Pace Law Review

Volume 28
Issue 1 *Fall 2007*

Article 3

September 2007

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Introduction

Consider the following scenario: A delivery truck driver causes an accident that disables his vehicle. A company supervisor who responds to the scene notices that the driver's eyes are bloodshot; he also appears disoriented and slurs his words. Pursuant to the company's drug and alcohol policy, the supervisor has the right to send an employee to the company's medical department for drug and alcohol testing if there is reasonable suspicion to believe that he or she is under the influence of drugs or alcohol while on-duty. Such a test is not mandatory. The supervisor has discretion to determine whether an accident warrants drug or alcohol testing. Based on what she has observed, the supervisor believes that such testing is necessary to determine whether the employee was under the influence of drugs or alcohol when the accident occurred.

Upon informing the employee of the supervisor's decision to send him to the company's medical department for drug and alcohol testing, the employee immediately requests union representation. There is no union steward at the scene of the accident, but after making a phone call, the supervisor determines that a union steward can report to the accident scene in approximately one hour. The employee is insistent on union representation before he even reports to the company's medical department for testing. What should the supervisor do?

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Drug and alcohol testing of employees has become commonplace in the American workplace.[1] Whether it be pre-employment screening, random or "reasonable suspicion"[2] testing of current employees, many employers, both unionized and non-unionized, believe that such testing is essential to ensure a safe and productive workforce:[3]

> Employers, whether public or private, have a right to control their workplace to ensure its efficiency, safety, and in the private sector, profitability. Substance abuse adversely affects all three concerns. . . . [A]ccident rates for substance abusers are three and one-half times greater than for non-abusers. Industrial accidents (which normally lead to workers' compensation claims) are likely to occur two or three times more often with alcoholic employees. Absenteeism and tardiness is three times greater. Furthermore, the quality of the abuser's work is generally substandard.
>
> In exchange for the employer's right to control the workplace the law imposes certain duties upon him. The employer's duty to provide employees with a safe working environment is imposed by statute and common law. Public employers have an additional general duty to protect the public welfare. Substance abuse testing may be undertaken by employers exercising these rights and

1. *See* Leslie Paik, *Organizational Interpretations of Drug Test Results*, 40 LAW & SOC'Y REV. 931, 931 (2006) ("Mandatory drug testing in America has become an increasingly prevalent way to monitor people's drug-free behavior in many facets of everyday life."); Stephen O. Griffin, Adrienne Keller & Alan Cohn, *Developing a Drug Testing Policy at a Public University: Participant Perspectives*, 30 PUB. PERSONNEL MGMT. 467 (2001) (citing the statistic that, in 1996, 81 percent of all major corporations performed some sort of drug testing on employees).

2. "Reasonable suspicion" testing generally involves the testing of employees after an employee has exhibited some physical symptom or other indicator of drug or alcohol use while working, or has committed a serious safety infraction such as an automobile accident or a traffic violation. *See, e.g.*, Dykes v. S. Pa. Transp. Auth., 68 F.3d 1564, 1567-70 (3d Cir. 1995) (discussing legality of public employer's reasonable suspicion testing); *see also* Melissa Skidmore Cowan, Note, *Workers, Drinks, and Drugs: Can Employers Test?*, 55 U. CIN. L. REV. 127, 134-37 (1986) (discussing reasonable suspicion drug and alcohol testing of employees).

3. Safety concerns notwithstanding, numerous scholars have debated the impact of drug testing on employee privacy. *See, e.g.*, Paul F. Gerhart, *Employee Privacy Rights in the United States*, 17 COMP. LAB. L.J. 175 (1995); Matthew W. Finkin, *Employee Privacy, American Values, and the Law*, 72 CHI.-KENT L. REV. 221 (1996). For a thought-provoking discussion that challenges whether drug testing programs in the state of Alaska provide value to employers, *see* Mechelle Zarou, Note, *The Good, the Bad, and the Ugly: Drug Testing by Employers in Alaska*, 16 ALASKA L. REV. 297 (1999).

discharging these duties. However, these employer interests must be balanced against the rights of individual employees.[4]

Given the substantial numbers of employers that regularly test employees for drug and alcohol use in the workplace, it is surprising that one issue that the National Labor Relations Board ("NLRB" or the "Board") has not completely explored is the application of *Weingarten* rights to drug and alcohol testing.[5] Although there has been no Board decision that directly considers and fully addresses this issue, existing NLRB and administrative law judge decisions generally have assumed that *Weingarten* rights attach in the context of drug and alcohol testing of employees. For the most part, state labor relations boards and labor arbitrators have reached the same conclusion.

This article discusses the applicability of *Weingarten* rights to employee drug and alcohol testing and concludes that such application makes no sense and cannot be justified based upon existing law or public policy. More specifically, when an employee provides a hair, urine, blood or breath sample, he or she is not submitting to an investigatory interview; nor is the employee being interrogated in a way that he or she can provide an incriminating statement that may subject the employee to disciplinary action. Thus, a drug or alcohol test of an employee should not implicate *Weingarten* rights in any way. Indeed, such a conclusion is entirely consistent with how the NLRB has treated employees' assertion of *Weingarten* rights in the context of other medical procedures, including employee physical examinations by company doctors.

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4. Michael S. Cecere & Philip B. Rosen, *Legal Implications of Substance Abuse Testing in the Workplace*, 62 NOTRE DAME L. REV. 859, 860 (1987); *see also* Mark A. Rothstein, *Drug Testing in the Workplace: The Challenge to Employment Relations and Employment Law*, 63 CHI.-KENT L. REV. 683, 687-91 (1987) (discussing cost of employee drug use to employers). The effectiveness of drug and alcohol testing of employees on improving workplace safety has long been debated. *See, e.g.*, Mireille Jacobson, *Drug Testing in the Trucking Industry: The Effect on Highway Safety*, 46 J.L. & ECON. 131 (2003).

5. As set forth, *infra*, in Section II, *Weingarten* rights refer to a unionized employee's right to have a union representative present at an investigatory interview if the employee reasonably believes that discipline may result from the interview. NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975); *see also* Daniel J. Herron, *Ten Years After* Weingarten*: Are the Standards Really Clear?*, 6 N. ILL. U. L. REV. 81 (1986) (discussing the *Weingarten* decision and the development of *Weingarten* rights).

