engaged in concerted activity “is a factual one based on the totality of the record evidence,” and must be made on a “case-by-case basis.”¹⁹ 281 NLRB at 886–887.

The above analysis fully justifies my position that even assuming without deciding that other interpretations of the Act and of the Court’s holding in *Weingarten* may be at least “permissible,” the better construction and the one most consistent with the language and policies of the Act is that the *Weingarten* right is unique to employees represented by a Section 9(a) bargaining representative. An examination of the dissent’s response only confirms the wisdom of this construction.

IV. RESPONSE TO DISSENT

As shown below, neither the dissent’s criticisms of my arguments, nor its description of my views, withstand scrutiny. Rather, it is the dissent’s own analysis that fails to survive application of law and logic.

The dissent begins its critique of my position by misstating it. The dissent asserts that I “strongly imply” that “the position taken in *Epilepsy Foundation* is not just incorrect, but is impermissible under the Act.” I do not say that. Rather, it is my position that the language and logic of the *Epilepsy* decision do not provide a sufficient analytical framework from which to conclude that the extension of the *Weingarten* right to the nonunion setting is permissible under the Act.

Having misstated my position, the dissent attacks it as “out of step with the decisions of the Board . . . and with the values of the Act.” The dissent then states that “[t]he Act put an end to narrow notions of when employees were free to act together.” I infer that, at least from my dissenting colleagues’ point of view, my position is “out of step with the decisions of the Board . . . and with the values of the Act” because I concur with those circuit court decisions that rejected the *Alleluia Cushion* theory of presumed concerted activity and I adhere to the definition of protected concerted activity set out in *Meyers I* and *II*. The *Meyers* decisions may, perhaps, establish too ‘narrow a notion’ of concerted activity for my dissenting colleagues, but that standard is nevertheless extant Board law. Having disposed of my dissenting colleagues’ criticisms, I will now address their arguments.

A. Extension of the Weingarten Rationale to the Nonunion Setting Lacks a “Strong Foundation” in the Act

In support of its own position that the presumed Section 7 right to representation by a coworker

in a non-union setting is coextensive with the Section 7 right to representation in the union setting, the dissent asserts that the right to coworker representation, “in nonunion workplaces as well as unionized ones, has a strong foundation in the Act.” The dissent then proceeds to locate this “strong foundation” not in the Act itself, but in the following argument: First, it relies on the Board’s *Epilepsy* decision for the proposition that “Section 7 rights are enjoyed by all employees and are in no wise dependent on union representation for their implementation.” 331 NLRB at 678. It then asserts its “belief” that the right to representation is guaranteed by Section 7 and concludes therefrom that “any infringement of that right [i.e., the right to representation] is presumptively a violation of Section 8(a)(1)[.]” By seeking to confirm its belief that the right to representation in the nonunion setting as well as the union setting “is guaranteed by Section 7” and that this right has a “strong foundation” in the Act, the dissent attempts to prove too much.

For, as explained above in Section I, it is the presence of a collective-bargaining agreement and the right of access to a 9(a) representative that establish the “strong foundation” of the Section 7 right to representation at an investigatory interview. Such a right is, after all, a collective right, not an individual one. As the Supreme Court explained in *Emporium Capwell Co. v. Community Org.*, 420 U.S. 50, 61–62 (1975) (emphasis added):

Section 7 affirmatively guarantees employees the most basic rights of industrial self-determination, “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,” as well as the right to refrain from these activities. *These are, for the most part, collective rights*, rights to act in concert with one’s fellow employees; they are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife “by encouraging the practice and procedure of collective bargaining.” 29 U. S. C. § 151.

The Court went on to observe that “[c]entral to the policy of fostering collective bargaining, where the employees elect that course, is the principle of majority rule.” *Id.* at 62. This principle “extinguishes the individual employee’s power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.”²⁰ Clearly, then, the “strong foundation,” to use the dissent’s term, of the Section 7 right to representation by a coworker at an investigatory interview is premised upon the presence of a union in the workplace and the right of access to the 9(a) representative.

B. “Concert” Cannot Be Presumed

What, then, is the foundation of this presumed Section 7 right to representation in the nonunion setting? As explained in Section III above, the existence of such a collective right in the nonunion context depends on whether an individual employee’s insistence upon the presence of a coworker at an investigatory interview constitutes concerted activity for mutual aid or protection.²¹ As relevant here, the existence of such a right depends on whether the conduct at issue satisfies the Board’s present definition of “concerted activity” set out in *Meyers I* and *II*, *supra*. Under the definition of “concerted activity” there set out, whether the conduct at issue is concerted is a question of fact that must be resolved on a case-by-case basis. Ignoring

Meyers I and II, the *Epilepsy* Board erroneously applied *Alleluia Cushion's* discredited definition of concerted activity and then presumed its existence in all cases because it found, in effect, that the nonunion employee's insistence on the presence of a coworker at an investigatory interview increased employee solidarity by "enhanc[ing]" employees' opportunities to act in concert.

The dissent only compounds this error by asserting a strong foundation for the presumed Section 7 right to representation in the nonunion setting without attempting to reconcile the *Epilepsy* concertedness analysis with the definition of concerted activity set out in *Meyers I and II*. The impossibility of such an explanation does not excuse its absence.

C. The Dissent Construes the Act Too Broadly

Finally, having failed to establish, but persisting in its belief, that there is a Section 7 right to representation in the nonunion setting, the dissent accuses me of "suggest[ing] that, as a statute in derogation of the common law, [the Act] must be construed narrowly." This because I find, as explained in Section II above, that in the nonunion setting, and in the absence of a collective-bargaining agreement, the common-law rights of management, including the right to deal with its employees on an individual basis, must prevail over an individual employee's insistence on the presence of a coworker at a predisciplinary investigatory interview.

In asserting that I construe the Act too narrowly, the dissent accuses me of "invok[ing] the 'common-law prerogatives of management in nonunion settings.'" As set out in Section II above, however, I did not "invoke" this proposition, but simply observed there that "[t]he Board [itself] has often recognized and affirmed the common-law prerogatives of management in nonunion settings, including management's right to deal with its employees on an individual basis, the right that was implicated in *Epilepsy* and in the case under consideration." *Agwilines, Inc. v. NLRB*, 87 F.2d 146 (5th Cir. 1936), and *NLRB v. Colten*, 105 F.2d 179 (6th Cir. 1939), cases relied on by the dissent, are not to the contrary because both cases arose *in a union, not a nonunion, context*. To the extent that these cases support a finding that management must yield certain of its prerogatives when a collective-bargaining agreement is in effect and there is a 9(a) representative present, they only confirm the existence of a *Weingarten* right in the union setting.

In maintaining the existence of a right to insist on the presence of a coworker at an investigatory interview in the nonunion setting, and to refuse to participate if the employee's request is not granted, it is the dissent that reads the statute too broadly. It is the dissent that fails to heed the admonition of Congress which the Second Circuit recalled in its decision in *Ontario Knife Co. v. NLRB*, 637 F.2d at 843 fn. 4:

Indeed, Congress has admonished the courts and the Board generally to be faithful to the text of the statute. The Senate Report accompanying the NLRA states that the "bill is specific in its terms. Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair." Sen. Rep. No. 573, 74th Cong., 1st Sess. 8 (1935).

In sum, the dissent has not only failed to confirm its belief that a right to representation exists in the nonunion as well as the union setting, it has proven that the foundation of such a *presumed* right in the Act is more imagined than real.

CONCLUSION

The *Epilepsy* Board erred by overruling precedent while skirting legal issues and adopting impermissible presumptions. A careful analysis demonstrates that it was the existence of the collective-bargaining agreement in *Weingarten* which allowed the Supreme Court to presume, if you will, concerted activity for mutual aid and protection whenever an employee requests the presence of the employee's Section 9 (a) union representative at a predisciplinary investigatory interview. By purporting to extend *Weingarten* to the nonunion setting, the *Epilepsy* Board engaged without warrant in the same presumption, ignoring the case-by-case evidentiary demonstration required under *Meyers I* and *II*. Further, the *Epilepsy* Board turned a deaf ear to the link to "the interests of the entire bargaining unit" emphasized by the Board in its argument to the *Weingarten* Court and the Court's subsequent decision. Finally, the *Epilepsy* Board failed to address a nonunionized employer's inherent rights to manage its business as it sees fit and to deal with its employees individually, rights left intact in the absence of a collective-bargaining agreement and union representation.

In sum, by creating *ex nihilo* a Section 7 right in a nonunion workplace to the presence of a coworker at a predisciplinary investigatory interview, the *Epilepsy* Board confused and impaired long-standing principles of law. For these reasons, as well as for the policy considerations elaborated by my colleagues, I find that it was imprudent as a matter of policy and unwise as a matter of law for the Board to have extended the *Weingarten* right to the nonunion setting.

