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LIMITING THE *WEINGARTEN* RIGHT IN THE NONUNION SETTING: THE IMPLICATIONS OF *SEARS*, *ROEBUCK AND CO.*

The National Labor Relations Act¹ was enacted fifty years ago to promote the free flow of commerce “by removing certain recognized sources of industrial strife and unrest.”² To achieve this goal, the Act seeks to end inequality in employer and employee relations by encouraging the practice of collective bargaining and by protecting employee rights to organize and freely associate.³ Section 7 of the Act grants employees the right to engage in “concerted activities for the purpose of . . . mutual aid or protection.”⁴ In general, protected concerted activity involves activity that is peacefully pursued by

1. Ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982)). For a discussion of the origin and development of the National Labor Relations Act, see generally A. COX, *LAW AND THE NATIONAL LABOR POLICY* 8-19 (1960); W. GOULD, *A PRIMER ON AMERICAN LABOR LAW* 31-50 (1982); 1 ABA SECTION OF LABOR AND EMPLOYMENT LAW, *THE DEVELOPING LABOR LAW* 3-48 (C. Morris 2d ed. 1983) [hereinafter cited as *THE DEVELOPING LABOR LAW*]; C. TOMLINS, *THE STATE AND THE UNIONS, LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, 99-316 (1985).

2. National Labor Relations Act § 1 (codified as amended at 29 U.S.C. § 151 (1982)).

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Id.

3. *Id.* The preamble of the Act states:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

National Labor Relations Act § 1 (codified as amended at 29 U.S.C. § 151 (1982)).

4. Section 7 provides that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.” National Labor Relations Act § 7 (codified as amended at 29 U.S.C. § 157 (1982)).

employees in the exercise of their section 7 rights.⁵ Until recently it appeared that the protection afforded by section 7 applied equally to unionized and nonunionized employees.⁶

In 1975, the United States Supreme Court found in *NLRB v. J. Weingarten, Inc.*,⁷ that an employee's right to engage in protected concerted activity included the right to have union representation at an investigatory

5. See THE DEVELOPING LABOR LAW, *supra* note 1, at 136. Examples of protected activity include economic or sympathy strikes and other activity "in resistance or opposition to the union's leadership." *Id.*

However, if a collective bargaining agreement contains a no-strike clause, then a violation of such a clause will render the employees' activity unprotected, provided the employer has not engaged in unfair labor practices. See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278-84 (1956).

Moreover, other activities, although concerted in nature, may be unprotected if they are "unlawful, violent, or in breach of contract." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962) (footnotes omitted); see also *NLRB v. City Disposal Systems*, 465 U.S. 822, 837 (1984) (concerted activity conducted in "an abusive manner" loses § 7 protection).

6. This concept was first set forth in *Washington Aluminum Co.*, 370 U.S. at 14-15, where the employer discharged nonunion employees who walked off the job in protest of poor working conditions. The Court found that the employer violated the Act by interfering with the employees' § 7 right to engage in concerted activity for mutual aid or protection; see also *Vic Tanny Int'l v. NLRB*, 622 F.2d 237, 241 (6th Cir. 1980) (unorganized employees who jointly staged a walkout to present work-related grievances held to be protected since "Congress . . . clearly intended to protect not only concerted activity under the sanction of a labor union, but also concerted activity of the same nature engaged in by unorganized employees"); *Keokuk Gas Serv. Co. v. NLRB*, 580 F.2d 328, 333 (8th Cir. 1978) (employee's threat to file a grievance in protest of his punishment was protected concerted activity under § 7 despite the absence of a collective bargaining agreement); *Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 547 F.2d 575, 592 (D.C. Cir. 1976) (when employer denied employee's request for union representation where no collective bargaining agreement or grievance procedure was present, the court, citing the *Weingarten* dissent, noted that § 7 protects an employee's right to engage in concerted activity and not simply the right to engage in such activity with a recognized union), *cert. denied*, 431 U.S. 966 (1977); *NLRB v. Columbia Univ.*, 541 F.2d 922, 931 n.5 (2d Cir. 1976) (where employer called an interview with an employee after a completed investigation and for the sole purpose of discharging the employee, although *Weingarten* was not dispositive, the court did hold that the representative right was applicable to a nonunionized setting); *Materials Research Corp.*, 262 N.L.R.B. 1010, 1012 (1982) (where unorganized employee was denied a witness at an investigatory interview, the Board found that "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").

7. 420 U.S. 251 (1975). In *Weingarten*, an employee at one of the employer's retail stores was called in for an interview with the store manager and confronted with alleged charges of theft. During the interview, the employee made several requests that her union steward be present. These requests, however, were denied by the employer. Following the interview, the employee told union representatives about the employer's actions and the union subsequently filed charges alleging that the employer committed an unfair labor practice. *Id.* at 254-56. See also *International Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276 (1975) (a companion case to *Weingarten*).

interview.⁸ The Court determined that an employer who denies an employee this right violates section 8(a)(1)⁹ of the Act by interfering with the employee's exercise of a section 7 right.¹⁰ The Court based its decision on the finding that union representation not only safeguards the interests of the individual employee but also protects the interests of the entire bargaining unit by preventing the employer from unjustly imposing punishment.¹¹

Weingarten, however, left many questions unanswered, one of which was whether section 7 affords unorganized employees the same representational right enjoyed by their union counterparts. In 1982, the National Labor Re-

8. 420 U.S. at 260-61. See also *Quality Mfg. Co.*, 195 N.L.R.B. 197, 199 (1972), *enforcement denied in part*, 481 F.2d 1018 (4th Cir. 1973), *rev'd in part*, 420 U.S. 276 (1975), where the Board stated:

We would not apply the rule to such run-of-the-mill shop-floor conversation as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative.

9. The Act is separated into several sections. When an employer commits an unfair labor practice, it violates § 8(a). In particular, § 8(a)(1) prohibits an employer from interfering with the exercise of rights by employees which are guaranteed under § 7. This provision is very broad and an employer violates it when he commits other unfair labor practices. As a result, whenever there is a violation of § 8(a)(2), (3), (4), or (5), a violation of § 8(a)(1) is also committed.

Section 8(a)(2) makes it unlawful for an employer to dominate or interfere with a labor organization or in any way provide illegal assistance or support to the union. An employer is said to have dominated the formation of the union when it appears to be the true bargaining representative for unit employees.

A § 8(a)(3) unfair labor practice is committed when an employer discriminates against employees on terms and conditions of employment in order to encourage or discourage union membership. Likewise, discrimination for NLRB activity is prohibited by § 8(a)(4).

The last section involving employer violations is § 8(a)(5) which makes it illegal for an employer to refuse to bargain collectively with representatives selected by the majority of employees over terms and conditions of employment. To prove a § 8(a)(5) violation, a bargaining representative must show that the unit is appropriate and has been selected by a majority of employees and that there has been a demand that the employer bargain and the employer has refused to comply. This duty to bargain also prohibits the employer from taking unilateral action on mandatory bargaining subjects and from changing terms or conditions of employment without consulting the union. See National Labor Relations Act § 8 (codified as amended at 29 U.S.C. § 158 (1982)). See generally NATIONAL LABOR RELATIONS BOARD, A GUIDE TO BASIC LAW AND PROCEDURE UNDER THE NATIONAL ACT 19-28 (1978).

10. 420 U.S. at 256, 260. See also *Mobil Oil Corp.*, 196 N.L.R.B. 1052 (1972) ("An employee's right to union representation is based on Section 7 of the Act which guarantees the right of employees to act in concert for 'mutual aid and protection.'"), *enforcement denied*, 482 F.2d 842 (7th Cir. 1973).

11. 420 U.S. at 260-61. The Court further noted, "[t]his is true even though the employee alone may have an immediate stake in the outcome The union representative whose participation he seeks is, however, safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit" *Id.*

lations Board addressed this specific issue in *Materials Research Corp.*,¹² and held that the right to have a representative present at an investigatory interview flows from an employee's section 7 rights and thus applies equally to union and nonunion employees.¹³

Just three years later the Board reversed itself and overruled *Materials Research* in *Sears, Roebuck and Co.*,¹⁴ concluding that the right to representation during investigatory interviews does not exist where there is no certified or recognized union.¹⁵ In *Sears*, employee Larry Ward was suspected of falsifying company records¹⁶ and was called to the store manager's office to discuss the alleged misconduct.¹⁷ Realizing it was a disciplinary interview, Ward requested that his union representative or a fellow employee be present.¹⁸ His request was refused and, following the interview, Ward was fired.¹⁹

In a nearly unanimous opinion,²⁰ the Board found that at the time of his interview, Ward was not represented by a recognized or certified union and therefore was not entitled to have a representative accompany him to the meeting.²¹ The Board based its decision on the distinction between a union

12. 262 N.L.R.B. 1010, 1014 (1982) ("the rationale enunciated in *Weingarten* compels the conclusion that unrepresented employees are entitled to the presence of a co-worker at an investigatory interview"). See also *Interstate Sec. Servs.*, 263 N.L.R.B. 6 (1982).

13. 262 N.L.R.B. at 1010.

14. 274 N.L.R.B. No. 55, 118 L.R.R.M. 1329 (Feb. 22, 1985).