Moreover, the assertion of *Weingarten* rights in the context of drug and alcohol testing has the capacity to defeat the purpose of the test. That is, any delay brought about by an employee's invocation of *Weingarten*—such as the time it may take to locate a union representative before requiring that the employee undergo the procedure—may make the test less reliable and thus thwart the employer's interest in determining whether the employee was under the influence of drugs or alcohol while working. Finally, there is very little benefit for an employee to have a union representative present during drug and alcohol testing. Indeed, the only conceivable purpose or benefit to an employee of having a union representative present is to advise the employee as to whether the particular test was properly required. Such a benefit does not justify the application of *Weingarten* to drug and alcohol testing as existing law already provides an adequate remedy for an employer's decision to improperly test an employee.

Accordingly, any attempt to apply *Weingarten* rights during employee drug and alcohol testing is an attempt to pound a square peg into a round hole—the two concepts just do not fit together.

I. *Weingarten* Rights: An Overview

The basic parameters of an employee's right to union representation in the workplace were outlined by the Supreme Court in *NLRB v. J. Weingarten, Inc.*[6] In *Weingarten*, the Court considered whether an employer's decision to deny union representation to an employee who requested it throughout an interview, conducted during an investigation of employee theft, violated the employee's rights under the National Labor Relations Act ("NLRA" or the "Act").[7] Specifically, the employer in *Weingarten* was a retail store.[8] The store manager and a "Loss Prevention Specialist" summoned the employee for an interview concerning an allegation that she had purchased a $2.98 box of

6. *Weingarten*, 420 U.S. 251 (1975).

7. *Id.* at 252-53. The NLRA is the most commonly-used name for the Labor Management Relations Act (also known as the Wagner Act). The NLRA is codified at 29 U.S.C. § 151 *et seq.*

8. *Weingarten*, 420 U.S. at 254.

chicken, but only placed $1 in the cash register.[9] On several occasions while being questioned, the employee requested that her shop steward or some other union representative be brought to the interview.[10] The employer denied those requests.[11]

Based upon the employer's denial of the employee's request for a union representative during the interview, the union filed an unfair labor practice charge.[12] Essentially, the charge claimed that the employer's denial of union representation during the investigatory interview violated the employee's rights under Section 7 of the NLRA.[13] The NLRB found that the employer's actions did violate the Act, holding that Section 7 of the NLRA creates a statutory right for an employee to refuse to submit to an investigatory interview without union representation if the employee reasonably fears that discipline may result from the interview.[14] The Board defined the contours of this statutory right as follows:

- The right arises from the NLRA's "guarantee of the right of employees to act in concert for mutual aid and protection;"[15]
- The right arises only where the employee actually requests representation;[16]
- The right is limited only to interviews "where the employee reasonably believe[s] the investigation will result in disciplinary action;"[17]
- An employee's decision to exercise his or her rights "may not interfere with legitimate employer prerogatives;"[18] and

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9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 255.

13. *Id.* at 252-53. Among other things, Section 7 of the NLRA protects employees' rights to engage in "concerted activity" for "mutual aid or protection." 29 U.S.C. § 157 (2007). Section 8(a)(1) of the NLRA makes it an unfair labor practice for employers to interfere with, restrain or coerce employees in the exercise of their Section 7 rights. 29 U.S.C. § 158(a)(1) (2007).

14. *Weingarten,* 420 U.S. at 256.

15. *Id.*

16. *Id.* at 257.

17. *Id.*

18. *Id.* at 258.

- The employer does not have a "duty to bargain with any union representative who may be permitted to attend the investigatory interview."[19]

The Board also made clear that the right does not attach to every employee interaction with management:

> We would not apply the rule to such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative.[20]

The United States Court of Appeals for the Fifth Circuit held that the Board's decision was an impermissible construction of employee rights under the NLRA and, thus, overturned the NLRB's decision.[21] The Supreme Court, however, in an opinion by Justice William Brennan, reversed the Fifth Circuit decision and held that the Board's ruling was "a permissible construction of 'concerted activities for . . . mutual aid or protection' by the agency charged by Congress with enforcement of the Act . . . ."[22] In so holding, Justice Brennan explained the type of assistance a union representative could provide to an employee during an investigatory interview:[23]

> A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or

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19. *Id.* at 259.

20. *Id.* at 257-58 (quoting Quality Mfg. Co., 195 N.L.R.B. 197, 199 (1972)). One commentator has defined an "investigatory interview" as follows:

> When an employer investigates workplace misconduct, it may interview employees who are either suspected of misconduct or believed to have knowledge of employee misconduct. If a meeting is conducted between an employer and an employee prior to a decision to discipline an employee, under Section 7 the meeting is an investigatory interview.

Nancy J. King, *Labor Law for Managers of Non-Union Employees in Traditional and Cyber Workplaces*, 40 AM. BUS. L.J. 827, 841 (2003).

21. *Weingarten*, 420 U.S. at 253.

22. *Id.* at 260.

23. For an interesting discussion of Justice Brennan's background in labor law and labor law jurisprudence, *see* B. Glenn George, *Visions of a Labor Lawyer: The Legacy of Justice Brennan*, 33 WM. AND MARY L. REV. 1123 (1992). Professor George posits that Justice Brennan's decision in *Weingarten* was designed "to diminish the employee's isolation and align her with the union." *Id.* at 1173.

> inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. 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. Certainly the presence need not transform the interview into an adversary contest.[24]

According to the NLRB, if an employee properly asserts his or her *Weingarten* rights during an investigatory interview, the employer essentially has three options: (1) grant the request for representation; (2) discontinue the interview; or (3) inform the employee that the interview will not proceed unless the employee is willing to continue without representation.[25] The Board has made clear, however, that an employee's right to union representation only attaches to an investigatory interview.[26]

Since 1975, the law of employee *Weingarten* rights has developed and evolved and the Board has attempted to set forth the parameters of a union representative's role during an investigatory interview. The Board specifically has held that a union representative is not permitted to disrupt an investigatory interview.[27] The Board also has made clear, however, that an employer must delay an interview to allow time for the union

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24. *Weingarten*, 420 U.S. at 262-63.