Dated, Washington, D.C. June 9, 2004

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

MEMBERS LIEBMAN AND WALSH, dissenting.

Today, American workers without unions, the overwhelming majority of employees, are stripped of a right integral to workplace democracy. Abruptly overruling *Epilepsy Foundation of Northeast Ohio*, a recent decision upheld on appeal as "both clear and reasonable,"¹ the majority holds that nonunion employees are not entitled to have a coworker present when their employer conducts an investigatory interview that could lead to discipline.

Under Section 7 of the National Labor Relations Act, all workers, union-represented or not, have the "right to . . . engage in . . . concerted activities for the purpose of

. . . mutual aid or protection.”² It is hard to imagine an act more basic to “mutual aid or protection” than turning to a coworker for help when faced with an interview that might end with the employee fired. In its *Weingarten* decision, the Supreme Court recognized that union-represented workers have a right to representation.³ But the majority rejects the same right for workers without a union—second-class citizens of the workplace, it seems. According to the majority, nonunion workers are not capable of representing each other effectively and therefore have no right to representation. With little interest in empirical evidence, the majority confidently says that recognizing such a right would make it impossible for nonunion employers to conduct effective workplace investigations and so would endanger the workplace.

Due process in the nonunion workplace should not be sacrificed on such dubious grounds. Workers 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. The majority’s predictions of harm, in turn, are baseless. There is no evidence before the Board that coworker representatives have interfered with a single employer investigation since *Epilepsy Foundation* issued in 2000. We are told instead 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.

As we will explain, the right to coworker representation, in nonunion workplaces as well as in unionized ones, has a strong foundation in the Act. Two of our colleagues, at least, recognize that *Epilepsy Foundation* is “a permissible interpretation of the Act,” but they invoke “policy considerations” (which a third colleague joins) for refusing to adhere to it. To the extent that the majority raises any legitimate concerns, they easily can be accommodated without abandoning that right, which—as applied in unionized workplaces and as it presumably would apply in nonunion workplaces—is quite limited. Under the Board’s application of *Weingarten*: the employer has the option to forego an interview; the union representative may not obstruct an investigation; the right to have a witness present does not apply to every conversation or workplace matter; and the employer has no duty to “bargain with” the representative.⁴

I.

The right to representation in nonunion workplaces has had a surprisingly fitful history. Our colleagues now aim to bury the right forever. “[T]he matter can now be set to rest,” they say. We beg to differ.

In *Epilepsy Foundation*, the Board traced the history of the right to representation, beginning with the Supreme Court’s decision in *Weingarten*, *supra*, which involved unionized workers.⁵ First recognized by the Board with respect to nonunion workers in 1982 (*Materials Research*⁶), the right was lost in 1985, when the Board concluded that it had no statutory basis (*Sears, Roebuck*⁷). That view was rejected—but the right was not restored—in 1988, when the Board conceded (following an adverse court decision) that the Act *could be* interpreted to grant the right, but refused to do so (*E. I. DuPont*⁸). There the law stood until the Board came full circle in *Epilepsy Foundation*, decided in 2000 and approved by the United States Court of Appeals

for the District of Columbia Circuit the following year. That is where the Board should have left things.

What is at stake is the Act's guarantees for workers who are not represented by a union, today the great majority of American workers.⁹ The Act applies to these workers, whether they know it or not, and whether or not the Board is prepared to give full recognition to that fact. As one commentator has observed, before *Epilepsy Foundation*, the "scope of coverage of section 7 and its application to nonunion employees may have been one of the best-kept secrets of labor law."¹⁰ However obscure that coverage is, it is well-established, if now endangered. In *Materials Research*, citing decisions by the Board, the appellate courts, and the Supreme Court itself, the Board pointed out that:

It is by now 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.

262 NLRB at 1012 (footnote omitted).¹¹ The majority here, of course, adds to those exceptions.

In contrast, we adhere to the view of the *Epilepsy Foundation* Board and the *Materials Research* Board before it. We believe, in other words, that the Supreme Court's decision in *Weingarten* supports the right to representation, even in nonunion settings, because that right is grounded in Section 7 and because the "right to have a coworker present at an investigatory 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.'" *Epilepsy Foundation*, 331 NLRB at 678, quoting *Weingarten*, 420 U.S. at 260. As the *Materials Research Board* explained:

[A] request for the assistance of a fellow employee is . . . concerted activity—in its most basic and obvious form—since employees are seeking to act together. It is likewise activity for mutual aid or protection: by such, all employees can be assured that they too can avail themselves of the assistance of a coworker in like circumstances

262 NLRB at 1015.¹²

The District of Columbia Circuit, in turn, has endorsed this reasoning. It has rejected, as "terribly shortsighted," the view that concerted activity is not involved here. 268 F.3d at 1100. It has described as "compelling," the *Epilepsy Foundation* Board's answer to the argument that

extending *Weingarten* rights to nonunion workers is in conflict with the principle of exclusive representation embodied in Section 9(a) of the Act. *Id.* at 1101. And it has labeled as “plainly meritless” any claim that *Epilepsy Foundation* was inadequately explained. *Id.* at 1102.

The majority now eliminates the *Weingarten* right for nonunion workers, leaving intact only the protection against discharge or discipline based on the mere request for a coworker representative.¹³

II.

All of our colleagues subscribe to policy arguments for overruling *Epilepsy Foundation*, and we address those arguments below. First, however, we examine the position urged by our concurring colleague, Member Schaumber, who strongly implies that the position taken in *Epilepsy Foundation* is not just incorrect, but is impermissible under the Act. No other current Board member joins that view. Its flaws are clear.

To begin, we do not understand the concurrence to rely on the language of Section 7, which even prior Boards opposed to the extension of *Weingarten* rights have acknowledged is open to our interpretation. See *E. I.*

DuPont & Co., supra, 289 NLRB at 628. Section 7’s words, of course, admit of the possibility that “an individual may be engaged in concerted activity when he acts alone.” *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 831 (1984). With respect to the statutory language, there is no basis for distinguishing between an employee’s request for a union representative and his request, in a nonunion workplace, for a coworker’s presence. Cf. *Weingarten*, supra, 420 U.S. at 260 (“The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of section 7. . .”).

The heart of the concurrence is its reading of *Weingarten*. But it is one thing to say that the Supreme Court’s decision does not compel recognition of a right to representation for nonunion workers, and quite another to say that the decision prevents the Board from doing so. Nothing in *Weingarten* suggests that the holding of *Epilepsy Foundation* was not a permissible interpretation of the Act. Indeed, the dissenting opinion in *Weingarten* raised the prospect that, given the Supreme Court’s decision, the right to representation “also exists in the absence of a recognized union.” *Weingarten*, supra, 420 U.S. at 270 fn. 1 (dissenting opinion of Justice Powell). Citing the *Weingarten* dissent, other courts have held or suggested as much.¹⁴ The Second Circuit, for example, has observed that the “representative right . . . must also apply to a nonunion representative.”¹⁵

The concurrence makes the novel argument that *Epilepsy Foundation*, and *Materials Research* before it, were based on a view of concerted activity that the Board rejected in *Meyers Industries, Inc.*, 281 NLRB 882 (1986) (*Meyers II*), aff’d sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). The concurrence argues that in a nonunion workplace, the *Weingarten* right can only be based on a no longer viable “theory of presumed concerted activity.” Even if our concurring colleague’s interpretation of *Meyers* were correct, it would not follow that our position is inconsistent with the Act itself. As the courts have made clear, the Board’s *Meyers* doctrine may be permissible, but the Act does not compel it.¹⁶

In any case, our colleague misreads Board precedent. In *Meyers II*, supra, the Board

reiterated that the “definition of concerted activity . . . encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action.” 281 NLRB at 887.¹⁷ Seeking a witness, and serving as a witness, in a disciplinary interview obviously meets this standard. The concurrence argues that the *Epilepsy Foundation* Board erred by not considering the employee’s request for a witness in isolation.¹⁸ On the view of our concurring colleague, apparently, the employee does not act in concert unless and until his request for a coworker witness is communicated to his fellow employee, granted by the employer, and taken up by the coworker. This view is “terribly shortsighted,” to borrow the District of Columbia Circuit’s phrase.¹⁹ Indeed, it is not clear that our colleague would protect an employee from discharge merely for asking permission to have a coworker representative.²⁰

The “proper focus in evaluating the requirement of concertedness in this context should be on the literal nature of the activity that would take place if the employee’s request was granted.” *E. I. DuPont & Co. v. NLRB*, 724 F.2d 1061, 1066 (3d Cir. 1983), vacated, 733 F.2d 296 (3d Cir. 1984) (granting Board’s motion to remand). There is an integral relationship between the request and the assistance that may follow. Cf. *City Disposal Systems*, supra, 465 U.S. at 831–833 and fn. 10 (discussing “integral relationship” between individual activity of invoking right under collective-bargaining agreement and process that gave rise to agreement). An employer’s prohibition against coworker representation stifles concerted activity just as surely as a rule prohibiting employees from discussing working conditions, which is clearly unlawful.²¹

It is the view taken by the concurrence, then—and not *Epilepsy Foundation*—that is out of step with the decisions of the Board and the courts and with the values of the Act. The Act put an end to narrow notions of when employees were free to act together.