15. *Id.* The Board found that "[w]hen no union is present . . . the imposition of *Weingarten* rights upon employee interviews wrecks havoc with fundamental provisions of the Act . . . because the converse of the rule that forbids individual dealing when a union is present is the rule that, when no union is present, an employer is entirely free to deal with its employees on an individual, group, or wholesale basis." *Id.* at 1330.

16. 274 N.L.R.B. No. 55, at 35.

17. *Id.* at 41.

18. *Id.* at 36. In *Sears*, the International Union of Electrical Workers (IUE) had been conducting and organizing a campaign at the company's service center through union agent Edward Gaskill. When Ward made his request at the investigatory interview he asked that Gaskill, his "union representative," be present. The administrative law judge commented in his decision that it was difficult to see how Gaskill's presence would have changed the situation since Gaskill was not the bargaining representative of the employees and had no bargaining authority or contract machinery to invoke.

Additionally, the judge found no evidence that Gaskill was on the premises and available to attend the interview. As the judge stated, "an employer is not required to unduly delay a disciplinary or investigatory interview because of the unavailability of an employee's representative." *Id.* at 44-46.

19. *Id.* at 35-36.

20. Chairman Dotson and Member Dennis voted in the majority while Member Hunter wrote a concurring opinion. At the time of the decision, there were three members, including the chairman, on the Board.

21. 274 N.L.R.B. No. 55, 118 L.R.R.M. at 1329.

and nonunion setting.²² Unlike the *Materials Research* majority, the Board found that section 7 protection varied depending on an employee's representational status and that the rights of one group could not automatically be transferred to the other.²³ According to Chairman Dotson and Member Dennis, the *Weingarten* rule in a unionized setting is appropriate because it "meshes comfortably" with labor policy²⁴ and, in particular, with section 9 of the Act.²⁵ However, they maintained that in a nonunion setting allowing a *Weingarten* representative would force the employer to afford the group the status of a labor organization in contravention of the Act's exclusivity principle.²⁶

Member Hunter, who dissented in *Materials Research*,²⁷ concurred in *Sears* noting that while it may be permissible to extend *Weingarten* rights to unrepresented employees, this could not be done under a reasonable interpretation of section 7.²⁸ However, Hunter disagreed with the majority's reli-

22. 118 L.R.R.M. at 1329-30. Although the Board agreed with the administrative law judge's dismissal of Ward's complaint, it rejected the rationale set forth by the judge. In his decision, the judge found that the interview was held solely to inform Ward of predetermined discipline and thus the *Weingarten* right to representation did not apply. *Id.* at 1329 (citing *Texaco*, 246 N.L.R.B. 1021 (1979) and *Baton Rouge Water Works Co.*, 246 N.L.R.B. 995 (1979)). The judge noted, however, that had Ward asked for a witness to accompany him as distinguished from a union representative it would have been difficult to see how this request could have been denied. *See* 274 N.L.R.B. No. 55, at 44-45.

23. 118 L.R.R.M. at 1330. In reaching this conclusion, the Board rejected the rationale of the majority in *Materials Research* that *Weingarten* was based on § 7 and applied equally to union and nonunion workers. Member Dennis found that § 7 does not protect a nonunion employee who refuses to participate in an investigatory interview without a fellow employee "witness" being present. However, she stressed that the employee does engage in protected concerted activity by requesting the assistance of a coworker. Relying on *Meyers Industries*, 268 N.L.R.B. 493, 497 (1984), Dennis perceived the employee's request for a coworker witness as "an attempt to initiate concerted activity because, if successful, two employees would together confront the employer as it considered whether to impose discipline." Nevertheless, Chairman Dotson found it unnecessary to decide this issue. 118 L.R.R.M. at 1330 n.8.

24. 118 L.R.R.M. at 1330.

25. *Id.* *See* National Labor Relations Act § 9 (codified as amended at 29 U.S.C. § 159 (1982)). Under § 8 of the Act, it is unlawful for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." National Labor Relations Act § 8(5) (codified as amended at 29 U.S.C. § 158(a)(5) (1982)).

26. 118 L.R.R.M. at 1330. The Board found that the *Weingarten* representative "acts as a representative for the employee being interviewed and all other employees in the unit." It reasoned that the representative's participation in the interview amounted to "dealing with" the employer which is a "primary indicium of labor organization status as well as a traditional union function." *Id.* at 1331.

27. 262 N.L.R.B. at 1021-22.

28. 118 L.R.R.M. at 1332-33. In response to the majority's view, Member Hunter noted that the Supreme Court in *Weingarten* gave considerable deference to the Board's interpretation of § 7 as evidenced by its conclusion that the right to representation was permissible but not required under the Act. Hunter rejected the *Materials Research* majority's view that *Weingarten* compelled the same construction of § 7 in a nonunion setting. However, Hunter

ance on section 9.²⁹ He noted that in the *Weingarten* setting the employer has no duty to bargain with the representative and that section 9 is, therefore, inapplicable in this situation.³⁰

This Note will examine the general protections of section 7. It will discuss the scope of these protections as defined in *Weingarten* and explore how section 7 has been applied in the nonunion setting with particular attention to the Board's decision in *Materials Research*. An analysis of *Sears* will then follow with a discussion of the Board's reliance on section 9³¹ to support its decision. Finally, this Note will conclude that national labor policy necessitates the overruling of *Sears* and the application of *Weingarten* rights to non-union employees in a disciplinary setting.

I. THE MEANING OF CONCERTED ACTIVITY

While Congress has never clearly defined concerted activity, an employee must be engaged in "concerted activity for collective bargaining or other mutual aid and protection," in order for his conduct to fall within the ambit of section 7 of the Act.³² Although it has long been established that the collective conduct of several employees is concerted activity,³³ a problem arises in the interpretation of concerted activity with regard to a lone em-

also disputed the Board majority's assertion in *Sears* that the Act compelled no *Weingarten* rights for unorganized workers. According to Hunter, both views are erroneous in light of the Court's limitations in reviewing the Board's interpretation of § 7. *Id.*

Chairman Dotson and Member Dennis noted that their major difference with Member Hunter was that he appeared to view their decision in *Sears* as a permissible interpretation of the Act, while they viewed the result as "one the Act compels." *Id.* at 1329 n.5.

29. *Id.* at 1333. In particular, Hunter rejected the majority's reliance on *Emporium Capwell v. Western Addition Community Org.*, 420 U.S. 50 (1975), discussed *infra* note 148 and accompanying text.

30. 118 L.R.R.M. at 1332.

31. The relevant portion of § 9 states that "[r]epresentatives 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." National Labor Relations Act § 9(a) (codified as amended at 29 U.S.C. § 159(a) (1982)).

32. National Labor Relations Act § 7 (codified as amended at 29 U.S.C. § 157 (1982)). The relevant portion states "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Section 8 provides that "[i]t shall be an unfair labor practice for an employer—(1) [t]o interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." National Labor Relations Act § 8(1) (codified as amended at 29 U.S.C. § 158(a)(1) (1982)). See *supra* note 9 and accompanying text.

33. See *Washington Aluminum*, 370 U.S. at 14-17. Upholding the Board's decision, the Supreme Court found that the employees' walkout represented concerted activity that was clearly protected under § 7. *Id.* at 12-13. See *supra* note 6 for a discussion of *Washington Aluminum*.

ployee.³⁴ Some Board and court decisions have strictly interpreted concerted activity to require more than one employee.³⁵ Others have determined that in certain circumstances a single employee's actions may be protected under section 7.³⁶

However, the circumstances which render individual activity concerted and protected under section 7 vary. For example, one approach adopts a narrow interpretation of section 7 and finds an individual's activity concerted only if he acts as a representative of other employees.³⁷ Under a

34. See generally Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. PA. L. REV. 286 (1981); Note, *Protection of Individual Action as "Concerted Activity" Under the National Labor Relations Act*, 68 CORNELL L. REV. 369 (1983).

35. See, e.g., *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 844 (2d Cir. 1980) ("by definition, an individual acting alone cannot act in concert"); *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 306 (4th Cir. 1980) ("'[c]oncerted activity' under the statute, read literally, would appear to require more than a single participant").

36. See, e.g., *Royal Dev. Co. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1983) (employee's actions are considered concerted only when he acts collectively or on behalf of other employees); *ARO, Inc. v. NLRB*, 596 F.2d 713, 718 (6th Cir. 1979) ("[f]or an individual claim or complaint to amount to concerted action under the Act it must not have been made solely on behalf of an individual employee, but it must be made on behalf of other employees"); *Mushroom Trans. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) (an individual's conversations with fellow employees was protected activity only if it aimed at initiating or invoking group action, and "mere 'gripping'" would not be considered concerted activity if it "looks forward to no action at all"); *NLRB v. Guernsey-Muskingum Elec. Coop.*, 285 F.2d 8, 12-13 (6th Cir. 1960) (employee must be acting in behalf of other employees and not merely for the benefit of employees in the theoretical sense); *Ontario Knife Co.*, 247 N.L.R.B. 1288, 1289 ("individual protest was protected because it involved a group concern" over the violation of a statutory right afforded to the entire unit), *enforcement denied*, 637 F.2d 840 (2d Cir. 1980); *Steere Dairy, Inc.*, 237 N.L.R.B. 1350, 1351 (1978) (holding that an employee who walked off the job to protest a change in terms of employment and work conditions was engaging in protected concerted activity despite the refusal of the other employees to join in); *Alleluia Cushion Co.*, 221 N.L.R.B. 999, 1000 (1975) (holding an individual's actions to be concerted in the limited context of protesting unsafe work conditions).