25. Roadway Express, 246 N.L.R.B.1127, 1129 (1984). For a discussion of the potential remedies that may be ordered by the Board based upon a finding that an employee's *Weingarten* rights have been violated, *see* Michael D. Moberly & Andrea G. Lisenbee, *Honing Our Kraft?: Reconciling Variations in the Remedial Treatment of* Weingarten *Violations*, 21 HOFSTRA LAB. & EMP. L.J. 523 (2004).

26. *See, e.g.*, Baton Rouge Water Works Co., 246 N.L.R.B. 995, 997 (1979) ("[U]nder the Supreme Court's decision in *Weingarten*, an employee has no Section 7 right to the presence of his union representative at a meeting with his employer held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision."); LIR-USA Manuf. Co., Inc., 306 N.L.R.B. 298, 305 (1992) (same).

27. *See, e.g.*, Robyn Wilensky, Note, *Can I Get a Witness?: Extension of the* Weingarten *Right in the Non-Unionized Workplace-Problems of Implementation Create Potential Harm for Both Employers and Employees*, 36 GA. L. REV. 315, 340-43 (2001) (discussing role of witness/union representatives in investigatory interviews); Southwestern Bell Tel. Co. v. NLRB, 667 F.2d 470, 472-74 (5th Cir. 1982) (upholding employer's decision to not allow union representative to speak during questioning; representative was allowed to speak at the end of interview to make "clarifications" and "additions" of fact).

representative to consult with the employee before an interview:

> [T]he *Weingarten* right is ineffective without prior consultation since the representative is precluded from performing his envisioned role as a knowledgeable representative. Prior consultation, and the knowledge which resulted therefrom, enables the representative to assist the employer by eliciting facts and saves the employer production time by getting to the bottom of the incident. At the same time it enables the representative to counsel and assist the employee who may be too fearful or inarticulate to relate accurately to the incident being investigated.[28]

In recent years, the NLRB reversed its position on the application of *Weingarten* rights to non-union employees. In *Epilepsy Foundation of Northeast Ohio*, the NLRB extended the right of representation in an investigatory interview to the non-union context, arguing that an employee's right to engage in concerted activity for mutual aid or protection is not limited to unionized employees.[29] Only a few years later, perhaps reflecting the political nature of the Board's jurisprudential function, the NLRB switched positions and overturned the *Epilepsy Foundation* decision in *IBM Corp.*[30]

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28. U.S. Postal Serv., 288 N.L.R.B. 864, 867 (1988) (citing Pacific Tel. & Telegraph Co., 262 N.L.R.B. 1048 (1982)).

29. Epilepsy Found. of Northeast Ohio, 331 N.L.R.B. 676 (2000). For an article touting the correctness of the Board's decision in *Epilepsy Foundation*, *see* Sam Heldman, et. al., *Epilepsy Foundation of Northeast Ohio and the Recognition of* Weingarten *Rights in the Non-Organized Workplace: A Manifestly Correct Decision and a Seed for Further Progress*, 17 LAB. LAW 201 (2001). For an opposing view, *see* G. Roger King, et al., *Who Let the* Weingarten *Rights Out? The National Labor Relations Board Compounds Earlier Error by the Supreme Court*, 2002 L. REV. M.S.U.-D.C.L. 149 (2002).

30. IBM Corp., 341 N.L.R.B. 1288 (2004). For discussions of the Board's history of back-and-forth jurisprudence on this issue, *see* Christine Neylon O'Brien, *The NLRB Waffling on* Weingarten *Rights*, 37 LOY. U. CHI. L.J. 111 (2005); William R. Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability*, 27 BERKELEY J. EMP. & LAB. L. 23 (2006); Sarah C. Flannery, Note, *Extending* Weingarten *to the Nonunion Setting: A History of Oscillation*, 49 CLEV. ST. L. REV. 163 (2001). It is interesting, to say the least, to read scholarly notes and articles from the 1980s that easily could have been written in response to the Board's recent decisions in *Epilepsy Foundation* and *IBM Corp. See, e.g.*, Steve Carlin, Note, *Extending* Weingarten *Rights to Nonunion Employees*, 86 COLUM. L. REV. 618 (1986).

At least one commentator has argued that the Board's tendency to change positions based upon the political make-up of its members, as well as its isolated decision-making style, is a factor in the continued decline of unionization in the

So, in the context of unionized workplaces, the right of employees to *Weingarten* representation during investigatory interviews is well-established and widely followed. However, despite the prevalence of employee drug and alcohol testing programs in the American workplace, there are relatively few NLRB decisions addressing the application of *Weingarten* rights in that context. In fact, as set forth in detail below, the NLRB has never decided head-on the issue of whether a unionized employee's *Weingarten* right to union representation should be applied in the context of an employer's decision to test an employee for drug or alcohol usage while working.

II. A Review of NLRB and Other Decisions Interpreting Weingarten Rights in the Context of Employee Drug and Alcohol Testing

Only five NLRB decisions have discussed the issue of the application of *Weingarten* rights to employee drug and alcohol testing. As described in detail below, the NLRB has gone to great lengths to avoid directly deciding the issue of whether and in what context *Weingarten* rights should apply to an employer's decision to test an employee for drug and alcohol usage.

A. *Mashkin Freight Lines, Inc.*[31]

The first NLRB decision to consider the issue of the application of *Weingarten* rights to employee drug and alcohol testing was *Mashkin Freight Lines, Inc.* In *Mashkin*, the NLRB considered whether an employer impermissibly denied four employees the opportunity to consult with union representatives during a mandatory blood alcohol test.[32] Specifically, the employees in *Mashkin* were suspected of consuming alcohol before they were scheduled to report to work and drive company vehi-

American workforce. James J. Brudney, *The National Labor Relations Board in Comparative Context: Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221 (2005). Professor Brudney concludes that the NLRB's "long tradition of ad hoc decision-making" perhaps inevitably leads to the partisan and ping-ponging jurisprudence that is reflected in the Board's decisions on the application of *Weingarten* rights in the non-union workplace. *Id.* at 259-60.