III.

Chairman Battista and Member Meisburg acknowledge that the Board’s decision in *Epilepsy Foundation* is “a permissible interpretation of the Act,” but invoke “policy considerations” for refusing to adhere to it, and Member Schaumber endorses those considerations.²² The decision to overrule a recent precedent, carefully reasoned and upheld in the courts, should be based on far more compelling reasons than our colleagues have articulated. Before examining the reasons actually offered, it is worth emphasizing what (besides justifying a departure from the doctrine of stare decisis) those reasons must accomplish. They must explain 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. The majority appears to make arguments of both kinds, none of them persuasive.

A.

Our colleagues argue that differences in the union and nonunion settings justify denying nonunion workers the right recognized in *Weingarten*. The real question, however, is whether these differences mean that the right to representation can be grounded in Section 7 only where a union represents workers. Clearly, they do not, for reasons convincingly explained in *Epilepsy Foundation*.

From the perspective of Section 7, at least, it makes no difference whether, like union

representatives, coworker representatives (1) represent the interests of the entire workforce,²³ (2) can redress the imbalance of power between employers and employees, or (3) have the skills needed to be effective. The majority makes a powerful case for unionization, but a weak one for refusing to recognize the rights of nonunion workers.²⁴ As the *Epilepsy Foundation* Board correctly observed, “Section 7 rights do not turn on either the skills or the motives of the employee’s representative.” 331 NLRB at 679. The majority here simply confuses the efficacy of a right with its existence.

According to the majority, there is a “critical difference between a unionized work force and a nonunion work force” that is relevant here: “the employer in the latter situation can deal with employees on an individual basis.” This contention was refuted by the Board in *Epilepsy Foundation*, drawing on a decision of the Third Circuit. 331 NLRB at 678, citing *Slaughter v. NLRB*, 794 F.2d 120, 127 (3d Cir. 1986). The District of Columbia Circuit, in turn, has rejected the majority’s point. *Epilepsy Foundation*, 268 F.3d at 1101–1102. Simply put, requiring a nonunion employer to permit coworker 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 the argument as based on the “historic distinction between unionized and nonunion employers,” as opposed to the Act itself, does not save it.²⁵

B.

Aside from its attempt to distinguish union and nonunion workplaces, the majority claims that employers have an overriding need to prevent interference with workplace investigations mandated by law. But there is no basis to conclude that coworker representation has had, or likely will have, any of the harmful consequences that the majority conjures up. The solution here is to strike a balance, not to pretend that nonunion employees have no Section 7 interest that must be respected.²⁶

Although the majority does not bother to detail the sources of employers’ legal obligations to conduct effective workplace investigations, we will assume that employers do have such a legal obligation, in some circumstances. Further, we will assume that nonunion employees’ right to representation makes it harder, in some measure, for employers to discharge that obligation—just as observing other legal requirements or moral norms does (Star Chamber proceedings, in contrast, were wonderfully efficient). Even making these assumptions, however, it is impossible fairly to reach the majority’s conclusion: that nonunion workers are *never* entitled to a coworker representative in investigatory interviews.

First, to the extent that employees’ rights under the Act may be in tension with legitimate employer interests or the goals of other federal statutes, the majority never explains why it is that Section 7 must give way, always and completely. Surely the process is one of balancing and accommodation, conducted case-by-case, as federal labor law has long recognized in other contexts.²⁷ If, as we believe, the right to representation is guaranteed by Section 7, then any infringement of that right is presumptively a violation of Section 8(a)(1), but the presumption may be overcome, in appropriate circumstances (a point we will address).

Second, the majority has simply failed to make the case that a nonunion employer cannot conduct an effective investigation if employees are entitled to coworker representation during interviews that reasonably may lead to discipline. Here, too, the majority contrasts union representatives and coworker representatives, arguing that union representatives may actually facilitate an effective investigation and that in any case, their special legal status makes them

less likely to violate confidentiality.

The majority's arguments against extending the *Weingarten* right to nonunion employees prove too much. If employers' obligation to conduct effective investigations is an overriding concern, then even the right to a union representative should be foreclosed (a radical step we hope the majority forswears). Nothing 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.²⁸ Indeed, 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 coworker representation in nonunion workplaces.

In any case, there is no evidence before the Board either that unions have interfered with employers' investigatory obligations since 1975, when *Weingarten* was decided, or that coworker representatives have caused harm since *Epilepsy Foundation* issued in 2000. Nothing in the record shows that investigations have come to a halt because of the presence of a coworker at an investigatory interview, or that information obtained during such an interview has been compromised. Rotely repeating the unsupported assertions of employer advocates in their briefs to the Board, the majority shows a startling lack of interest in what is actually happening in American workplaces.

If and when the right to representation raises legitimate concerns, they can and should be addressed by refining the right, case-by-case. For example, our colleagues have suggested that an investigation could be impeded if the employer were compelled to permit representation by a coworker involved in the same incident being investigated (a so-called "coconspirator"). That concern could be addressed specifically, by permitting an employer to deny an employee's request for representation by a possible coconspirator, under appropriate circumstances. But instead of permitting the Board's law to evolve in response to actual situations confronting employers and employees, the majority proceeds by fiat.

IV.

No one suggests that the National Labor Relations Act gives employees the same protections that are available to criminal suspects under the Constitution. The *Weingarten* right is not the equivalent of a right to counsel, and employees have no privilege against self-incrimination. Yet modest as the *Weingarten* right is, it brings a measure of due process to workplace discipline, particularly in nonunion 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. "[T]he presence of a coworker 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." *Epilepsy Foundation*, 268 F.3d at 1100. Needless to say, unjust discipline can provoke labor disputes. Because a purpose of the Act is to provide a vehicle for employee voice and a system for resolving workplace disputes, this due process requirement furthers the goals of the Act.

Far from being an anachronism, then, *Epilepsy Foundation* is in perfect step with the times.²⁹ In nonunion workplaces, employer-imposed alternative dispute resolution (ADR) mechanisms, from grievance procedures to compulsory arbitration, are becoming increasingly common.³⁰ These mechanisms, when adopted in good faith, reflect an evolving norm of fairness and due process in the workplace—a norm that should not be entirely dependent on winning union

representation. The arbitrary exercise of power by employers, over their employees, no longer strikes us as either natural or desirable. Grounded in the Act's notion of "mutual aid or protection," the right to coworker representation for nonunion workers also contributes to a workplace in which employers respect something like the rule of law.³¹

On this view, it is our colleagues who are taking a step backwards. They have neither demonstrated that *Epilepsy Foundation* is contrary to the Act, nor offered compelling policy reasons for failing to follow precedent. They have overruled a sound decision not because they must, and not because they should, but because they can. As a result, today's decision itself is unlikely to have an enduring place in American labor law. We dissent.

Dated, Washington, D.C. June 9, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

Rosetta B. Lane, Esq., for the General Counsel.

Gregory R. Meyer and John F. Ring, Esqs., for the Respondent.

Richard W. Rutherford, Esq., for the Charging Parties.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Winston-Salem, North Carolina, on August 9, 2002, pursuant to a complaint that issued on April 30, 2002.¹ The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by denying the requests of the Charging Parties to be represented during interviews that they had reasonable cause to believe would result in disciplinary action.² The Respondent's answer denies any violation of the Act. I find that the evidence does establish that the Respondent violated the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, IBM Corporation, the Company, is a New York corporation with facilities

located in Research Triangle Park, North Carolina, where it is engaged in the manufacture and distribution of computer products. During the past 12 months the Respondent, at its Research Triangle Park facilities, purchased and received goods and materials valued in excess of \$50,000 directly from points outside the State of North Carolina. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

The Charging Parties were all discharged by the Company in late November. The discharges are not at issue in this proceeding. The only issue in this case is the alleged refusal of the Company to permit the Charging Parties to have a witness at investigatory interviews that were conducted on October 23. All parties are aware of the Board's decision in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), that extended *Weingarten* rights to unrepresented employees. Although the Company contends that *Epilepsy Foundation* was wrongly decided, its primary contention is that *Epilepsy Foundation* is not applicable because the Charging Parties did not request a witness. The Charging Parties each testified that they did, individually, request a witness prior to one-on-one interviews conducted on October 23. Thus, resolution of this case is totally dependent on the credibility of the witnesses.