37. See, e.g., *Blaw-Knox Foundry & Mill Mach., Inc. v. NLRB*, 646 F.2d 113, 116 (4th Cir. 1981) (employees' protests alleging sexual harassment against his relative was a personal concern and thereby held not to be concerted activity); *Ontario Knife Co. v. NLRB*, 637 F.2d at 845 (employee walking off the job alone to protest a work assignment was not concerted activity because other employees did not participate in or approve of the action); *Krispy Kreme*, 635 F.2d at 306-08 (actions by a single employee who continued to file workman's compensation claims were not concerted activity since he did not intend to advance group activity); *Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23, 28-29 (7th Cir. 1980) (employee complaining about job rates and overtime was engaged in concerted activity but evidence was insufficient to support a finding that employee's discharge was motivated by the activity); *ARO, Inc.*, 596 F.2d at 718 (where the court concluded that an individual's activity is concerted only if it is made on behalf of other employees or with the objective of inducing some group action); *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 328 (7th Cir. 1976) (employee acting alone in distributing leaflets directed toward inadequate supervision in areas of safety and discipline seen to have a purpose protected under § 7); *NLRB v. Buddies Supermar-*

broader standard, adopted by the Third Circuit in *Mushroom Transportation v. NLRB*,³⁸ an employee's conversation can be concerted activity if its purpose is to induce or prepare for group action, and is in the interest of all employees.³⁹ Therefore, under the *Mushroom Transportation* standard, an individual employee's communication with other employees is protected if it is more than "mere griping" and appears to promote some kind of group action.⁴⁰ The *Mushroom Transportation* standard has been followed by many courts⁴¹ although recent Board and court decisions have not relied upon it in addressing the issue of whether a nonunion employee's request for *Weingarten* representation is concerted activity.⁴²

A fundamental case in which the court established the concept of "constructive concerted activity"⁴³ was *Interboro Contractors, Inc. v. NLRB*.⁴⁴

kets, 481 F.2d 714, 717 (5th Cir. 1973) (milk salesman's efforts to gain more favorable contract terms for himself not seen as inviting others to join him in his protests); *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1352 (3d Cir. 1969) (employee's protest of company's profit-sharing plan constituted sufficient group action), *cert. denied*, 397 U.S. 35 (1970); *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969) (two employees' involvement in circulating a petition protesting inadequate working conditions construed as concerted activity); *Indiana Gear Works v. NLRB*, 371 F.2d 273, 276 (7th Cir. 1967) (employee complaining about two-cent an hour increase not protected in absence of any evidence that he was acting to induce group action).

38. 330 F.2d 683 (3d Cir. 1964). In *Mushroom Transportation*, a part-time driver, not covered by the bargaining agreement, was alleged to have frequently discussed terms and conditions of employment with employees and to have offered his advice to them on these matters. Although the conversations concerned the rights of the individual employees, the court determined that these conversations were not protected under § 7 of the Act because there was no indication of contemplated group activity. *Id.* at 684-85.

39. *Id.* at 685 ("mere talk" could be concerted activity if it appeared "that it was engaged in with the object of initiating . . . or preparing for group action or that it had some relation to group action in the interest of the employees").

40. *Id.*

41. See *Hugh H. Wilson Corp.*, 414 F.2d at 1348 ("'Mere griping' about a condition of employment is not protected, but when the 'griping' coalesces with expression inclined to produce group or representation action, the statute protects the activity." (quoting *Mushroom Transportation*, 330 F.2d at 685)). See also *Owens-Corning Fiberglas Corp.*, 407 F.2d at 1365 ("The activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity. The one seldom exists without the other.").

42. See *Materials Research*, 262 N.L.R.B. at 1011-13; *E.I. Du Pont de Nemours & Co. v. NLRB*, 724 F.2d 1061, 1065-67 (1983), *vacated*, 733 F.2d 296 (3d Cir. 1984); *E.I. Du Pont de Nemours & Co. v. NLRB*, 707 F.2d 1076, 1078-79 (9th Cir. 1983).

43. For a discussion of the concept of "constructive concerted activity" first introduced in *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295 (1966), and subsequently adopted by the Second Circuit in *Interboro Contractors, Inc. v. NLRB*, 388 F.2d 495 (2d Cir. 1967), see generally Comment, *Constructive Concerted Activity and Individual Rights: The Northern Metal-Interboro Split*, 121 U. PA. L. REV. 152 (1972); see also Wilson, *The Supreme Court Takes One Step Forward and the NLRB Takes One Step Backward: Redefining Constructive Concerted Activities*, 38 VAND. L. REV. 1295 (1985).

Under the *Interboro* doctrine, a single employee acting alone is protected under section 7 if the employee is attempting to enforce provisions of an existing collective bargaining agreement.⁴⁵ Moreover, even without a showing of support on the part of other employees, the court determined that an individual's actions could still be concerted activity if they involved an attempt to enforce contract provisions.⁴⁶ The rationale underlying the concept of "constructive concerted activity" is that an employee's attempts to enforce collective bargaining provisions are an extension of the concerted activity which produced the contract and that, as such, the employee's actions affect the rights of all employees in the bargaining unit.⁴⁷

The *Interboro* doctrine was later extended in *Alleluia Cushion Co.* to include situations in which no collective bargaining agreement existed.⁴⁸ In *Alleluia*, the Board held that "constructive concerted activity" was involved where a nonunion employee filed a safety complaint with the State Occupational Safety and Health Administration (OSHA).⁴⁹ Acknowledging that the employee acted alone, the Board nevertheless found the employee's activity to be protected, even in the absence of either a collective bargaining agreement or any evidence of support from other employees.⁵⁰ The Board noted that safety in the workplace is a concern of all employees and that an employee's assertion of his rights under state health and safety laws carried with it the "implied consent" of his fellow workers.⁵¹ The *Alleluia* rationale thus appeared to be based on two principles: an individual's activity is presumed to be concerted when it relates to an issue of mutual concern and is asserted under a statute enacted for the benefit of employees.⁵²

44. 388 F.2d 495, 499-500 (2d Cir. 1968). In *Interboro*, two employees were discharged following their repeated complaints about contract violations. The court found that the employees' complaints were for a legitimate concerted purpose. Additionally, it dismissed allegations that one of the employees was acting for personal benefit stating that even if there was no showing of support by fellow workers, an employee's actions would be concerted if they involved attempts to enforce provisions of the contract. *Id.*

45. *Id.*

46. *Id.* at 501. Relying on the Board's decision, the court noted that "the Board need not find the complaints to be meritorious in order to hold the activity protected." *Id.* at 500.

47. *See id.* at 500.

48. 221 N.L.R.B. 999, 1000 (1975). *But see* NLRB v. Bighorn Beverage, 614 F.2d 1238, 1242 (9th Cir. 1980) (where the court, relying on a pre-*Alleluia* decision, NLRB v. C & I Air Conditioning, Inc., 486 F.2d 977 (9th Cir. 1973), refused to extend *Interboro* in the absence of a collective bargaining agreement); NLRB v. Dawson Cabinet Co., 566 F.2d 1079, 1084 (8th Cir. 1977) (although agreeing with *Interboro*, the court found it distinguishable in the context of a nonunion setting).

49. 221 N.L.R.B. at 1000-01.

50. *Id.* at 1000. The Board found that "consent and concert of action emanates from the mere assertion" of the rights under the state health and safety laws. *Id.*

51. *Id.*

52. *See* Meyers Indus., 268 N.L.R.B. 493, 499-500 (1984) (Zimmerman, Member, dissent-

Nine years later in *Meyers Industries*,⁵³ the Board overruled *Alleluia* and formulated a new “objective standard” for concerted activity. In *Meyers*, the Board held that an employee in a nonunion plant was lawfully discharged when he refused to drive an allegedly malfunctioning truck and later complained to state authorities about the unsafe condition of the vehicle.⁵⁴ Although the state subsequently determined that the truck was faulty, the Board held that the employee’s activity required evidence of collective interaction in order to gain protection under the Act.⁵⁵ Accordingly, under the *Meyers* test, an employee’s activity is concerted if it is engaged in with the participation or approval of other employees, and not by a lone employee acting in his own self-interest.⁵⁶

However, the strict interpretation of concerted activities enunciated in *Meyers* was recently questioned in *Prill v. NLRB*,⁵⁷ where the United States Court of Appeals for the District of Columbia concluded that neither the Board’s “objective test” nor its rejection of *Alleluia* were required by the language of the Act.⁵⁸ The court reversed *Meyers* in light of the Supreme Court’s opinion in *NLRB v. City Disposal Systems*⁵⁹ where the Court reaffirmed the Board’s broad power to define the boundaries of the section 7 concerted activity requirement.⁶⁰

The facts in *City Disposal* were very similar to *Meyers* except that the employee was in a unionized setting.⁶¹ In a five-to-four decision, the

ing), *remanded sub nom.* *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 313, 352 (1985).

53. 268 N.L.R.B. 493 (1984).

54. *Id.* at 498.

55. *Id.* at 497.

56. *Id.* The Board cautioned that its definition of concerted activity was not a “comprehensive” or “exhaustive” one. Moreover, it noted that the question of whether an employee’s conduct is concerted activity is a factual determination dependent on the particular circumstances of each case. *Id.* at 496-97.