31. 272 N.L.R.B. 427 (1984).

32. *Id.* at 427.

cles.[33] When confronted by management, the employees agreed to go to the hospital for blood alcohol testing.[34] After the hospital took blood samples, however, the employees refused to sign the required consent forms for the hospital to perform the alcohol testing until after they spoke with a union representative.[35] As a result, the employer suspended the employees for drinking on the job.[36]

In finding the suspensions to be a violation of the employees' *Weingarten* rights, the NLRB Administrative Law Judge[37] ("ALJ") found that the employee blood alcohol tests were analogous to investigatory interviews under *Weingarten*.[38] The ALJ reasoned as follows:

> While it might be argued that handing over the results of a blood test is not an "interview" within the meaning of *Weingarten*, I do not find this persuasive. The thrust of *Weingarten*, in this context, relates to employee participation in an investigation conducted by the employer. Whether the employer gathers oral, written, or physical evidence at the investigatory interview would not appear to affect the employees' right to the presence of a union representative.[39]

The ALJ further concluded that the employer violated the employees' *Weingarten* rights because it treated the employees' refusal to submit to blood alcohol testing without first consulting

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33. *Id.* at 432. Indeed, the decision to send the employees to the hospital for testing came about because the owner of the company personally witnessed three of the employees consuming alcohol in a restaurant immediately before the start of their shift. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. NLRB administrative law judges make the initial determination of whether the NLRB has proven an unfair labor practice charge. The losing party then has the right to gain review of that decision by filing exceptions with the NLRB. *See* 29 C.F.R. § 102.46 (2007).

38. *Maskin Freight Lines, Inc.*, 272 N.L.R.B. at 434.

39. *Id.* The ALJ reached this conclusion with very little analysis or difficulty, despite the fact that the gathering of physical evidence through taking blood or some other method raises issues that are very much different than the issues raised by an employee who is being questioned by his or her employer in an investigatory interview. For example, a union representative may be able to provide guidance to an employee about the best way to answer a question. It seems less likely that he or she can provide similar assistance to an employee who is providing a blood or urine sample that ultimately will be sent to a laboratory for testing.

with a union representative as an admission of impermissible intoxication.[40]

In reviewing the ALJ's conclusions, however, the NLRB avoided the tough question of whether the employee's *Weingarten* rights were implicated by the alcohol test.[41] Instead, the Board found that the employees' suspensions violated Section 8(a)(3) of the Act for other reasons. Thus, the *Mashkin* Board specifically noted that it was not deciding whether "the suspended employees were denied their Sec[tion] 7 rights under [*Weingarten*]."[42]

B. *System 99*[43]

Just a few years after *Mashkin*, the NLRB again had the opportunity to consider the extent to which drug and alcohol testing implicates employees' *Weingarten* right to union representation. Specifically, in *System 99*[44], an employer refused to allow an employee suspected of on-the-job intoxication to call a union steward before the employee decided whether he would submit to an alcohol test required by the employer.[45] The employer then discharged the employee for his refusal to submit to testing.[46] The ALJ concluded that the employee's request for union representation implicated *Weingarten* because the employer's questions as to whether the employee would submit to testing had "an 'investigative' quality to them."[47] The ALJ reasoned:

> *Weingarten* makes clear that an employee who is asked to answer questions in an interview about his suspected misconduct is entitled to insist on union representation at such a meeting and that he is further insulated from discipline for refusing to participate if the employer refuses his demand for such representation. Where, as here, an employee is advised by his employer—and therefore

40. *Id.*

41. *Id.* at 427.

42. *Id.* at 427 n.4. Section 8(a)(3) of the Act prohibits employer discrimination "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." 29 U.S.C. § 158(a)(3) (2007).

43. 289 N.L.R.B. 723 (1988).

44. *Id.*

45. *Id.* at 725.

46. *Id.*

47. *Id.* at 726.

> he 'reasonably believes'—that he may be disciplined if he refuses to submit to a proposed set of tests, there appears to be no reason for concluding that he should not be entitled to the services of a representative before deciding what he will do.[48]

Like *Mashkin*, the ALJ in *System 99* also emphasized that an employee who is denied union representation cannot be treated as admitting that he impermissibly is intoxicated when he refuses to submit to a sobriety test.[49] The ALJ explained:

> It must be recalled . . . that if [the employee] had been permitted to consult with [his union representative], the latter might well have pointed out that, under the circumstances, [the employee] had nothing to lose by taking the test. Hearing this from a fellow employee in a candid, private setting might well have caused [the employee] to agree to the test, rather than remaining silent on the question. And, if he had so agreed, he might have passed the test. [The employer's] refusal to accord [the employee] those consultation rights has therefore made it impossible to know whether [the employee] would have been fired based on evidence other than that 'evidence' which it obtained through [the employee's] silence—evidence that was itself tainted by its unlawful conduct.[50]

The opinions in *System 99* and *Mashkin* diverged in one important respect. In *System 99*, the ALJ emphasized that pre-testing conversations in which employers ask employees to consent to sobriety testing are investigatory in nature; the ALJ did not find that drug and alcohol tests *themselves* implicate *Weingarten*.[51] In contrast, the ALJ in *Mashkin* applied *Weingarten* to the tests *themselves*, holding that "handing over the results of a blood test" constitutes an investigatory interview.[52]

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48. *Id.* at 727. The ALJ did express doubt, however, that an employee would have the right to delay a test until a union representative could be located, noting that the effects that the passage of time could have on the accuracy of the test. *Id.*

49. *Id.* at 728.

50. *Id.* Such reasoning is peculiar, as the ALJ appears to justify the employee's refusal to take the test on the fact that there was no union representative present to convince him to take the test by explaining to the employee that the test might result in an exculpatory negative result. Presumably, the employee would have an idea of whether his or her test ultimately will lead to a negative test result, as he or she should have some knowledge of whether they used drugs or alcohol. The union representative likely would have nothing to add to that decision.

51. *Id.* at 726.