B. Facts

In early October, the Company received a letter dated October 1 from an attorney representing a former contract employee who had worked for the Company from August 2000 until late June or early July 2001. The letter set out allegations of alleged harassment by IBM employees Kenneth Schult and Steven Parsley. The letter was forwarded to Human Resources Partner Julie Harrison, who is based in Atlanta, Georgia. Harrison assigned the investigation to Manager of e-business Solutions Nels Maine who is located in Raleigh, North Carolina. Although the investigation was not a true "open door investigation," presumably because the complaint came from a former contract employee rather than a company employee, Harrison sent Maine the guidelines for conducting an "open door investigation," i.e., an investigation initiated through the Company's open door policy.

The guidelines sent by Harrison set out the procedures to be followed by the investigator. Paragraph 3 of the section on investigative fact finding in the guidelines includes the following directives:

Individuals interviewed should be instructed . . . to keep any information disclosed to them by the investigator confidential. It is inappropriate, however, to order an employee who is suspected of wrongdoing not to discuss the matter with others. [Emphasis added.]

Paragraph 4 notes that recording devices should not be used and that the investigator should "terminate the interview" if there is "cause to believe" the interview is being recorded.

The guidelines, published in 1998, contain no revision noting the Board's decision in *Epilepsy Foundation*. Although Harrison and other human resources professionals in the Company had been briefed regarding *Epilepsy Foundation* in a conference call held in August 2000, Maine was unaware of the decision at the time he conducted the investigation. Harrison and Cynthia Hopson, program manager for corporate internal appeals, testified that, if an employee invoked the right to a witness, the Company's policy was to advise the employee that, if the employee continued to assert that right, the investigation would proceed without that employee's input. This is consistent with the provision in the guidelines providing that, if an employee insisted on recording the interview, the interview should be terminated.

During the week preceding October 14, Maine interviewed various supervisors of the employees who were the subjects of the investigation. He began interviewing employees during the week of October 14. Notwithstanding their technical expertise and various designations, all parties stipulated that, for purposes of this proceeding, the Charging Parties and Senior Project Manager Kenneth Jones are statutory employees, not supervisors, under the Act. The interviews were conducted in a conference room in the building in which the employees worked at the Research Triangle Park near Raleigh, North Carolina. None of the Charging Parties were advised that they had been accused of any misconduct. Maine testified that, at the outset of each interview, he introduced himself and informed the employees that he was investigating concerns "stated in a letter that was sent to IBM." He then instructed each employee as follows:

I expect your honesty, please do not disclose the fact that an investigation is in progress. Keep any information I disclose to you confidential. I ask you to be discreet about the matter so the process can be given a chance to work. I am simply doing an investigation, please do not make any inferences from the questions I will be asking you.

At the second interview he held with each employee on October 23, Maine admitted that he advised each employee that "failing to cooperate in an investigation is a business conduct issue that translated into disciplinary action up to and including firing." Each of the Charging Parties testified that the statement regarding the consequences of failing to cooperate was made at both interviews. Whether it was is immaterial to the issues before me.

On October 15 Maine interviewed employee Kenneth Schult at 11 a.m. After Maine had finished questioning him, Schult asked what his rights were. Maine replied that he was not accused of anything, that he was just being asked to answer the questions. Schult responded that it was obvious from the questions that he was being accused and wanted to know what would be the next step. Maine responded that this was the first time that he had conducted an investigation of this nature and that "someone would get back" to Schult. As Schult left, Maine told him that he was "prohibited from speaking with anyone other than himself [Maine] or a manager." Maine did not specifically deny the foregoing conversation and admitted that he told all employees not to make any inference from his questions and "to keep things confidential."

On October 15 Steve Parsley was informed by one of his supervisors, personal development manager (PDM), Mary Geerdes, that he needed to attend an interview at 12:15 p.m. Parsley

said that he had a luncheon appointment, and Geerdes told him to cancel it. She escorted him to a conference room where he met with Maine. Maine asked him a list of questions. Like Schult, Parsley asked Maine what he was being accused of, and Maine replied that he was not being accused of anything, that he simply needed to cooperate and answer the questions. As Parsley was leaving, Maine informed him that their conversation was "IBM confidential" and that he was not allowed to talk about it with any coworkers, that if he did so he could be disciplined. Maine did not deny stating to Parsley that he was not being accused of anything or giving the foregoing directive not to talk to any coworkers.

Employee Robert Bannon, although not specifically accused in the letter of October 1, was mentioned in the letter. Maine interviewed Bannon at 1 p.m. After Maine had questioned him, Bannon asked if he was accused, and Maine responded "you were on the outside," and that he "probably would not hear from him [Maine] again."

None of the Charging Parties requested the presence of a witness at the interviews conducted on October 15.

Despite Maine's admonition not to discuss the interview, Parsley went to the office of Schult, who had formerly been his project manager. There he spoke about the interview with Schult, Bannon, who shares Schult's office, and Supervisor Geerdes.

All three of the Charging Parties were suspended on Friday, October 19. Supervisor Judy Stackhouse called Schult on his cellular telephone and reached him as he was driving his children to the North Carolina State Fair. Stackhouse informed Schult that he was being sent home for the duration of the investigation, that he was to turn in his equipment and be available. Supervisor Geerdes called Bannon and informed him that he had been placed on "management directed time off." He asked if anyone else had been affected, and Geerdes identified Schult and Parsley. Parsley was in Charleston, West Virginia, to attend the wedding of a coworker. He received a telephone call from Supervisor Geerdes who told him that he was being placed on "management time off," that he was not to talk to any coworkers except for management, that he was not allowed on IBM premises, and that he was to return his company equipment on Monday. Parsley was directed to be available "if they needed to ask me any more questions." He asked what was going on and what his rights were. Geerdes replied that the investigation was continuing regarding "inappropriate conduct in the workplace" and that she did not know what his rights were. Geerdes noted that Schult and Bannon had also been sent home.

On Sunday, October 21, Parsley received a telephone call from his current project manager, Senior Project Manager Kenneth Jones, regarding final actions that needed to be completed before the project on which Parsley had been working could be deployed. Jones had been advised that Parsley had been placed on "management time off" and would not be present at work. Parsley informed Jones that he did not know when he would be returning, that he felt like he had been pushed out of the Company and that he was concerned that he was going to be terminated since "they sent me home." Jones is a former lieutenant colonel in the United States Army. Parsley recalls that Jones, speaking from his military experience, told him that, "if someone believed [there] was going to be punitive charges against them, that they should ask for a coworker to be present in investigations or be able to tape the conversations."

Jones confirmed that when he spoke with Parsley he noted that he was a "manager in the Army for 22 years. And if something is adverse, be sure that you either record the

conversation or have a witness.” On cross-examination Jones was asked whether he had used the word “[w]itness, third party, something else.” Jones responded, “I don’t recall. I just said be sure that if you’re in an adversarial situation . . . that you’re not alone, if you will. I don’t recall my exact words. I just told him, record it or have a witness.”

Shortly after this conversation, Parsley called Schult and informed him that Jones had told him that “if there was to be some more interviews that we should insist on having a coworker present during those interviews.” Schult recalled that Parsley called him and informed him that Jones had said that we “need to ask for a coworker.” Schult called Bannon and informed him of what Parsley had told him.

Between October 15 and 19, Schult sent Maine e-mail messages to which he attached copies of prior e-mails relating to an invoicing problem with the contractor that had supplied the contract employee on whose behalf the letter of October 1 had been written and copies of prior e-mails relating to the contract employee. Schult’s communications with Maine ceased after October 19. On October 20, Schult sent an e-mail to his director noting that his manager had stated that no accusations had been made against him but that he had been placed on leave by his manager. He questioned why he had been placed on leave and what his rights were. He noted that he was concerned that next thing he was going to receive was “a letter of termination.”³ The record contains no response to this inquiry. Schult testified that he searched the “web” and confirmed that employees were entitled to have a witness at interviews that could result in discipline. He was not certain when he printed out that information.