57. 755 F.2d 941 (D.C. Cir.), *cert. denied*, 106 S. Ct. 313, 352 (1985).

58. *Id.* at 956-57. The *Prill* court gave two reasons for its decision. First, the court found that the Board erred in concluding that the Act mandated its narrow definition of concerted activities. In particular, the court found that *City Disposal*, 465 U.S. 822 (1984), “makes clear that the Board is not required to give a narrowly literal interpretation to ‘concerted activities’ but has substantial authority to ‘define’ the scope of § 7.” *Prill*, 755 F.2d at 956. Second, the court found that the *Meyers* test was not a return to pre-*Alleluia* concerted activities standards, as the Board had declared, but it was in fact a more restrictive standard. *Id.* at 956-57.

59. 465 U.S. 822 (1984). For a comparison of *City Disposal* and *Meyers* see Berthel, *Constructive Concerted Activity Under the NLRA: Conflicting Signals from the Court and the Board*, 59 Ind. L. J. 583 (1984); see also Wilson, *supra* note 43, at 1295.

60. 465 U.S. at 829.

61. *Id.* at 824-25. In *City Disposal*, an employee was discharged after he refused to drive a vehicle which he alleged was unsafe. Under Article XXI of the contract between the employer and Teamsters Local 247, “[t]he Employer shall not require employees to take out on the

Supreme Court held that a lone employee who invokes a right derived from a collective bargaining agreement is engaged in concerted activity.⁶² Additionally, relying on the *Interboro* doctrine, the Court found that the employee's assertion of this right affects the rights of all workers covered by the labor contract.⁶³ The Supreme Court explained that "concerted" need not be read literally.⁶⁴ Rather, in light of its expertise in the labor field, the Board should exercise its discretion and construe the term to best effectuate the policies of the Act.⁶⁵ The Court further stated that Congress did not intend to limit the protection extended to individual employees based on the way in which the employee's activity combined with that of his fellow workers.⁶⁶ Instead, it concluded that Congress enacted section 7 to equalize the bargaining power between the employee and the employer by allowing employees to confront collectively the employer on terms and conditions of employment.⁶⁷ Thus, the Court reasoned, an individual employee is protected, even when acting alone, if the employee is participating "in an integral aspect of . . . the entire process of labor organizing, collective bargaining, and enforcement of collective bargaining agreements."⁶⁸

Accordingly, in relation to *City Disposal*, the *Meyers* test appears too restrictive since an employee may participate in an "integral" part of the collective process without the authority of other employees.⁶⁹ Nevertheless, the *City Disposal* majority noted that *Meyers* was distinguishable because it in-

streets or highways any vehicle that is not in safe operating condition It shall be a violation of the Agreement where employees refuse to operate such equipment unless such refusal is unjustified." *Id.* The Court noted that while the employee complained about the questionable safety of the vehicle he did not explicitly refer to Article XXI of the contract. *Id.* at 827.

62. *Id.* at 824-41. The Court reasoned that the act of organizing and joining a union was itself a collective action and that, as such, an employee's invocation of a right derived from the collective bargaining agreement is concerted activity. The Court found that the *Interboro* doctrine compelled the conclusion that an honest assertion of a contractual right was concerted activity despite the fact that the employee may have been wrong in his belief that a right had been violated. *Id.* at 840.

63. *Id.* at 829.

64. *Id.* at 831. Reversing a Sixth Circuit Court of Appeals decision, the Supreme Court reasoned that "[a]lthough one could interpret the phrase, 'to engage in concerted activities,' to refer to a situation in which two or more employees are working together at the same time and the same place toward a common goal, the language of § 7 does not confine itself to such a narrow meaning." *Id.*

65. *Id.* at 829-30.

66. *Id.* While not addressing specifically the § 7 rights of an unorganized employee, the Court did state that Congress intended to protect individual employees participating in the collective bargaining process, although this term was not clearly defined by the Court. *Id.*

67. *Id.* at 835.

68. *Id.*

69. According to the *Prill* court, "*City Disposal* makes it unmistakably clear that, contrary to the Board's view in *Meyers*, neither the language nor the history of section 7 requires that

volved a nonunion workplace and, thus, the “constructive concerted activity” theory established was inapplicable.⁷⁰ Consequently, until the effect of the *Prill* decision is more clearly determined, the concept of concerted activity remains a source of controversy.

II. THE SCOPE AND APPLICATION OF SECTION 7

Employee activity falls within the scope of section 7 protection if it is concerted in nature and pursued either “for the purpose of collective bargaining or other mutual aid or protection.”⁷¹ Despite this language, the scope of section 7 protection remains undefined in many circumstances. Although the dividing line between protected and unprotected employee action has not been drawn precisely, it appears that the predominant concern of the Board and courts is to maintain equality in the bargaining relationship between the employer and the employee.⁷² What has emerged is the implication that this goal should prevail over distinctions based on employees’ representational status.

A. *Development of the Weingarten Right in a Unionized Setting*

In *NLRB v. J. Weingarten, Inc.*, the Supreme Court held that an employee’s request for union representation at a confrontation with the employer satisfied the concerted activity and mutual aid requirements of section 7.⁷³ Initially, the Board found that the employer violated section 8(a)(1) of the Act⁷⁴ by denying the employee’s request for union representation because it interfered with the individual employee’s exercise of section 7 rights.⁷⁵ The Supreme Court upheld the Board’s ruling as a permissible construction of “concerted activities for . . . mutual aid or protection.”⁷⁶ Moreover, the Court concluded that the employee’s action in seeking the

the term ‘concerted activities’ be interpreted to protect only the most narrowly defined forms of common action by employees” 755 F.2d at 952.

70. 465 U.S. at 829 n.6; see also *Meyers*, 268 N.L.R.B. at 496 n.21, where the Board noted that *City Disposal* was pending before the Supreme Court.

71. See *supra* note 4 and accompanying text.

72. See *City Disposal*, 465 U.S. at 835; *Weingarten*, 420 U.S. at 262. See generally Gorman & Finkin, *supra* note 34, at 331-46.

73. 420 U.S. at 260-61. See *supra* note 7 and accompanying text for the facts of *Weingarten*.

74. See 420 U.S. at 252, 257; see also *supra* notes 9, 32, for a discussion of § 8(a)(1).

75. *J. Weingarten, Inc.*, 202 N.L.R.B. 446, 450 (1973).

76. 420 U.S. at 260 (quoting *NLRB v. Peter Caliler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-06 (2d Cir. 1942)). In *Weingarten*, the Supreme Court defined mutual aid and protection as the solidarity created when an individual engages in activity with the support of his fellow workers, who, by joining with the employee, assure themselves of his assistance if they are ever in like circumstances. *Id.* at 261.

assistance of the union representative was within the literal wording of section 7 and thus was protected activity.⁷⁷ The Court cited two reasons for affording the employee protection under the Act.⁷⁸ First, the employee was seeking protection against what she believed to be a threat to her employment security.⁷⁹ Second, the union representative whose assistance she requested was protecting not only the employee's individual "interests, but also the interests of the entire bargaining unit."⁸⁰ Further, the Court found that the Board's construction of section 7 effectuated "the most fundamental purpose[s] of the Act"—to eliminate the imbalance in bargaining power between the employees and the employer.⁸¹ Additionally, the Court noted that requiring a lone employee to attend an interview that he reasonably believes to be disciplinary could perpetuate the imbalance in bargaining power.⁸²

The Court found, however, that this statutory right to representation was not absolute, and therefore, set forth several limitations on its holding.⁸³ First, the Court noted that the employee's right to union representation is based on section 7 of the Act, which guarantees an employee the right to act in concert with other employees for mutual aid.⁸⁴ Second, the right arises only upon the employee's request for representation and the employee may waive the right and participate in the interview without union representation.⁸⁵ Third, the Court held that the right existed only when the employee reasonably believes the investigation will result in disciplinary action.⁸⁶ Fourth, this right may not interfere with legitimate employer prerogatives⁸⁷ and the employer may refuse to grant the employee's request for union representation without offering an explanation.⁸⁸ This employer action leaves

77. *Id.* at 260.

78. *Id.*

79. *Id.*

80. *Id.* at 260-61. The Court reasoned that the presence of the representative assured other employees in the unit that, in like circumstances, they too could obtain the representative's aid and assistance. *Id.* at 261.

81. *Id.* at 261-62.

82. *Id.* at 262.

83. *Id.* at 256. In establishing these limitations the Court relied on two Board cases: *Quality Mfg. Co.*, 195 N.L.R.B. 197 (1972), *enforcement denied in part*, 481 F.2d 1018 (4th Cir. 1973), *rev'd in part*, 420 U.S. 276 (1975) and *Mobil Oil Corp.*, 196 N.L.R.B. 1052 (1972), *enforcement denied*, 482 F.2d 842 (7th Cir. 1973). These opinions, the Court noted, "shaped the contours and limits" of the employee's statutory right to representation. 420 U.S. at 256.

84. 420 U.S. at 256-57.

85. *Id.* at 257. It has also been found that an employee's silence can be an effective waiver of his *Weingarten* right. Moreover, the right to representation at an investigatory interview may be contractually waived so long as the waiver is "clear and unmistakable." *See Prudential Ins. Co. of Am. v. NLRB*, 661 F.2d 398, 400-01 (5th Cir. 1981).