52. Mashkin Freight Lines, Inc., 272 N.L.R.B. 427, 434 (1984).

Despite the potentially contradictory ALJ decisions in *Mashkin* and *System 99*, the NLRB again sidestepped the *Weingarten* issue in reviewing the ALJ's *System 99* ruling, holding that the employee was terminated for reporting to work in an intoxicated state, not because of his request for a union representative.[53] Thus, the NLRB found that the ALJ's proposed remedies of reinstatement and backpay were inappropriate.[54]

C. *Safeway Stores, Inc.*[55]

In 1991, the NLRB had yet another opportunity to address the issue. Specifically, in *Safeway Stores, Inc.*, an employee's supervisor asked him to take a drug test following a series of suspicious absences.[56] The employee, however, refused to consent to testing before he conferred with his union steward.[57] The employer declined to contact the union steward and suspended the employee for his continued refusal to submit to testing.[58]

The employer then decided to administer a drug test to the employee the next time he reported for work.[59] On that day, the employee was called into a meeting with managers.[60] When they informed the employee that he was required to take a drug test due to his attendance record, he explained that he had a medical condition with his kidney.[61] The employer still insisted that the employee take the test.[62] At that point, the employee requested union representation, arguing that when he previously had been reinstated by the company following a disciplinary suspension the company had sought, unsuccessfully, to get the union to agree to random drug testing.[63] The employer de-

53. *System 99*, 289 N.L.R.B. at 723.

54. *Id.* (citing Taracorp, Inc., 273 N.L.R.B. 221 (1984) (holding that reinstatement is not an appropriate remedy for a *Weingarten* violation where an employee has been discharged for cause)).

55. *See,* Safeway Stores, Inc., 303 N.L.R.B. 989 (1991).

56. *Id.* at 992.

57. *Id.* at 993.

58. *Id.*

59. *Id.*

60. *Id.* at 992.

61. *Id.* Presumably, the employee would have been aware of this kidney condition at the time he initially refused to take the drug test.

62. *Id.*

63. *Id.*

nied the employee's request for two reasons: (1) at that time of day, it was unlikely that a union representative would be available; and (2) the employer did not want to wait the amount of time it would take for the union representative to make it to the employer's location.[64] The employee then requested to be represented by a local union steward.[65] The employer denied this request as well.[66] The employee eventually asserted that without union representation, he would not agree to be tested.[67] The employer then suspended the employee from work for refusing to take the test and subsequently terminated his employment.[68]

In considering whether the employer's decision to discharge the employee violated his *Weingarten* rights, the ALJ noted that the managers were not necessarily going to question the employee, as is usually the case during an investigatory interview.[69] Nonetheless, relying upon the fact that it was reasonable for the employee to assume that discipline might result from the drug test, the ALJ found that the employer's decision to deny him a union representative before insisting upon a drug test was a violation of *Weingarten*.[70] The ALJ reasoned as follows:

> [T]he purpose of an employer's investigatory interview concerning the use of drugs and the possible adverse effects of such an interview upon an employee's employment are the same regardless of whether the employer's interrogation of the employee during the interview is done personally by supervision or by means of a drug test.[71]

As with its other decisions on the issue, the NLRB again attempted to sidestep ruling on the issue of the applicability of

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64. *Id.* The ALJ noted that the union's offices were approximately 27 miles away. *Id.*

65. *Id.* It is unclear from the decision if the steward was immediately available or not.

66. *Id.* at 992-93.

67. *Id.* at 993.

68. *Id.*

69. *Id.* at 993 n.8.

70. *Id.* at 995-96.

71. *Id.* at 995. In theory, under the ALJ's reasoning, an employee may be entitled to union representation in every situation that ultimately may lead to employee discipline, regardless of whether or not that situation involves an interview or questioning by the employer.

Weingarten rights to employee drug and alcohol testing. Specifically, the Board stated:

> We do not pass on the [ALJ's] apparent conclusion that a drug test, standing alone, would constitute an investigatory interview under *Weingarten*. As noted, however, the test here was part of an inquiry into [the employee's] absence record. [Hence, when the manager—carrying out his] instructions to the letter—disregarded [the employee's] requests for union assistance and suspended him for not taking the drug test, [the manager] was, in effect, penalizing [the employee] for claiming *Weingarten* rights with respect to the larger controversy. . . . Thus [the employer's] original suspension decision encompassed not only a simple refusal to take a drug test, but also [the employee's] reasonably foreseeable request for union representation at the meeting in which the test would be administered—a request that [the employer] was prepared to have its supervisor disregard. In these circumstances, the suspension cannot be divorced from [the employee's] assertion of *Weingarten* rights, and it is unlawful just as is the discharge.[72]

In a footnote, Board Member Radabaugh set forth a separate rationale for the applicability of *Weingarten* rights to the employee's meeting with the managers, essentially arguing that because the requested drug test was part of an overall inquiry "into [the employee's] record of absenteeism," then *Weingarten* rights attached to the meeting concerning the drug test.[73]

D. Turner Construction Co.[74] *and* Taos Health Systems, Inc.[75]

In 2003, the NLRB issued two decisions that once more touched on the issue of the applicability of *Weingarten* rights to employee drug and alcohol testing. Once again, the Board did little to flesh out or provide extensive guidance on the issue. More specifically, in *Turner Construction*, the NLRB affirmed an ALJ's decision that deferred to an arbitration award resolving a claim that an employer's decision to discharge employees who refused to submit to drug testing in the absence of union

72. *Id.* at 989.

73. *Id.* at 989 n.2. Member Radabaugh provided little analysis in reaching this conclusion.