On October 22 Bannon called Maine who, on answering the telephone, stated that he was glad Bannon had called, that he needed to interview him the next day. Bannon testified that he asked if he could have a coworker or an attorney present. Maine replied, “[N]o. You just need to come in and answer the questions.” Maine continued, stating that Bannon needed to take this “very, very seriously.” Bannon noted that Maine was contradicting himself since he had told him that he was not accused of anything and had been “sitting there laughing when he asked him the first set of questions.” Maine responded that he had “just laughed at one question.” Maine did not deny the laughing reference, but did deny that Bannon requested a coworker or attorney. A memo that Maine made regarding this call does not reflect a request for a coworker or attorney or the reference to laughing. It reports that Bannon asked whether any allegations had been made against him and that Maine responded that he “could not answer that question.” Bannon testified that his request to have an attorney present resulted from conversations with another coworker, not Schult or Parsley.

Following Bannon’s call, Schult, Bannon, and Parsley met at a Barnes and Noble bookstore in Cary, North Carolina. Bannon informed Parsley and Schult that he had called Maine and that Maine had told him that he would have another interview. Bannon noted that he had requested to have a coworker present and Maine had denied the request. Schult recalled reporting that he had searched the “web” and that he stated, “Ken’s right,” referring to the advice Ken Jones had given Parsley. The three employees agreed that each would ask to have one of the others of them present at any interview if Maine would permit them to do so.

Later that day, Schult received a call from Maine’s assistant who scheduled an interview on the following day. Schult testified that he then called Maine, stating that he had made the appointment “with Wendy.” Maine replied that he knew, “I asked her to call you.” Schult testified that he told Maine that he would “like to have a coworker present tomorrow for this

interview,” and that Maine replied that he could not and noted that he was “not supposed to be talking . . . with anyone either.” Maine only acknowledged receiving communications from Schult from the 15th through the 19th, implicitly denying the telephone call on October 22.

On October 23 Bannon met with Maine at 10:15. Maine’s assistant escorted him to the interview room, a conference room in a building in which the company’s executive offices are located. When Maine arrived, Bannon asked what his rights were and “whether I could have an attorney or coworker present.” Maine replied no, advised Bannon that he needed to answer his questions, and read a statement advising that failure to cooperate could result in disciplinary action up to and including termination. Maine admitted that he did not “remember exactly” what Bannon said, but it was “something like” why he was there and how he was supposed to act. Maine’s testimony that he responded to Bannon by telling him that he expected him to be open and honest and then reading the statement that set out the consequences for failure to cooperate establishes that he did not directly respond to Bannon’s questions. I credit Bannon.

Following the interview, Bannon went to the parking lot of a local restaurant where he met with Parsley and Schult. He informed them of what had occurred and that “we weren’t going to be allowed to bring anyone with us.”

Schult’s interview was at noon. After greeting Maine, Schult testified that he told Maine that he knew he had “said ‘no’ yesterday, but I really would like to have a coworker present.” Maine replied, no, that Schult just needed to answer the questions. Schult asked what his rights were, and Maine again replied that he just needed to answer his questions. Maine admitted that Schult “may” have asked why he was there. Although Schult had written his director asking what his rights were, Maine denied that Schult asked him that question. I credit Schult.

Parsley’s interview was scheduled for 1 p.m. Maine was late. When he returned from lunch, they greeted each other. Parsley asked if he could have a coworker present. Maine replied, “No,” that all he needed to do was answer the questions. Maine told Parsley that he was “not being accused of anything.” Parsley noted that “the questions being asked indicated that I was being accused of something.” Maine responded by informing Parsley that he needed to cooperate and that failure to do so could result in disciplinary action including termination.

On November 26, Geerdes informed Parsley that he was being terminated and that he could file an internal appeal. He did so. Among other matters, Parsley asserted that he had asked for a coworker on October 23. His appeal was handled by Program Manager for Corporate Internal Appeals Cynthia Hopson. It was denied. When informing him of the denial, Parsley testified that Hopson stated that Maine “didn’t remember me asking” for a coworker and there was no “concrete evidence to prove otherwise.” Hopson testified that Maine specifically denied that Parsley requested a witness and that she so informed Parsley.

Schult and Bannon also filed internal appeals. The report of Schult’s appeal is not in the record. Hopson’s report regarding Bannon’s appeal reflects that Maine denied that Bannon requested that a coworker or attorney be permitted to attend his interview on October 23.

Maine denied that any of the Charging Parties requested a coworker as a witness at any time. He testified that, if they had done so, he would have called Julie Harrison to “get a ruling on how I should handle the situation.”

C. Contentions of the Parties, Analysis, and Concluding Findings

Counsel for the General Counsel and counsel for the Charging Parties argue that these three employees, each of whom had been placed on "management time off," consulted with each other regarding their rights. Regarding those rights, "[o]ne piece of concrete advice" was that of Senior Project Manager Jones, and the employees acted on it.

The Respondent argues that I should credit Maine's denials and find that, if any of the employees had requested a witness, he would have called Harrison for instructions. The Respondent further argues that the failure of any of the Charging Parties to protest the purported denial of their rights until after their terminations confirms that no request was made. In arguing that the Charging Parties were not credible, the Respondent notes that Bannon did not report to Parsley and Schult that an employee had advised him to request an attorney and that Schult did not take a printout of the information he found on the "web" to the meeting at Barnes and Noble. The fact that Bannon did not share the advice that he had received regarding an attorney does not contradict his testimony that he, Schult, and Parsley agreed that each would request a witness. Schult testified that he was uncertain as to when he first printed out the information from the "web." Regardless of when he did so, the absence of a document at Barnes and Noble confirming his statement that "Ken's right" is of no import. The Respondent points out that Parsley never mentioned to Schult and Bannon that Jones had also suggested taping the conversation and that, when asked why he did not request to tape the conversation, Parsley answered that "they said you had to be alone" and that he "figured they wouldn't let me do it anyway." The Respondent argues that this same rationale would apply to having a coworker present. Although the Respondent would apply the same rationale to either request, it should be noted that a request to tape the interview rather than for a coworker to be present would not have invoked a Section 7 right. Jones told Parsley that he should "be sure that if you're in an adversarial situation . . . that you're not alone, if you will. . . . [R]ecord it or have a witness." Although Parsley's logic may not have been consistent when he concluded that seeking to tape any interview would not be allowed but that he should insist on having a coworker present, the Respondent's guidelines confirm that taping would not have been allowed. Having discounted the suggestion that he attempt to tape any interview, Parsley focused upon the advice that he should have a witness, and that is what he reported to Schult.

The Respondent argues that the testimony of the Charging Parties is suspect because none protested the denial of a witness until they filed appeals regarding their terminations. Parsley had asked Geerdes what his rights were, and she said she did not know. Schult sent an e-mail to his director asking what his rights were, and there is no evidence that he received a reply. Schult and Bannon asked Maine what their rights were and he replied that they just needed to answer his questions. The employees had been placed on management time off on October 19. No further adverse action was taken against them until they were terminated. There is no evidence in this record that there was any procedure for the employees to follow prior to their terminations. The compelling evidence on this record is that, immediately upon being terminated, Parsley, Schult, and Bannon appealed their terminations and each separately protested the denial of a witness on October 23.

The Respondent's argument regarding Maine calling Harrison if any of the Charging Parties had requested a witness would be more persuasive if the record confirmed that Maine followed the guidelines. The record establishes that he did not. Maine admitted composing his own

statement that he read at the first interviews. That statement instructs the employees not to “disclose the fact that an investigation is in progress” and he did not deny ordering Schult and Parsley to “keep it confidential.” Paragraph 3 of the guidelines includes the statement that “[i]t is inappropriate . . . to order an employee who is suspected of wrongdoing not to discuss the matter with others.” The letter of October 1 specifically accused Schult and Parsley.

Jones advised Parsley “to be sure that if you’re in an adversarial situation . . . that you’re not alone, . . . record it or have a witness.” I fully credit Jones. His testimony was straightforward and his demeanor was impressive. Parsley credibly testified that he advised Schult that Jones had told him that he should “insist on having a coworker.”

All three employees had reasonable cause to believe that the interviews being conducted on October 23 would result in disciplinary action. Each had been suspended on October 19. Schult wrote his director on October 20 stating that he was concerned that the next thing he was going to receive was a letter of termination, Parsley expressed to Jones on October 21 that he was concerned that he was going to be terminated since “they sent me home,” and Bannon called Maine on October 22 asking if he was accused of anything.

I do not credit Maine’s denial that none of the Charging Parties requested the presence of a coworker. His demeanor was not impressive. When questioned regarding his meetings with employees, Maine became defensive, as reflected by the following exchange on cross-examination:

Ms. Lane: And you always met with employees in a one on one setting. Is that correct?

Mr. Maine: Yes.