86. 420 U.S. at 257-58.

87. *Id.* at 258.

88. *Id.*

the employee with the options of either continuing the interview without a union representative present, or refusing the interview, thereby losing the benefits that might result.⁸⁹ Finally, the employer is under no duty to bargain with the union representative who attends the investigatory interview.⁹⁰

In their dissent, Justices Powell and Stewart concluded that the interview was not concerted within the meaning of the Act.⁹¹ In their opinion, the right to union representation at an investigatory interview was intended by Congress to be a part of the collective bargaining process,⁹² and they noted that many labor agreements include sections that grant and define this right.⁹³ Additionally, although the dissent did not directly address the issue of unorganized employees' rights to union representation, it found that the section 7 right to act "in concert" in employee interviews existed even in the absence of a recognized union.⁹⁴

Decisions following *Weingarten* have identified several situations in which the rule can be appropriately applied.⁹⁵ These decisions, however, have arisen primarily in an organized setting.⁹⁶ Until 1982, the issue of whether

89. *Id.* at 258-59. The Court presented the reasoning from *Quality Mfg. Co.*, 195 N.L.R.B. at 198-99, to explain its point:

This seems to us to be the only course consistent with all of the provisions of our Act.

It permits the employer to reject a collective course in situations such as investigatory interviews where a collective course is not required but protects the employee's right to protection by his chosen agents.

420 U.S. at 259.

90. 420 U.S. at 259-60; *see also* *Southwestern Bell Tel. Co. v. NLRB*, 667 F.2d 470, 473 (5th Cir. 1982) (employee's right to representation was not violated when the employer refused to allow the *Weingarten* representative to interfere with employer's questioning of the employee).

91. 420 U.S. at 269-70.

92. *Id.* at 270.

93. *Id.* at 275.

94. *Id.* at 270 & n.1.

95. *See* *Certified Grocers*, 227 N.L.R.B. 1211 (1977) (*Weingarten* applies to both investigatory and disciplinary interviews when the employee reasonably believes that discipline may result), *enforcement denied*, 587 F.2d 436 (9th Cir. 1978); *but see* *Baton Rouge Water Works Co.*, 246 N.L.R.B. 995, 997 (1979) (where the Board partially overruled *Certified Grocers* by holding that an employee does not have a § 7 right to union representation in a meeting held solely to notify the employee of, and act upon, a previously determined disciplinary decision based on information obtained prior to the meeting); *Texaco, Inc.*, 246 N.L.R.B. 1021, 1022 (1979) (where the Board expanded on *Baton Rouge* by holding that an employer's offer to allow employees an opportunity to explain or defend themselves after they had been advised of the predetermined discipline did not warrant *Weingarten* protection).

96. *See, e.g.*, *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1392 (5th Cir. 1983); *NLRB v. Southern Bell Tel. & Tel. Co.*, 676 F.2d 499, 500 (11th Cir. 1982); *Prudential Ins. Co. of Am.*, 661 F.2d at 399; *NLRB v. Texaco, Inc.*, 659 F.2d 124, 125 (9th Cir. 1981); *Lennox Indus. v. NLRB*, 637 F.2d 340, 342 (5th Cir.), *cert. denied*, 452 U.S. 963 (1981); *Good Hope Refineries, Inc. v. NLRB*, 620 F.2d 57, 58 (5th Cir.), *cert. denied*, 449 U.S. 1012 (1980).

Weingarten applied to a nonunion setting was addressed only indirectly.⁹⁷ Nevertheless, the consensus in these circumstances has been that the employee is entitled to union representation.⁹⁸

For example, in *Glomac Plastics, Inc.*, the employee was denied union representation by an employer who unlawfully refused to recognize the union as the employee's collective bargaining agent.⁹⁹ Interpreting *Weingarten* broadly, the Board found that the employee has the right to a certain degree of protection against an unjust employer regardless of the employee's representational status.¹⁰⁰ Similarly, in *Crown Cork & Seal Co.*, an employer's refusal to permit a union representative at an employee interview was held unlawful despite the fact that the union's status was still pending at the appellate court level.¹⁰¹

Other decisions have expressed in clearer terms the right of nonunion employees to *Weingarten* representation.¹⁰² In *NLRB v. Columbia University*,¹⁰³ the United States Court of Appeals for the Second Circuit stated that *Weingarten* rights apply equally to unionized and nonunionized workers.¹⁰⁴ The issue was also addressed by the United States Court of Appeals for the Sixth Circuit in *ITT Lighting Fixtures v. NLRB*.¹⁰⁵ There, the employer denied an employee's request for the presence of a fellow employee at an

97. See, e.g., *Illinois Bell Tel. Co. v. NLRB*, 674 F.2d 618 (7th Cir. 1982) (union member instead of union official present); *Crown Cork & Seal Co.*, 659 F.2d 127 (10th Cir. 1981) (no union certification), *cert. denied*, 454 U.S. 1150 (1982); *Anchortank, Inc. v. NLRB*, 618 F.2d 1153 (5th Cir. 1980) (union not certified); *Glomac Plastics, Inc.*, 600 F.2d 3 (2d Cir. 1979) (union certification period extended).

98. *Illinois Bell*, 674 F.2d at 622 (employee was entitled to coemployee witness with no official union status as a representative when no union official was working at the time of the investigatory interview); *Anchortank*, 618 F.2d at 1165 (employee has the right to have a union representative present at a *Weingarten* type interview which occurs during the period between the union's challenged victory in a representation election and its successful certification as the employees' bargaining representative); *Crown Cork & Seal Co.*, 255 N.L.R.B. 14, 48-49 (1981) (*Weingarten* applies where the employer refuses to recognize the union as the employee's bargaining representative), *enforced without opinion*, 691 F.2d 506 (9th Cir. 1982); *Glomac Plastics, Inc.*, 234 N.L.R.B. 1309, 1311 (1978) (employee has a right to certain protections against unjust employer practices whether or not the employee is represented by a union), *enforced*, 592 F.2d 94 (2d Cir. 1979); see also *ITT Lighting Fixtures v. NLRB*, 719 F.2d 851, 854 (6th Cir. 1983) (*Weingarten* rule is applicable "when a union has been approved by the vote of the employees but when a decision on certification is pending.").

99. 234 N.L.R.B. at 1311.

100. *Id.*

101. 255 N.L.R.B. at 48-49.

102. See, e.g., *NLRB v. Columbia Univ.*, 541 F.2d 922, 931 n.5 (2d Cir. 1976); *Anchortank*, 618 F.2d at 1157-58; *ITT Lighting Fixtures*, 719 F.2d at 855-56. See *supra* note 98 for discussion of *Anchortank* and *ITT Lighting Fixtures*.

103. 541 F.2d 922 (2d Cir. 1976)

104. *Id.* at 931 n.5.

105. 719 F.2d at 851.

interview that occurred after the union had been voted in by a majority of employees but before it was certified.¹⁰⁶ The court found that the employee's request was protected under *Weingarten* even though the fellow employee could not have been his certified union representative.¹⁰⁷ In both of these cases, the courts relied on the assumption set forth in the *Weingarten* dissent that the section 7 right to act "in concert" at employee interviews exists not only for organized workers but also for employees in an unorganized setting.¹⁰⁸

*B. Materials Research: Application of Weingarten
in the Nonunion Setting*

The Board directly confronted the issue of whether *Weingarten* rights were applicable to unorganized employees in *Materials Research Corp.*¹⁰⁹ and held that the right to representation at an investigatory interview extended equally to nonunion workers.¹¹⁰ The majority reasoned that the *Weingarten* Court did not intend to limit section 7 protection based on an employee's representational status.¹¹¹ The Board noted that in *Weingarten* an employee's right to representation stemmed from section 7 and not from a union's section 9 right to act as the collective bargaining agent.¹¹² It also indicated that a nonunion employee should be afforded the opportunity to have a witness present to provide a check against arbitrary or unfair acts by the employer and to offer moral support.¹¹³ The Board stressed that an employer has the prerogative to deny an employee's request for representation at an interview leaving the employee with the choice of continuing the interview unassisted or refusing it and foregoing the benefits that may come as a

106. *Id.* at 854. *But see Anchortank*, 618 F.2d at 1161-62. The court concluded that prior to a representation election an employee's action in seeking union representation at an interview did not satisfy the concerted activity requirement. However, following an election where the union wins, the situation changes even if the union's victory is challenged. After the union has won the election, the employer must necessarily perceive the employee's request to be for the concerted mutual aid and protection of his coworkers. *Id.*

107. 719 F.2d at 856.

108. 420 U.S. at 270 n.1. *See also* NLRB v. Columbia Univ., 541 F.2d at 931; *ITT Lighting Fixtures*, 719 F.2d at 855; *Glomac Plastics*, 234 N.L.R.B. at 1311.

109. 262 N.L.R.B. 1010 (1982).

110. *Id.* at 1014.

111. *Id.* at 1012.