74. Turner Constr. Co., 339 N.L.R.B. 451 (2003).

75. Tao Health Sys., Inc., 2003 N.L.R.B. LEXIS 687 (Oct. 7, 2003).

representation constituted a *Weingarten* violation.[76] Again, the Board did not resolve the *Weingarten* issue. In so deciding, however, the Board let stand the following reasoning from the ALJ:

> The gravamen of the complaint is that [the employees] were discharged for refusing to cooperate with the employer in an investigatory interview without union representation. An employee's insistence upon union representation at an employer's investigatory interview that the employee reasonably believes might result in disciplinary action is protected concerted activity. The General Counsel contends that the drug tests proposed by the [e]mployer fall within the purview of *Weingarten*. While there is no reported case where the Board has applied *Weingarten* to drug testing, the contention is fairly arguable.[77]

The Board made no further comment on the issue.[78]

In *Taos Health*, a case that was not appealed to the NLRB, an ALJ held that where "an employer insists on administering a medical test as part of an investigation into an employee's misconduct, the employee has a right to consult with his union representative before consenting to take the test."[79] In so holding, the ALJ relied on the *Safeway Stores* and *System 99* decisions, despite the fact that the issue was not directly ruled upon by the NLRB in those cases.[80] Ultimately, however, the ALJ found that because the employer's discipline of the employee was based upon her "refusal to take the test, leaving the meeting [with her manager] and the belief of the [employer's] managers" that the employee was impaired, not the employee's assertion of

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76. *Turner Constr. Co.*, 339 N.L.R.B. . at 451-52. One of the employees in *Turner Construction* alleged that a manager informed him, upon requesting that he submit to the test, that the employer "was not obligated to bring [the employee] his business agent and that [the employee's] only choice was to take the test and prove himself innocent." *Id.* at 452.

77. *Id.* at 455 (citation omitted). It is unclear why the ALJ cited *System 99* and *Mashkin*, but made no reference to the *Safeway Stores* decision.

78. *Id.* at 455-56.

79. *Taos Health Sys., Inc.*, 2003 N.L.R.B. LEXIS at *69. The *Taos Health* case arose in the context of an emergency room secretary at a hospital who reported to work smelling like alcohol. *Id.* at *66.

80. *Id.* at *69.

Weingarten rights, the employer's decision to discipline the employee did not violate the Act.[81]

E. *State Labor Relations Boards*

Several state labor relations boards also have addressed the issue of the applicability of *Weingarten* rights to employee drug and alcohol testing.[82] For the most part, these agencies have held that an employee's *Weingarten* right to union representation attaches to drug and alcohol testing of employees. For example, in *Fraternal Order of Police*, the Pennsylvania Labor Relations Board ("PLRB") considered a *Weingarten* claim in the context of employee drug and alcohol testing.[83] Specifically, a supervisor suspected a state liquor control enforcement officer of working while intoxicated.[84] The supervisor drove the officer to the local hospital emergency room and asked him to submit to blood and urine tests.[85] When the officer requested union representation, his supervisor told him that it "'was not necessary at that time.'"[86] Citing the NLRB's decision in *Safeway Stores*, the PLRB concluded that the employee had properly invoked his *Weingarten* rights:

> [T]he NLRB has stated that an employer's request for [a] blood or urine test standing alone may not necessarily constitute an investigatory interview within the meaning of *Weingarten*, but has held that an employee properly exercised the *Weingarten* right when it was clear that the purpose of the test was to aid in the employer's determination of whether discipline should be imposed as a result of the employee misconduct.[87]

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81. *Id.* at *72-*73. Conversely, if the assertion of *Weingarten* rights actually motivated the employer's discipline, then it would constitute a violation of the Act. *Id.* at *72.

82. Typically, state labor relations boards have jurisdiction over employees excluded from coverage under the NLRA, such as employees of state agencies or local municipalities. *See* 29 U.S.C. § 152(2) (2007). Although the *Weingarten* decision thus is not directly controlling on public employers, most state labor relations boards follow the decision, assuming that state law provides a similar employee right to union representation during investigatory interviews.

83. 28 Pa. Pub. Employee Rep. (Lab. Rel. Press) ¶ 28,203 (L.R.B. Aug. 5, 1997).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* (citations omitted).

The PLRB noted that the officer was asked to submit to blood and urine tests within a disciplinary context, and that his supervisor's refusal to call a union representative at the officer's request thus constituted an unfair labor practice.[88]

At least two other state labor relations boards have considered the propriety of employees invoking *Weingarten* rights when they are asked to submit to drug or alcohol testing.[89] In *Chicago Park District,*[90] an Illinois employer requested that an electrical employee take a "fitness for duty test," or a drug test, and sign a form consenting to the test.[91] When the employee asked for union representation, the employer attempted to locate the particular union business agent sought by the employee.[92] When the employer discovered that the employee's requested union representative was not available, it informed the employee that he could either consent to the test or be suspended.[93] The employee again refused to consent to the test.[94] As the employee gathered his belongings to leave for the day, his employer relented, and asked him if he would like to speak with a different union representative.[95] The employee then cursed at his employer and left the premises.[96] The employer later fired the employee for refusing to submit to drug testing.[97]

Again, citing *Safeway Stores*, an ALJ for the Illinois Local Labor Relations Board found that the employee's request for union representation implicated *Weingarten* because he was asked to submit to drug testing, not as a stand-alone inquiry, but "as a means of inquiring into . . . perceived misconduct," and because "pursuant to the contract, refusal to take the test as well as testing positive results in discipline, including dis-

88. *Id.*

89. As most state labor board decisions are not as widely disseminated and reported as NLRB decisions, it is difficult to ascertain exactly how many such boards have considered the issue.

90. 17 Pub. Employee Rep. of Ill. (LRP) ¶ 3021 (Ill. L.L.R.B. 2001).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

charge."[98] However, the ALJ concluded that, because the employer first attempted to locate one union representative and later offered to locate a second representative, the employee's *Weingarten* rights were not violated when he was discharged for his refusal to submit to drug testing.[99]

Two years later, the New York Public Employment Relations Board ("PERB") also considered the scope of *Weingarten* rights in the context of sobriety testing, albeit in dicta. Specifically, in *Transport Workers Union of America Local 100 v. New York City Transit Authority*,[100] a train conductor completed a questionnaire about his drug and alcohol use as part of a biennial physical examination.[101] Based on his answers, the employer referred the employee for psychological testing and then for participation in an employer-sponsored chemical dependency relapse prevention program.[102] Several months later, the employer scheduled a follow-up medical examination.[103] However, no drug or alcohol testing was scheduled to take place at the examination.[104] The employee declined to participate in the examination without a union representative present, and was suspended from work for a week.[105] An ALJ for the New York PERB found that the employer violated the conductor's *Weingarten* rights when it suspended him.[106] The New York PERB disagreed and reversed the ALJ's decision. The New York PERB explained that the employee did not face discipline based on the results of the examination; rather, the employee only faced a referral for continued sobriety treatment that had no bearing on his employment status, so he had no right to union representation at the examination.[107] The New York PERB, therefore, distinguished the examination at issue in this case

98. *Id.* This reasoning would appear to distinguish between reasonable suspicion testing—where the employer actually suspects the employee of being under the influence while working—and random testing that is unrelated to any specific allegation of misconduct against the employee.