Ms. Lane: No other employees present. Is that correct?

Mr. Maine: Or requested to be present.

The letter of October 1 specifically accused Schult and Parsley. Maine denied to them that they had been accused. After he was suspended, Bannon called Maine. Maine’s own memorandum reports that, when Bannon asked whether there were any allegations against him, he replied that he “could not answer that question.” He was no more forthcoming when he met with Bannon on October 23. When Bannon and Schult asked what their rights were on October 23, Maine responded that they needed to answer his questions. It is clear that Maine was focused on the questions that he was asking and the answers that he was receiving, not the requests of the employees that were the subjects of the investigation.

I credit Parsley, Schult, and Bannon. Each of these employees realized on October 19 that unusual actions were occurring and each was justifiably concerned about possible discipline. Parsley spoke directly with Jones on October 21. As of October 23, the only advice that Parsley had received was the advice of Jones who confirmed that he told Parsley “to be sure . . . that you’re not alone . . . record it or have a witness.” No management official responded to Parsley’s request of Geerdes regarding what his rights were. Parsley concluded, correctly,

that he would not be permitted to tape any interview. Parsley called Schult, stating that Jones had advised him to “insist on having a coworker present.” Schult confirmed on the “web” that it was good advice. The three employees met together and discussed the advice of Senior Project Manager Jones, a retired military officer, and agreed that each would request the presence of a coworker. This was the only definitive advice that they discussed since Bannon did not volunteer his conversations relating to an attorney. It defies logic to believe that these employees would not thereafter carry out their mutual agreement to seek to have a witness when being interviewed by Maine. I find that they did so and that Maine denied the requests and continued the interviews. On being notified of their terminations, each employee separately protested the denial of a coworker as a witness at the interviews held on October 23. By denying the requests of these employees to have a coworker present during interviews that they had reasonable cause to believe would result in disciplinary action, the Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

The Respondent, by denying the requests of the Charging Parties to be represented during interviews that they had reasonable cause to believe would result in disciplinary action and then conducting those interviews following the denials of those requests has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, IBM Corporation, Research Triangle Park, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying a witness to any employee who requests a witness during interviews which could reasonably lead to discipline and proceeding to conduct such interviews without the presence of a witness.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facilities in Research Triangle Park, North Carolina, copies of the attached notice marked “Appendix.”⁵ Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at

its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 23, 2001.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 25, 2002

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT deny a witness to any of you who request a witness during interviews which could reasonably lead to disci

pline, and WE WILL NOT conduct any interview without a witness after a witness has been requested.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

IBM CORPORATION

[1] On September 25, 2002, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief.

On March 6, 2003, the Board granted the joint request of LPA, Inc., The Equal Employment Advisory Council, Associated Builders and Contractors, the Chamber of Commerce of the United States, the Society for Human Resource Management, the International Mass Retail Association, and the National Association of Manufacturers, to file an amicus brief and accepted the brief that accompanied the request.

On March 19, 2003, the Board granted the request of the Council on Labor Law Equality (COLLE) to file an amicus brief and accepted the brief that accompanied the request.

On April 4, 2003, Wal-Mart Stores, Inc. filed a response in support of briefs amici curiae and a request for oral argument. The request for oral argument is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] All subsequent dates are in 2001 unless indicated otherwise.

[4] There is no issue concerning the Respondent's discharge of the Charging Parties.

[5] Sec. 9(a) 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 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.”

[6] The *DuPont* Board expressly overruled *Sears, Roebuck & Co.*, 274 NLRB 230 (1985), which had found the Act compelled the limitation of *Weingarten* to unionized workplaces. 289 NLRB 628 fn. 8.

[7] Although the Respondent raised the coconspirator issue in the instant case, the record shows that the Respondent, at the time it denied the employees’ requests, did not know that each of the employees being investigated intended to call each other to be witnesses in their respective individual interviews.

[8] The Board holds that “direct dealing, by its very nature, improperly affects the bargaining relationship.” *American Pine Lodge Nursing*, 325 NLRB 98, 99 (1997).

[9] Even without statutorily-required investigations, employers are required to keep employee information confidential. For example, an employer may not release information about an employee’s health without authorization.

[10] The duty of fair representation requires that a union “exercise its discretion with complete good faith and honesty.” See *Marquez v. Screen Actors Guild*, 525 U.S. 33, 44 (1998), quoting *Vaca v. Sipes*, 386 U.S. 171 (1967).

1 331 NLRB 676 (2000), enf’d. in relevant part, 268 F.3d 1095 (D.C. Cir. 2001), cert. denied 536 U.S. 904 (2002).

2 *NLRB v. J. Weingarten, Inc. (Weingarten)*, 420 U.S. 251 (1975).

3 *Sears, Roebuck & Co.*, 274 NLRB 230 (1985). In *Sears*, a Board majority found that principles embodied in Sec. 9(a) and 8(a)(5) of the Act compelled the limitation of the *Weingarten* right to the unionized workplace.

4 *E. I. DuPont & Co.*, 289 NLRB 627 (1988). In *E. I. DuPont & Co.*, 274 NLRB 1104 (1985), the Board applied the rationale of *Sears* (see fn. 3 above) to find that the Act compelled a finding that unrepresented employees are not entitled to *Weingarten* rights. On review, the Third Circuit rejected the *Sears* rationale, found that the *Weingarten* right was grounded in Sec. 7 of the Act, and determined that the extension of *Weingarten* rights to unrepresented employees represented at least a permissible interpretation of the Act. *Slaughter v. NLRB*, 794

F.2d 120 (1986). On remand, the Board overruled *Sears* and “recogniz[ed] that the Act might be amenable to other interpretations.” 289 NLRB at 628. However, the Board declined to extend *Weingarten* rights to the nonunion setting, holding that “an employee in a nonunionized workplace does not possess a right under Section 7 to insist on the presence of a fellow

employee in an investigatory interview[.]” *Id.*

While I agree with the Third Circuit that the *Weingarten* right is grounded in Sec. 7 of the Act, I find for the reasons set out herein that the limitation of the *Weingarten* right to the unionized workplace is the preferable interpretation of the Act.

5 That the right the Court was affirming was the right to a Sec. 9(a) representative is evident from the Court’s description of the “contours and limits of the statutory right” found by the Board. The Court said, in part, as follows: “First, the right inheres in Section 7’s guarantee of the right of employees to act in concert for mutual aid and protection.” The Court followed with a discussion of *Mobil Oil Corp.*, 196 NLRB 1052 (1972), in which the Board referred to an employee’s “right to union representation upon request” and “the assistance of his statutory representative.” “Second, . . . the employee may forego his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative.” “Third, [the employee’s request is limited to a pre-disciplinary interview.]” “Fourth, exercise of the right may not interfere with legitimate employer prerogatives.” The Court then discussed the employee’s right to refrain from participating in the interview “without his chosen agent” and the employer’s right to forego the interview. “Fifth, the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview. The Board said in *Mobil*, ‘we are not giving the Union any particular rights with respect to pre-disciplinary discussions which it otherwise was not able to secure during collective bargaining negotiations.’” 420 U.S. at 256–260.

6 *Interboro Contractors*, 157 NLRB 1295, 1298 (1966), *enfd.* 388 F.2d 495 (2d Cir. 1967).

7 30 LA 744 (1958). In *Independent Lock Company*, the arbitrator said that the “[participation by the union representative] might reasonably be designed to clarify the issues at this first stage of the existence of a question, . . . give assistance to employees who . . . might in fact need the more experienced kind of counsel which their union steward might represent [and] [t]he foreman, himself, may benefit from the presence of the steward by seeing the issue, the problem, the implications of the facts, and the collective-bargaining clause in question more clearly.” *Id.* at 746.

8 44 LA 647 (1965). In *Caterpillar Tractor Co.*, the arbitrator explained: “The presence of the union steward is regarded as a factor conducive to the avoidance of formal grievances through the medium of discussion and persuasion conducted at the threshold of an impending grievance.” *Id.* at 651.

9 The Court has cautioned that in interpreting the Act it is “essential” to afford “due protection . . . [to] the employer’s right to manage his enterprise.” *American Ship Building Co. v. NLRB*, 380 U.S. at 309 (citations omitted).

10 331 NLRB at 678.