112. *Id.* The Board concluded from this that the right is invoked only if the employee makes a request for representation because this activates the concerted activity requirement in § 7. *Id.*

113. *Id.* at 1015. Here the Board reasoned that in the absence of a grievance-arbitration procedure an employee in a nonunion setting may be more apprehensive than one in a unionized facility. *Id.*

result.¹¹⁴

Then-Chairman Van de Water wrote a dissenting opinion that was later relied upon by the majority in *Sears*.¹¹⁵ According to Van de Water, the section 7 right does not attach in the absence of a duly recognized union.¹¹⁶ Rather, he reasoned that as in *Weingarten*, an established collective bargaining agreement and the obligations thereby created were essential to determining the parameters of the employee's right to representation.¹¹⁷

Van de Water argued that the question of whether an employee has a right to representation when no union is present turns on section 9 considerations.¹¹⁸ He stressed that in the absence of a union an employer has no statutory duty to recognize an individual employee or a group of employees on matters concerning terms and conditions of employment.¹¹⁹ However, once the union has been certified, Van de Water reasoned that section 9 requires that the employer deal with the union as the employees' exclusive bargaining representative.¹²⁰ Van de Water also indicated that the *Weingarten* representative is not required to be silent in the interview and thus the representative's role is "strikingly similar to the role of a labor organization in its dealings with an employer."¹²¹

Lastly, Van de Water cited *Emporium Capwell*¹²² to support his conclusion that the right to engage in concerted activity must, in some situations, give way when it contravenes rights guaranteed in other provisions of the

114. *Id.* at 1015-16.

115. *See Sears*, 118 L.R.R.M. at 1330.

116. 262 N.L.R.B. at 1016. *See* Van de Water, *New Trends in NLRB Law*, 33 LAB. L.J. 635, 640 (1982). Former Chairman Van de Water, speaking before the American Bar Association, explained his reasons for dissenting in *Materials Research*. In his view, the *Weingarten* rule applies only in an organized setting where there are union representatives that the employer is obligated to recognize. He noted that while the majority may believe that nonunion employees need protection, it should not be obtained at the expense of the statutory scheme. *Id.*

117. 262 N.L.R.B. at 1018.

118. *Id.* at 1016.

119. *Id.*

120. *Id.* at 1016-17. Van de Water reasoned that once the union has been certified as the employees' exclusive bargaining representative, the employer is no longer free to deal with an employee on an individual basis. This obligation, according to Van de Water, is imposed by §§ 9(a), 8(d) and 8(a)(5) of the Act which require the employer "to deal with employees collectively through their exclusive representative on matters concerning the employees' terms and conditions of employment." In support of his argument, the former Chairman relied on *Texaco, Inc., Houston Producing Div.*, 168 N.L.R.B. 361 (1967), *appeal denied*, 408 F.2d 142 (5th Cir. 1969), a pre-*Weingarten* decision. In *Texaco*, the Board found that an established collective bargaining relationship was an essential factor in determining an employee's right to representation. 262 N.L.R.B. at 1017 (citing *Texaco*, 168 N.L.R.B. at 362).

121. 262 N.L.R.B. at 1019.

122. *See infra* note 146 and accompanying text.

Act.¹²³ Section 7, he reasoned, affords protection to employees who seek mutual aid and protection. However, it does not mandate that an employer accede to the employees' demands in all situations.¹²⁴

Soon after *Materials Research*, two courts produced contrary conclusions on whether a nonemployee's request for the presence of a coworker witness at an investigatory interview was concerted activity under section 7.¹²⁵ In *E.I. Du Pont de Nemours v. NLRB (Du Pont I)*,¹²⁶ a nonunion employee's request for a fellow employee to witness a disciplinary meeting with his supervisor was denied by his employer.¹²⁷ Affirming the administrative law judge's decision, the Board found that the employer violated the Act by refusing the employee's request.¹²⁸

Denying enforcement of the Board's order, the United States Court of Appeals for the Ninth Circuit refused to extend *Weingarten* to the nonunion setting in the absence of a showing of concert between the employee and his fellow workers.¹²⁹ The court noted that in *Weingarten* the assumption of concert was supported by the fact that the union had been organized through the collective action of employees and this ensured that concerted activity would follow an employee's request for assistance.¹³⁰ Nevertheless, the court did not foreclose the possibility that section 7 protection applied to a single employee's request in an unorganized setting as well.¹³¹ However, to meet the requirement of concert there must be a history of group activity or the implication of future collective action; the latter of which the

123. 262 N.L.R.B. at 1020.

124. *Id.* at 1020-21. Van de Water stated, "I believe that Section 7 vigilantly protects the right of employees to seek mutual aid and protection. But I find nothing in the Act which mandates that an employer must, in all instances, accede to the employees' terms." *Id.*

125. See *E.I. Du Pont de Nemours & Co. v. NLRB*, 707 F.2d 1076 (9th Cir. 1983) [hereinafter cited as *Du Pont I*]; *E.I. Du Pont de Nemours & Co. v. NLRB*, 724 F.2d 1061 (1983), *vacated*, 733 F.2d 296 (3d Cir. 1984) [hereinafter cited as *Du Pont II*].

126. *Du Pont I*, 707 F.2d at 1077. In this case, the employer docked employee Henry Burke's pay in response to Burke's unauthorized visit to his doctor. The following day the employer summoned Burke and presented him with documents listing his work deficiencies and the conditions necessary for his continued employment. Burke requested copies of the document but his employer would not comply with his request. Burke then refused to sign the forms unless a coworker was present to witness the transaction. The employer denied Burke's request and subsequently dismissed him. *Id.*

127. *Id.*

128. *E.I. Du Pont de Nemours & Co.*, 262 N.L.R.B. 1040, 1045 (1982).

129. *Du Pont I*, 707 F.2d at 1078.

130. *Id.* The court found that the concerted activity requirement could be assumed since the union had been formed by concerted activity and stood as a guarantee that such activity would result from a request for help. *Id.*

131. *Id.* at 1079 ("[U]nionization is not the only sure indicator of concertedness. There must, however, be a showing that the requesting employee acts as part of a group.").

court found to be "wholly speculative" in *Du Pont I*.¹³² Additionally, although acknowledging *Materials Research*, the court did not comment on the Board's ruling.¹³³

In a case decided shortly thereafter, the United States Court of Appeals for the Third Circuit reached a different conclusion on whether an unorganized worker's request for the presence of a coemployee witness at an investigatory interview met the concerted activity requirement of section 7.¹³⁴ In *Du Pont de Nemours v. NLRB (Du Pont II)*,¹³⁵ the court enforced the Board's ruling that *Weingarten* applied in nonunionized settings¹³⁶ where an employee who was called in for an interview with his supervisor refused to attend without a coworker witness present.¹³⁷

In deciding that the Board's interpretation of the Act was permissible, the court observed that *Weingarten* did not expressly limit its holding to a union setting.¹³⁸ The Third Circuit listed several reasons to support its conclusion. First, the employee's request for the presence of a coworker "builds solidarity and vigilance among employees in the absence of a union no differently than it does where a collective bargaining representative has been recognized."¹³⁹ Second, the application of *Weingarten* in a nonunion setting negates any inequality in the bargaining power that may exist between employees and the employer.¹⁴⁰ The court noted that the presence of a coworker may lead to a more efficient handling of the dispute and may help the parties to settle the dispute on an informal basis.¹⁴¹

Addressing the Ninth Circuit's decision in *Du Pont I*, the Third Circuit concluded that the Ninth Circuit's interpretation of *Weingarten* was "foreclosed by the Supreme Court's expansive interpretation of Section 7 in the

132. *Id.*

133. *Id.* at 1077 n.1.

134. *Du Pont II*, 724 F. Supp. at 1061. Following a petition for rehearing by Du Pont, the court granted a panel rehearing and remanded the case to the Board for reconsideration. In light of the *Sears* decision the Board found that the employee's refusal to submit to the interview was not protected activity. See E.I. Du Pont de Nemours, 274 N.L.R.B. No. 176 (1985).

135. *Du Pont II*, 724 F.2d at 1061.

136. *Id.*

137. *Id.* at 1063.

138. *Id.* at 1065-66. The Third Circuit noted that the *Weingarten* Court was aware that its decision would be extended to a nonunion setting, and had the Court meant to limit its opinion to an organized situation, it would have clearly expressed this intention.

139. *Id.* at 1066. The court added "[s]uch voluntary action by one worker on behalf of another may stimulate others to follow the example, thereby establishing a matrix of mutual support and assistance." *Id.*

140. *Id.* The court reasoned that the worker's perception of any inequality may be heightened when no union is present, and the risk of employer misconduct may also be accentuated. *Id.*

141. *Id.*

Weingarten opinion itself.”¹⁴² Indeed, the court reasoned that under the *Weingarten* analysis, the proper focus for determining whether the requirement of concertedness is satisfied should be on the “literal nature” of the activity that would occur if the employee’s request was granted.¹⁴³

C. *The Effect of Section 9 on the Concerted Activity Requirement of Section 7*

One final difficulty in determining the scope of section 7 involves balancing the concerted activity requirement against other provisions of the Act. In particular, section 9,¹⁴⁴ which confers on the union the exclusive right to represent employees on terms and conditions of employment, has been weighed against section 7 in several decisions.¹⁴⁵ For example, in *Emporium Capwell, Co. v. Western Community Organization*,¹⁴⁶ the Supreme Court concluded that the concerted actions of unionized workers may be denied the section 7 protection which they might otherwise have obtained when such activity contravenes the union’s role as the exclusive bargaining representative for all unit employees.¹⁴⁷ Accordingly, the Court found that the exclusivity principles in section 9 should prevail over section 7 to ensure the continued strength of the collective bargaining unit.¹⁴⁸

Several courts have distinguished *Emporium Capwell* in circumstances where the protesting employee’s activity is not an attempt to undermine or bypass the union’s domain.¹⁴⁹ In *Dreis & Krump Manufacturing Co. v.*

142. *Id.*

143. *Id.* at 1066.