99. *Id.*

100. 36 N.Y. Pub. Employee Re. (Lab. Rel. Press) ¶ 3,049 (Dec. 12, 2003).

101. *Id.* at 3142.

102. *Id.*

103. *Id.*

104. *Id.* at 3143.

105. *Id.* at 3142.

106. *Id.*

107. *Id.* at 3143.

from traditional drug and alcohol testing, and noted in dicta that *Weingarten* rights would attach in such situations.[108]

F. *Labor Arbitration Decisions*

Although, as set forth above, the NLRB and some state labor boards generally have found and/or assumed that *Weingarten* rights attach in most drug and alcohol testing contexts, labor arbitrators have found the issue to be much less clear-cut.[109] In one of the first reported cases on the subject, *In re Trailways, Inc.*,[110] an employer ordered an employee suspected of arriving at work in an intoxicated state to take an alcohol test.[111] The employee refused to consent to the test until he spoke with his union representative.[112] The employer declined to call the representative, sent the employee home for the day, and later discharged him for being intoxicated while on duty and failing to follow a direct order from a supervisor.[113] The arbitrator found that the employer violated the employee's right to union representation, and noted that a representative could have assisted the employer in determining whether the employee reasonably appeared intoxicated and thus had a contractual obligation to submit to an alcohol test.[114]

In *Coca-Cola Bottling Group*,[115] however, an arbitrator found that *Weingarten* rights do not necessarily attach in the

108. *See id.* at 3143 (noting that "[d]iscipline, pursuant to the parties' collective bargaining agreement and the Authority's rules, would result if [the employee] had a third positive drug or alcohol test" and reiterating that the employee had a right "to union representation upon demand, in an investigatory interview which he . . . reasonably believe[d] may result in discipline").

109. For a discussion of the differing interpretations of *Weingarten* rights in the labor arbitration context versus the Board and the courts, *see* Steven J. Silverman, Comment, *The Differing Nature of the* Weingarten *Right to Union Representation in the NLRB and Arbitral Forums*, 44 U. MIAMI L. REV. 467 (1989).

110. *In re* Trailways, Inc., 88 Lab. Arb. Rep. (BNA) 941 (1987) (Heinsz, Arb.).

111. *Id.* at 943. As many labor arbitration decisions are never reported or published, it is impossible to compile a comprehensive list of the decisions in this area.

112. *Id.* at 944.

113. *Id.* at 943.

114. *Id.* at 947. The arbitrator apparently believed that the union representative would view his or her role as one of providing assistance to the company in properly administering the contract, rather than attempting to ensure that the employee did not receive discipline for his behavior.

115. Coca Cola Bottling Group v. Local 952, Gen. Truck Drivers, 97 Lab. Arb. Rep. (BNA) 343 (1991) (Weckstein, Arb.).

context of drug testing.[116] Specifically, an employer ordered an employee to submit to a drug test after another employee reported that the first employee, a delivery driver, paused for at least a minute at a stop sign, drove erratically, and appeared to have glassy eyes and a "somewhat faraway look."[117] The employee initially consented to take the drug test and then asked for a union representative. When the employee was unable to reach his representative, his employer required him to submit to the test or receive a three-day suspension.[118] The employee was later discharged and challenged his termination as violative of his *Weingarten* rights.[119] The arbitrator disagreed, explaining:

> Not all arbitrators agree that so-called *Weingarten* rights apply in arbitrations. A failure to provide union representation to an employee, upon request, at an investigative meeting that might lead to discipline can be an unfair labor practice under the National Labor Relations Act, but it is not necessarily a breach of the contractual rights owed to an employee, which arbitrators have jurisdiction to enforce, at least in the absence of a provision in the collective agreement or past practice of the parties, or a violation of the employee's fundamental rights as might occur if the employer sought to take advantage of an employee's unrepresented status. Nevertheless, it may be that the present [employee] was entitled to such Union representation at the meeting . . . which resulted in his being asked to submit to the drug/alcohol test, but it does not follow that he was entitled to consult with a Union representative before he could be required to take a test authorized by legitimate Company rules of which the [employee] and the Union had notice.[120]

The arbitrator noted, however, that "an opportunity to consult with a union representative has several advantages and constitutes good personnel policy."[121] Ultimately, though, the arbitrator found that the employee was discharged for just cause.[122]

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116. *Id.* at 350.
117. *Id.*
118. *Id.* at 345.
119. *Id.*
120. *Id.* at 349.
121. *Id.*
122. *Id.* at 350.

In a third case, *Bi-State Development Agency*,[123] an employee, who drove a bus for his employer, collided with a vehicle that attempted to speed through a yellow light.[124] The employee went to the hospital to receive treatment for his resulting injuries, and his employer informed him that he would have to submit to drug and alcohol testing in accordance with the employer's post-accident policy.[125] The employee asked for union representation, but the employer refused the request.[126] The employee then submitted to blood and urine drug tests.[127] After testing positive for the use of marijuana, the employee was terminated.[128]

The employee grieved his termination, alleging in part that his discharge should be set aside because the employer violated his *Weingarten* rights.[129] The arbitrator explained that the employee's discharge could not be set aside because the presence of a union representative would not have altered the outcome.[130] To the contrary, the arbitrator found that upon consultation with a union representative, the employee would have agreed to submit to the test pursuant to his employment contract and been discharged for the results, or he would have declined to submit to the test and been discharged for refusal to submit to a post-accident drug test.[131] The arbitrator found, however, that the employer had violated the employee's *Weingarten* rights; the arbitrator thus awarded the employee one month in back pay as a penalty.[132]