11 The *Epilepsy* Board relied upon *Glomac Plastics, Inc.*, 234 NLRB 1309 (1978). In *Glomac*, the employer was found to have violated Sec. 8(a)(5) by refusing to bargain in good faith with the union thereby “foreclos[ing] its employees from enjoying any of the benefits of collective bargaining and in particular deprived them of the ‘aid or protection’ of union representation.” 234 NLRB at 1311. Under these circumstances, the Board found the employer violated Sec. 8 (a)(1) by refusing to permit an employee to have a fellow employee, a union negotiating

committee member, present at a predisciplinary interview. The Board concluded that “Section 7 rights are enjoyed by all employees and are in no wise dependent on union representation for their implementation.” *Id.* With respect to the right to have the presence of the union negotiating committee member, the Board relied on a footnote comment in Justices Powell and Stewart’s dissent in *Weingarten*, wherein they cautioned the majority that as a result of the right it was affording employees in a union setting “to act ‘in concert’” in employer interviews, “it must be assumed that the Sec. 7 right . . . also exists in the absence of a recognized union.” *Id.*, quoting *Weingarten*, 420 U.S. at 270 fn. 1. The Board’s conclusion that the Sec. 7 rights of nonunion employees are necessarily coextensive with the Sec. 7 rights of union employees is of questionable validity particularly in light of the Supreme Court’s decision in *City Disposal*, supra, 465 U.S. 822. Further, the *Weingarten* dissenters’ cautionary remark was just that and cannot fairly be relied upon as proof for that about which they were warning.

12 Immediately prior to making this statement, the *Ontario Knife* court observed:

[t]hat the *Weingarten* decision deals only with the question of what activities are properly for “mutual aid or protection” was made clear by the Court’s approving quotation, 420 U.S. at 261, 95 S.Ct. at 965, of our opinion in *NLRB v. Peter Cailler Kohler Swiss Chocolates Co., Inc.*, 130 F.2d 503, 505–06 (2d Cir. 1942), that:

When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a ‘concerted activity’ for ‘mutual aid or protection,’ although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is ‘mutual aid’ in the most literal sense, as nobody doubts.

Id.

13 In *Alleluia*, an employee was discharged after reporting his employer’s safety violations to the state OSHA office and accompanying an OSHA inspector on a tour of the plant to point out the alleged violations. The employee acted individually, and no union represented the workers at the plant. Contrary to the administrative law judge, who recommended dismissal of the complaint because there was no outward manifestation of group action, the Board held that a lone employee’s invocation of a statutory safety right designed for the benefit of all employees will be “deemed” to be concerted “in the absence of any evidence that fellow employees disavow such representation.” 221 NLRB at 1000. Thus, the Board relieved the General Counsel of his burden of proving group action when the activity in question related to a matter potentially of common concern to employees.

14 In *Air Surrey*, the Board found that an individual employee’s (Patton’s) action in inquiring at respondent’s bank as to whether respondent had sufficient funds on deposit to meet its upcoming payroll constituted protected activity under the Board’s holding in *Alleluia Cushion*. Having reached this conclusion, the Board found it unnecessary “to pass upon the [judge’s] alternative rationale that Patton’s visit to the bank was protected because he was, in fact, acting in concert with the other employees.” *Id.* at 264. On review, the Sixth Circuit found that Patton was acting in concert with other employees when he made his inquiries at the bank but that the respondent did not know of the concerted nature of Patton’s actions when it discharged him. Applying the law of the circuit, the court denied enforcement on the ground that an employer cannot be held to have violated Sec. 8(a)(1) for conduct which may be protected under the Act when “the employer lacks knowledge of its protected character.” *Air Surrey Corp. v. NLRB*, 601 F.2d at 257.

15 The dissent relies on this language from *Materials Research* as support for its position that a “notion of solidarity” evidences concerted activity. The dissent then notes that “[t]his notion of solidarity . . . is basic to the Act,” as explained in the Second Circuit’s decision in *NLRB v. Peter Cailler Kohler Swiss Chocolates, Inc.*, 130 F.2d 503, 505 (1942). In support, the dissent, at fn. 12, quotes the very language from the *Kohler* decision that is set out above at fn. 12 of my concurrence.

But that the purpose of the conduct at issue is employee solidarity only answers the question of whether the conduct is for mutual aid or protection. It does not answer the question of whether the conduct is concerted. Therefore, by its argument here, the dissent only emphasizes that it is applying the *Alleluia Cushion* definition of concerted activity to find that the conduct at issue here is concerted, i.e., the purpose of the conduct (employee solidarity) evidences that the conduct is concerted. Given the *Meyers I* and *II* definition of concerted activity set out below, this argument must fail.

16 In the underlying case, *Bighorn Beverage*, 236 NLRB 736 (1978), the Board adopted the judge’s finding that the respondent unlawfully discharged employee Mortensen for filing a complaint about excessive carbon monoxide with the state of Montana’s Department of Health and Environmental Sciences. Although the judge concluded that Mortensen acted alone in making the complaint, he nevertheless found that “the nature of Mortensen’s complaint to the Department of Health and Environmental Sciences was not merely a matter of his own personal concern [but] involved a safety problem of *common concern* to all persons who were then working at the [r]espondent’s facility.” *Id.* at 752 (emphasis added). On this basis, the judge, relying on *Alleluia Cushion*, *supra*, concluded “that Mortensen was engaged in a protected concerted activity under the Act in making his complaint to a state agency regarding safety conditions at the [r]espondent’s facility.” *Id.* at 753.

17 In *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053, 1053 (1079), the Board agreed with the judge that the Board’s recent decision in *Self Cycle & Marine Distributor Co.*, 237 NLRB 75 (1978), was controlling and found the violation on that basis. As the Board explained:

In *Self Cycle*, the Board found that respondent violated Section 8(a)(1) by discharging an employee for pursuing an unemployment compensation claim. In so finding the Board observed that the matter of unemployment compensation benefits arises out of the employment relationship and is of *common interest to other employees*. Thus, by refusing to withdraw an unemployment compensation claim an employee refuses to allow the employer to deny that employee, and by way of example other employees, access to the State’s unemployment compensation appeals procedure. The same rationale applies to the matter of workmen’s compensation benefits. Such benefits also arise out of the employment relationship *and are of common interest to other employees*. Similarly, [the discriminatee’s] refusal to forebear from filing a claim opposes Respondent’s attempt to deny him and other employees access to workmen’s compensation benefits.

Id. (emphasis added).

18 I recognize that the D.C. Circuit accepted the *Epilepsy* Board majority’s conclusion that an individual employee’s assertion of the *Weingarten* right in a nonunionized workplace may constitute concerted activity within the meaning of Sec. 7. *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1100 (D.C. Cir. 2001). The court, however, did not address the question of why, contrary to the Board’s holding in *Meyers II*, a shared interest should be presumed when an individual employee insists on the presence of a coworker in a nonunion environment where there is no collective-bargaining agreement or 9(a) representative to establish the requisite link to group action. This is likely due to the fact that the Board majority in *Epilepsy* failed to address this extant Board law.

19 Assuming arguendo that the *Weingarten* right may properly be extended to the nonunion workplace, it is possible that an employee's insistence on the presence of a coworker at an investigatory interview may constitute protected concerted activity under some circumstances. However, that will not always be the case. See, e.g., *E. I. DuPont & Co. v. NLRB*, 707 F.2d 1076, 1077–1079 (9th Cir. 1983) (mere request for presence of another employee cannot be presumed to meet the requirement of concert).

20 *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (emphasis added):

National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. *The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.*

21 The dissent raises the issue of whether an employee's mere request for the presence of a coworker at an investigatory interview in the nonunion setting constitutes protected concerted activity. That is not the issue presented, nor is it likely that we will encounter that issue in the future. Rather, the issue here is whether the employee is *entitled* to the presence of a coworker at the interview or, put another way, whether the employer in the nonunion setting has the right *to refuse* the request. Since any right *to make* the request need not be parsed separately to resolve the issue presented, it is unnecessary to reach that issue here. I would only add that my dissenting colleagues err when they suggest that my position requires me to acquiesce if an employer retaliates against an employee for merely requesting the presence of a coworker at an investigatory interview. The right of an employer to deny the request does not compel the existence of a concomitant right to retaliate against an employee for making the request.

1 *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001), enfg. *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000).

2 29 U.S.C. §157.

3 *NLRB v. J. Weingarten, Inc.* 420 U.S. 251 (1975).

4 See *Roadway Express, Inc.*, 246 NLRB 1127 (1979) (employer may cancel request for interview, rather than holding it in presence of union representative); *New Jersey Bell Telephone*, 308 NLRB 277 (1992) (presence of representative should not transform interview into adversary contest or collective-bargaining confrontation); *Northwest Engineering Co.*, 265 NLRB 190 (1982) (employer-conducted meeting in lunchroom did not require application of *Weingarten* rights). Under current law, an employee discharged as the result of an investigatory interview during which he was denied the right to a union representative is not entitled to reinstatement or backpay. *Taracorp Industries*, 273 NLRB 221 (1984).