144. *See supra* note 25 and accompanying text.

145. *See Emporium Capwell v. Western Addition Community Org.*, 420 U.S. 50, 61-65 (1975); *Moore v. Sunbeam Corp.*, 459 F.2d 811, 817 (7th Cir. 1972) (employee’s independent efforts to resolve dispute with employer were in violation of no-strike agreement and without union support); *United Parcel Serv.*, 205 N.L.R.B. 991, 991 n.1 (1973) (picketing employees acting in contravention of established grievance procedure were not protected by § 7).

146. 420 U.S. at 50. In *Emporium Capwell* organized employees engaged in picketing to force the employer to deal with them and not with the union over the issue of racial discrimination. The Supreme Court found that the employer did not violate the Act by discharging the employees because, although § 7 guarantees employees the right to engage in “concerted activity,” this right cannot be pursued in contravention of § 9 which recognizes the union’s status as exclusive bargaining representative.

147. 420 U.S. at 70.

148. *Id.* at 69-70.

149. *See Richardson Paint Co. v. NLRB*, 574 F.2d 1195, 1205-06 (5th Cir. 1978) (employee engaging in concerted activity when peacefully passing out petition during nonwork-time to protest coworker’s layoff); *Dreis & Krump Mfg. Co.*, 544 F.2d at 327 (employee distributing leaflets derogatory of employer held lawful where employee had previously filed a grievance and was pursuing it); *NLRB v. Lasaponara & Sons, Inc.*, 541 F.2d 992, 998-99 (2d Cir. 1976) (one day work stoppage by employees was protected concerted activity absent any evidence of group acting contrary to union’s advice), *cert. denied*, 430 U.S. 914 (1977); *but see*

NLRB,¹⁵⁰ the United States Court of Appeals for the Seventh Circuit held that an employee was unlawfully discharged for distributing leaflets to fellow workers that were critical of the employer.¹⁵¹ Noting that the employee had a grievance pending against the employer,¹⁵² the court found that the employee's activity was an attempt to complement and not circumvent the union's activity.¹⁵³ Moreover, the critical inquiry, according to the court, was whether the purpose of the employee's activity was within the contemplation of section 7.¹⁵⁴

Similarly, the United States Court of Appeals for the Seventh Circuit in *East Chicago Rehabilitation Center, Inc. v. NLRB*,¹⁵⁵ found that a spontaneous and unorganized walkout by several employees at a nursing home to protest unilateral changes in terms of employment was protected under section 7.¹⁵⁶ Unlike the situation in *Emporium Capwell*, the court found that the collective activity in *East Chicago* was not engaged in to circumvent the bargaining process but was an example of concerted activity which was covered under the Act.¹⁵⁷ The Seventh Circuit stated that in *East Chicago*, the workers were not trying to force the employer to bargain with them directly but were instead protesting the employer's unilateral changes.¹⁵⁸ Their actions, the court indicated, were "but an instance of what section 7 protects under the rubric of 'other concerted activities for the purpose of . . . mutual aid or protection.'" ¹⁵⁹ The court concluded that section 9 only qualifies the portion of section 7 that assures workers the right to bargain collectively; it does not, however, impede or infringe upon an employee's section 7 right to

NLRB v. Wilson Freight Co., 604 F.2d 712, 725 n.17 (1st Cir. 1979) (employee complaints in opposition of positions taken by the union itself not entitled to § 7 protection).

150. 544 F.2d 320 (7th Cir. 1976).

151. *Id.* at 323-24.

152. *Id.* at 326.

153. *Id.* at 327.

154. *Id.* The Seventh Circuit found that the employee's purpose in distributing the leaflets was to notify fellow employees of alleged supervisory deficiencies. The court found the employee's purpose to be clearly for "'mutual aid or protection' of the employees" regardless of the fact that the employee acted alone. *Id.*

155. 710 F.2d 397 (7th Cir. 1983), *cert. denied*, 465 U.S. 1065 (1984).

156. *Id.* at 400. The Seventh Circuit distinguished the facts in this case from the circumstances in *Emporium Capwell*. It noted that unlike *Emporium*, the workers here were not dissatisfied with the union or attempting to circumvent the bargaining agreement. Rather, the court stated, the employees were merely expressing their anger at the employer's unilateral change in work rules. *Id.*

157. *Id.* at 400-01. The court stated that unless the purpose of the wildcat strike is to assert a right to bargain collectively in place of the union or to limit the union's bargaining power § 9 does not render strikers unprotected under § 7. *Id.*

158. *Id.* at 400.

159. *Id.*

participate in concerted activity for mutual aid and protection.¹⁶⁰

III. RESTRICTING THE SCOPE OF SECTION 7 PROTECTION: AN
ANALYSIS OF THE BOARD'S DECISION IN *SEARS*,
ROEBUCK & CO.

In reaching the conclusion that unorganized workers are not entitled to the presence of a coworker witness at an employer-conducted interview, the Board in *Sears* set forth two main arguments.¹⁶¹ First, the Board found that in a unionized setting the *Weingarten* rule is consistent with section 9 because an employer seeking to take action against an employee must recognize the union's representational rights and cannot compel the employee to meet on an individual basis.¹⁶² In agreement with former Chairman Van de Water's dissenting opinion in *Materials Research*, the Board asserted that protected section 7 rights are limited by the principles of exclusive representation established in section 9 of the Act.¹⁶³

Second, the Board reasoned that the *Weingarten* representative who may speak on behalf of the employee and make proposals during the investigatory interview functions much like a union representative.¹⁶⁴ As a result, the employees receive the benefit of a collective bargaining agreement without having selected a union as their authorized bargaining representative.¹⁶⁵ The Board found that this too contravened the Act's exclusivity principle.¹⁶⁶

In the first argument, the Board ignores one of the basic principles enunciated in *Weingarten*—the representative's role of protecting not only the lone employee, but the entire bargaining unit as well against unjust employer discrimination.¹⁶⁷ In narrowly interpreting *Weingarten*, the Board found this principle applicable only in a unionized setting.¹⁶⁸ In reality, however, the need for the presence of a coworker in a nonunion setting may be even more pressing because the imbalance in power and the risk of employer intimidation is often greater.¹⁶⁹

Further, the Board overlooks the limitations on the right, as stated by the *Weingarten* Court, which involve certain acts or omissions on the part of

160. *Id.* at 402.

161. 118 L.R.R.M. at 1330-31.

162. *Id.* at 1330.

163. *Id.* For a discussion of Van de Water's dissenting opinion, see *supra* text accompanying notes 117-26.

164. 118 L.R.R.M. at 1331.

165. *Id.* at 1330.

166. *Id.* at 1331.

167. *Id.* See *supra* note 80 and accompanying text.

168. 118 L.R.R.M. at 1330.

169. See *DuPont II*, 724 F.2d at 1066.

both the employer and the employee.¹⁷⁰ For example, the right to representation is not automatic. In order for the right to be activated the employee must request the presence of a witness.¹⁷¹ Once the request is made, the employer may refuse the request and discontinue the interview at once.¹⁷² Moreover, the employer is under no obligation to explain his reasons for denying the request and the interview can still take place without a coemployee witness present if the employee chooses to participate on his own.¹⁷³ In other words, employer prerogative determines whether *Weingarten* rights will be extended to the employee.¹⁷⁴ Thus, the *Weingarten* right is not guaranteed in all circumstances; rather, it is a conditional privilege subject to the employer's consent.¹⁷⁵

Moreover, the Board's reliance on the section 9 principles enunciated in *Emporium Capwell*¹⁷⁶ is erroneous. Section 9 deals with the rights of employers and employees to resolve disputes, directly and independent of any involvement by the designated collective bargaining representative,¹⁷⁷ without the employer being held liable for breach of a duty to bargain with the union under section 8(a)(5) of the Act.¹⁷⁸ In *Emporium Capwell*, section 9 was relevant since there was a union present that the protesting employees purposely bypassed in an attempt to deal with the employer directly.¹⁷⁹ Un-

170. See 420 U.S. at 61-70.

171. See *supra* text accompanying note 85.

172. See *supra* text accompanying note 88.

173. See *supra* text accompanying note 89.

174. See *supra* text accompanying note 88.

175. See *supra* note 89.

176. See 420 U.S. at 61.

177. See *supra* note 34 and accompanying text.

178. National Labor Relations Act § 9(a). As codified, this provision states that:

[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees . . . shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . [p]rovided, 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.

29 U.S.C. § 159(a) (1982). See also *Emporium Capwell*, 420 U.S. at 61 n.12 (“[t]he intentment of the proviso is to permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive bargaining representative, a violation of § 8(a)(5)”; *Black-Clawson Co.*, 313 F.2d at 185 (“section 9(a) merely set[s] up a buffer between the employee and his union, ‘permitting’ the employee to take his grievances to the employer, and ‘authorizing’ the employer to hear and adjust them without running afoul of the ‘exclusive bargaining representative’ language of the operative portion of section 9(a)” (footnote omitted))).

179. 420 U.S. at 56.

like *Emporium Capwell* there was no certified union involved in *Sears*.¹⁸⁰ Thus, the employee's request for the presence of a coemployee witness would not present the same dilemma.

Despite the factual distinction in *Emporium Capwell* and *Sears*, there is no language in section 9 that explicitly expands or limits the section 7 rights.¹⁸¹ Rather, as the Seventh Circuit found in *East Chicago*, section 9 clarifies the section 7 right to bargain collectively.¹⁸² This argument is buttressed by the fact that, by its own provisions, the Act precludes any interference with certain concerted activities such as the right to participate in a strike.¹⁸³ Therefore, while section 9 affects some section 7 rights of organized employees, it does not restrict the scope of section 7 protection afforded to unorganized workers.

The most fundamental distinction, however, between *Emporium Capwell* and *Sears* rests on the Supreme Court's holding that, in a *Weingarten* setting, there is no duty on the part of the employer to bargain with the representative.¹⁸⁴ Accordingly, *Emporium* is irrelevant to the outcome of *Sears* since the controversy in the latter has nothing to do with collective bargaining.

In the same sense, the second assertion by the Board that the representative functions as a collective bargaining agent conflicts with the contours and limits imposed by the *Weingarten* Court.¹⁸⁵ The right to representation was extended as a function of the section 7 "concerted activities for . . . mutual aid or protection" requirement and not as a function of the section 7 right to bargain through a union representative.¹⁸⁶ Moreover, the *Weingarten* representative's duties are not those of a traditional bargaining representative.¹⁸⁷ A union agent may not do any more in an interview than a coemployee witness.¹⁸⁸ Thus, a fellow employee could serve as a *Weingarten* representative as well as an officially designated union representative.

Similarly, the representative's presence, as noted in *Weingarten* and *Materials Research*, may in fact lead to a more efficient and speedy resolu-

180. 118 L.R.R.M. at 1329.

181. See *ARO, Inc.*, 596 F.2d at 719; Gorman & Finkin, *supra* note 34, at 357.

182. 710 F.2d at 400. See *supra* text accompanying note 160.

183. Section 13 provides that "[n]othing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike." National Labor Relations Act § 13 (codified as amended at 29 U.S.C. § 163 (1982)).

184. See *Weingarten*, 420 U.S. at 259-60.

185. See *supra* text accompanying notes 83-90.

186. See *supra* text accompanying notes 76-77.

187. 420 U.S. at 260.

188. See *Illinois Bell*, 251 N.L.R.B. at 934.

tion of the problems that would, in turn, minimize any detrimental effects on the employer's production activities.¹⁸⁹ Additionally, as the *Weingarten* Court emphasized, the employer is under no duty to bargain with the union representative and may insist on hearing the employee's own version of the incident under investigation.¹⁹⁰ More importantly, however, the employer has the power to limit the representative's involvement in the interview without explanation or consideration of the employee's rights.¹⁹¹

In light of the Board's misplaced reliance on *Emporium Capwell*, the analysis in *Sears* should focus on whether or not the lone employee's request for assistance is concerted activity. In this regard, the *Mushroom Transportation* court recognized that collective action begins with communication between individuals.¹⁹² Accordingly, the individual's activity in *Sears* would be protected because the employee's conversation met the standard as set forth in *Mushroom Transportation* of "mere talk . . . looking toward group action."¹⁹³

In contrast to the broad test adopted in *Mushroom Transportation*, the Ninth Circuit in *Du Pont I* set forth a narrow interpretation of section 7, thereby limiting the application of *Weingarten* in the unorganized setting.¹⁹⁴ Under the *Du Pont I* standard, the court would require a backdrop of group activity before extending *Weingarten* rights to a nonunion employee.¹⁹⁵ Consequently, an employer's denial of an employee's request for representation at an investigatory interview would effectively curtail any effort by the employee to enlist the support of coworkers.

Nevertheless, the *Meyers* test, which like *Du Pont I* presented an overly restrictive interpretation of section 7, was viewed by Board Member Dennis as encompassing an employee's request for a coworker witness in *Sears*.¹⁹⁶ In Dennis' view, the request "is an attempt to initiate concerted activity be-

189. 420 U.S. at 263; *Materials Research*, 262 N.L.R.B. at 1015; see *Du Pont II*, 724 F.2d at 1065-66.

190. 420 U.S. at 260.

191. See *supra* text accompanying notes 87-90.

192. 330 F.2d at 685. See *supra* notes 38-39 and accompanying text.

193. 330 F.2d at 685. See *supra* text accompanying notes 38-40. In *Sears*, Ward sought the presence of a coworker witness to accompany him during his interview. Under the expansive *Mushroom Transportation* test, Ward's conversations would constitute concerted activity since he was attempting to initiate group activity. Moreover, the fact that no collective action came as a result of his demands is not determinative since, according to the *Mushroom Transportation* court, "it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition." 330 F.2d at 685.

194. See *supra* notes 126-31 and accompanying text.

195. *Du Pont I*, 707 F.2d at 1079. See *supra* note 131 and accompanying text.

196. See *supra* note 23 and accompanying text.

cause, if successful, two employees would together confront the employer as it considered whether to impose discipline."¹⁹⁷

The impact of *Interboro* and other decisions that derive protection for a lone employee's activities from existing collective bargaining agreements will become clearer when the effect of *Prill* is considered in future decisions. It appears from *City Disposal*, however, that the Supreme Court's concern for equality in employee and employer relations necessitates that the Board apply a broader interpretation of concerted activity.¹⁹⁸

In this regard, the question of whether concerted activity must be literally construed to require more than one employee has been answered in the negative by the Supreme Court in *City Disposal*. Therefore, a lone employee's request for assistance arguably constitutes concerted activity. Although the existence of a collective bargaining agreement creates a presumption of collective action, in *Sears* the nonunion employee's request for a coworker witness may in itself be an example of employees seeking to act together.¹⁹⁹

Likewise, the employee's request represents activity for mutual aid or protection as all employees are assured that, in similar circumstances, they too can seek the assistance of a coworker. By limiting *Weingarten* to the organized setting, nonunion workers would be unable to gain the collective strength necessary to protect against unfair acts by the employer. Inequality in bargaining power would be greater in the nonunion setting. This is a result that is clearly in contravention of the Act.²⁰⁰ Such disparate treatment might conceivably force nonunion workers to affiliate with unions involuntarily in order to gain equal treatment in the workplace.

The *Weingarten* Court stressed the importance of the right to representation at an investigatory interview as a means of reducing the inequality in bargaining power between labor and management.²⁰¹ Therefore, national labor policy mandates the extension of *Weingarten* to a nonunion setting in order to effectively minimize the disparities in the workplace that the Act seeks to eliminate.²⁰²

197. 118 L.R.R.M. at 1330 n.8. See *supra* note 23 and accompanying text.

198. See *supra* note 69 and accompanying text.

199. See *supra* note 23 and accompanying text.

200. 420 U.S. at 261-62.

201. *Id.* See *supra* notes 115, 142, and accompanying text.

202. Recently, the third circuit directed the Board to reconsider its ruling that an employee in an unrepresented setting was lawfully discharged for refusing to submit to an investigatory interview unless a fellow employee was present. The court observed that the Board's dismissal of the complaint was premised on the erroneous view that a refusal to extend *Weingarten* to nonunion employees was compelled by the Act. The court now views it permissible in some circumstances to interpret § 7 as guaranteeing union and nonunion employees alike the right to have a representative present at an investigatory interview. However, the court also held

Accordingly, the employee's request in *Sears* represented protected concerted activity despite the absence of a union. Underlying this argument, however, is the fact that the employer may deny the employee's request and continue the investigation without the employee.²⁰³ Consequently, any partial benefits resulting from the employee's concerted activity may be limited by the actions of the employer. Despite the ultimate limitations that may exist on the "fruits" of the employee's concerted action, limits should not be imposed on the right to engage in this activity.

IV. CONCLUSION

In *Sears*, the Board imposed limitations on an employee's right to engage in section 7 concerted activity based on the individual's representational status. Consequently, unorganized workers were denied rights afforded to their organized counterparts, thereby allowing opportunity for an imbalance in employee and employer bargaining power to perpetuate in the workplace. The Supreme Court in *Weingarten* clearly stressed the need to protect employees in situations where the possibility of unjust employer action may exist. *Sears* thwarts this goal, however, by restricting the scope of section 7 based on the exclusivity principles set forth in section 9. Although section 9 should not be underestimated, it should not outweigh the protections guaranteed under section 7. Without section 7 employees would be unable to engage in concerted activity, including joining and forming unions, without the fear of employer reprisal.

In this respect, the *Weingarten* right to representation at an investigatory interview cannot be limited to the organized setting. An employee's request for the presence of a coworker witness constitutes an attempt to engage in concerted activity, albeit in its most formative stage. National labor policy necessitates that this attempt at collective action be protected under a broader interpretation of the section 7 concerted activity requirement. In this light, it is apparent that the Board should reassess its current direction and promote equality in labor-management relations in *all* work settings.

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open the possibility that the Board's position in *Sears* was a permissible interpretation of the Act. See *Slaughter v. NLRB*, 794 F.2d 120 (3d Cir. 1986).

203. 420 U.S. at 258. See *supra* text accompanying notes 88-89.