5 *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676, 677–678 (2000).

6 *Materials Research Corp.*, 262 NLRB 1010 (1982).

7 *Sears, Roebuck & Co.*, 274 NLRB 230 (1985). The Board's reasoning in *Sears, Roebuck*

was rejected by the United States Court of Appeals for the Third Circuit in *Slaughter v. NLRB*, 794 F.2d 120 (3d Cir. 1986). *Sears, Roebuck* was also the target of academic criticism. See Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 Ariz. L. Rev. 397, 412–413 (1992); Matthew W. Finkin, *Labor Law by Boz: A Theory of Meyers Industries, Inc., Sears, Roebuck and Co., and Bird Engineering*, 71 Iowa L. Rev. 155, 177–188 (1985); Paul Alan Levy, *The Unidimensional Perspective of the Reagan Labor Board*, 16 Rutgers L. J. 269, 286–293 (1985).

8 *E.I. DuPont*, 289 NLRB 627 (1988). *DuPont* was also received poorly by labor law scholars. See, e.g., Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. Pa. L. Rev. 1673, 1736–1749 (1989).

9 According to the Bureau of Labor Statistics, in 2003, only 8.2 percent of private-sector employees were unionized. U.S. Department of Labor, Bureau of Labor Statistics, “Union Members in 2003,” News Release USDL 04-53 (Jan. 21, 2004).

10 William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 Berkeley J. Employment & Labor L. 259, 267 (2002) (footnote omitted).

11 As the *Epilepsy Foundation* Board put it, “Section 7 rights are enjoyed by all employees and are in no wise dependent on union representation for their implementation.” 331 NLRB at 678, citing *Glomac Plastics, Inc.*, 234 NLRB 1309, 1311 (1978).

12 This notion of solidarity, of course, is basic to the Act, as Judge Learned Hand explained many years ago. *NLRB v. Peter Cailler Kohler Swiss Chocolates Co., Inc.*, 130 F.2d 503, 505 (2d Cir. 1942) (“[M]ak[ing] common cause with a fellow work[er] over his separate grievance” is the essence of employee solidarity, even if only the one worker “has any immediate stake in the outcome”).

13 Both before and after *Epilepsy Foundation*, the Board has held that regardless of whether an employee is entitled to have a coworker representative, the Act protects his right to ask for one. See *Electrical Workers Local 236*, 339 NLRB No. 156, slip op. at 2 (2003), citing *E. I. DuPont*, supra, 289 NLRB at 630 fn. 15.

14 See, e.g., *ITT Lighting Fixtures v. NLRB*, 719 F.2d 851, 855–856 (6th Cir. 1983); *Anchortank, Inc. v. NLRB*, 618 F.2d 1153, 1157 (5th Cir. 1980); *NLRB v. Columbia University*, 541 F.2d 922, 931 (2d Cir. 1976). As discussed, the Third Circuit and the District of Columbia Circuit have squarely held that the position taken in *Epilepsy Foundation* is permissible.

15 *Columbia University*, supra, 618 F.2d at 931 fn. 5.

16 See *Ewing v. NLRB*, 861 F.2d 353, 359–361 (2d Cir. 1988); *Prill v. NLRB*, 835 F.2d 1481, 1484 (D.C. Cir. 1987).

17 It hardly needs to be added that “group action” may involve as few as two employees, such as a speaker and a listener in conversation. *Id.* For example, the Board has “held that a communication from one employee to another in an attempt to protect the latter’s employment constitutes protected concerted activity.” *Tracer Protection Services*, 328 NLRB 734, 741 (1999), citing *Jhirmack Enterprises*, 283 NLRB 609 fn. 2 (1987).

18 Our colleague claims that the *Epilepsy Foundation* Board “applied the *Alleluia Cushion* [221 NLRB 999 (1975)] definition of concerted activity.” *Alleluia Cushion* involved an employee who made an individual complaint to a state agency, without involving—or attempting to involve—his coworkers. The doctrine involved there simply has no bearing on the situation implicated in this case.

19 *Epilepsy Foundation*, supra, 268 F.3d at 1100.

20 Our colleague observes that it is “unnecessary to reach that issue here.” But as we have pointed out (see fn. 13, supra), the Board has consistently held that requesting a coworker representative is protected concerted activity. We see no way to reconcile our colleague’s position on what constitutes concerted activity with the Board law that the simple request for a representative cannot be punished. In this respect, as in others, we believe that our colleague’s approach is inconsistent with Board law, regardless of whether the Board continues to adhere to *Epilepsy Foundation*.

21 Compare *Mediaone of Greater Florida, Inc.*, 340 NLRB No. 39, slip op. p. 3 (2003).

22 We therefore refer to the “majority” in addressing these policy arguments.

23 The District of Columbia Circuit has flatly rejected the notion that “because a coworker owes no ‘duty’ to a requesting worker, there is no foundation for ‘concerted’ activity.” *Epilepsy Foundation*, 268 F.3d at 1100.

24 In this regard, one critic of the Board’s earlier decisions in this area found it “astonishing to hear from the very appointees who proclaim the importance of protecting employees’ free choice, that it is only by voting for union representation that employees may gain their full complement of statutory rights.” Levy, supra, 16 Rutgers L. J. at 292–293.

25 We understand the concurrence—which champions the common-law right of nonunion employers to “deal with employees on an individual basis”—to endorse the strong form of this unsuccessful argument. To the extent our colleagues use the phrase “dealing with,” they seem to neglect its status as a term of art incorporated in the Act. See Sec. 2(5) (defining “labor organization” as existing “for the purpose of . . . dealing with employers”). The role of a coworker representative, as elucidated in the Board’s decisions (see fn. 4, supra), is not that of a labor organization. As we have explained, the *Weingarten* right to representation is based on Sec. 7, not Sec. 9, and *Weingarten* itself makes clear that even in a union setting, the employer has no duty to bargain with the representative. 420 U.S. at 259–260.

26 Our concurring colleague invokes the “common-law prerogatives of management in nonunion settings.” But the Act applies in nonunion settings, as well as in union settings, e.g., *NLRB v. Washington Aluminum*, 370 U.S. 9 (1962), and the statutory “prohibitions against interference by employers with self-organization of employees were not only unknown, they were obnoxious to the common law.” *Agwilines, Inc. v. NLRB*, 87 F.2d 146, 150 (5th Cir. 1936). See *NLRB v. Colten*, 105 F.2d 179, 182 (6th Cir. 1939) (Act is regulatory statute creating rights and remedies “not only unknown to the common law but often in derogation of it”). Nearly 70 years after the National Labor Relations Act was passed, it seems a little late to suggest that, as a statute in derogation of the common law, it must be construed narrowly.

27 See, e.g., *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–798 (1945) (addressing

Sec. 7 right to engage in union solicitation and to wear union insignia, in context of employer's property and management rights). Insofar as the majority relies on state or local law, it never explains why federal preemption does not come into play.

28 The majority asserts that "a union representative's fiduciary duty to all unit employees helps to assure confidentiality for the employer." We are aware of no Board or court decision that supports this proposition.

29 The evolution discussed here is not unique to the United States. For example, the United Kingdom in 1999 granted employees a statutory right to coworker representation in disciplinary or grievance hearings. Employment Relations Act 1999, 1999 Chapter c. 26, Sec. 10(1)-(4).

30 "A 1995 General Accounting Office (GAO) survey of 2,000 businesses with more than 100 employees found that more than 90 percent had established 'some sort of grievance procedure using one or more ADR approaches.' Roughly 10 percent used arbitration, although less than half made it mandatory. Other popular forms of ADR included fact-finding, negotiation, internal mediation and peer review." Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 *The Labor Lawyer* 21, 13 (Summer 1997) (footnotes omitted).

31 At the same time, of course, the experience of employee and coworker, acting together in the context of an investigatory interview, may lead to other concerted activity and, where a majority of employees desire it, ultimately to union representation. That process is exactly what the Act is intended to foster. See, e.g., *Finkin*, supra, 71 *Iowa L. Rev.* at 186-187 ("The formation of even so limited a solidarity has the potential of ripening into broader collective efforts—which may explain why a nonunion employer would resist the extension of *Weingarten*, wholly apart from considerations of administrative inconvenience").

1 All dates are in 2001 unless otherwise indicated.

2 The charge in Case 11-CA-19324-1 was filed on January 4, 2002, the charge in Case 11-CA-19329-1 was filed on January 10, 2002, and the charge in Case 11-CA-19334-1 was filed on January 11, 2002.

3 The Respondent's brief, at p. 6, incorrectly states the date of this e-mail as October 23.

4 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

5 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."



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