Some arbitration decisions have considered whether employees may request union representation in the context of drug and alcohol testing based on collective bargaining agreement provisions or past practice, which often mirror the rights set out in *Weingarten*. In one early case, *Deaconess Medical Center*,[133]

123. Bi-State Dev. Agency v. Amalgamated Transit Div. 788, 105 Lab. Arb. Rep. (BNA) 319 (1995) (Bailey, Arb.).
124. *Id.* at 321.
125. *Id.*
126. *Id.* at 321-22.
127. *Id.* at 321.
128. *Id.*
129. *Id.* at 321-24.
130. *Id.* at 324.
131. *Id.*
132. *Id.* at 325.
133. Deaconess Med. Ctr., 88 Lab. Arb. Rep. (BNA) 44 (1986) (Robinson, Arb.).

an employer discovered that an employee, a nurse, voluntarily had sought treatment for a drug problem and an eating disorder.[134] The employer then called a meeting with the employee during which a supervisor asked the employee to consent to random drug and alcohol testing.[135] The employee requested union representation, which was denied, and then signed the consent form.[136] The employee later revoked her consent to testing and filed a grievance against her employer.[137] An arbitrator found that, under the labor contract, the employee was entitled only to union representation during an investigatory interview that could result in discipline.[138] The arbitrator decided that that the employer attempted to solicit no information from the employee during their meeting, but only asked her to sign a consent form.[139] The arbitrator thus concluded that the employee's right to union representation was not implicated because no "investigatory interview" took place.[140]

In another case, *Southern California Gas Co.*,[141] an employer received an anonymous tip that an employee was smoking marijuana while on duty.[142] The employer then asked the employee to submit to a drug test.[143] The employee agreed, but asked if he first should speak with a union representative.[144] His employer replied that "he did not need one, as he was in no trouble."[145] The employee's urine tested positive for both marijuana and cocaine, and he was discharged.[146] He then filed a grievance, alleging that his employer violated a company policy of providing union representation upon request for employees

134. *Id.* at 45.
135. *Id.*
136. *Id.* at 45-46.
137. *Id.*
138. *Id.* at 49. The employee's contract adopted language set out in *Weingarten*, and provided in relevant part: "A nurse shall have the right to request the presence of an Association Representative at any interview which the nurse reasonably fears may lead to disciplinary action." *Id.* at 47.
139. *Id.* at 49.
140. *Id.*
141. Southern California Gas Co. v. Local 132, Utility Workers Union, 89 Lab. Arb. Rep. (BNA) 393 (1987) (Alleyne, Arb.).
142. *Id.* at 393.
143. *Id.* at 393-94.
144. *Id.* at 394.
145. *Id.*
146. *Id.*

facing drug testing so the representative could determine whether reasonable cause for testing existed.[147] The arbitrator concurred, concluding that the employee should not have been discharged because the employer failed to follow "the apparently established practice of providing a drug-suspect employee with a shop steward in advance of implementing a decision to test."[148]

In a case decided a decade later, *Integrated Distribution System,*[149] an employer asked an employee to submit to a drug test, pursuant to the collective bargaining agreement, after the employee was a party in a forklift accident.[150] The employee told his employer that he would take the test provided that he could speak with a particular union representative.[151] The employer attempted to reach the representative, but was told that the representative would be away for the remainder of the day.[152] The employer then attempted to locate an alternative union representative, but the employee declined to speak with him.[153] The employer then terminated the employee for refusing to submit to the drug test.[154] The employee grieved the employer's decision to discharge, requesting reinstatement and back pay.[155] The arbitrator found that the employer complied with the terms of the collective bargaining agreement because the contract provided no affirmative right for the employee to

147. *Id.* at 397. With regard to the company policy that allowed the employee to request union representation, the arbitrator explained:

> Section 12.06 of the [collective bargaining agreement] requires the presence of a shop steward at disciplinary interviews. Section 12.06 does not expressly require the presence of a shop steward when a decision is made to test an employee for drugs. However, interpreting that section in a manner consistent with practice, it requires a shop steward's presence, on request, in advance of implementing a decision to test for drugs.

Id. at 397 n.9.

148. *Id.* at 398.

149. Integrated Dist. Syst. v. Local 878, International Brotherhood of Teamsters, 108 Lab. Arb. Rep. (BNA) 737(1997) (Neas, Arb.).

150. *Id.* at 738.

151. *Id.*

152. *Id.*

153. *Id.* Locating the particular union representative with which an employee is comfortable is one example of the many ways in which an employee's invocation of *Weingarten* rights may result in delay.

154. *Id.*

155. *Id.*

consult with a representative, or to delay drug testing for any reason.[156] The arbitrator explained:

> The Contract does not preclude a Union representative from consulting with [an employee] at the time the [employee] is directed to take a drug test, and the Company had no objection to [the union representative] consulting with [the employee] on the date in question as evidenced by its attempt to locate him by telephone. The issue is 'delay.' [The employee] had no right to have his test delayed until some later date for any reason.[157]

The arbitrator added that, under basic principles of contract interpretation, it could not read into the labor contract a positive right to consult with a union representative in drug testing situations, particularly because the contract provided, in relevant part: "The Arbitrator shall not have the right to . . . add to . . . or otherwise alter the provisions of this Agreement."[158] The arbitrator thus refused to reinstate the employee or award him back pay.[159]

In a more recent arbitration decision, *Owens-Corning Corp.*,[160] a supervisor discovered an employee, in an otherwise empty warehouse, in an area that smelled of marijuana smoke.[161] The supervisor questioned the employee, demanded that the employee submit to a drug test, and took the employee back to his office, where the supervisor summoned a union representative and a security officer.[162] The employee submitted to the drug test and tested positive for the use of marijuana and a prescription narcotic.[163] The employee then was placed on paid disability leave while he underwent treatment for drug abuse.[164] The union challenged the propriety of the drug test,

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156. *Id.* at 741. The contract provided, in relevant part: "The Employer shall also have the right to require any employee to submit to drug or alcohol testing any time it has reasonable cause to believe an employee is under the influence of drugs or alcohol or any time an employee is involved in an accident or work-related injury." *Id.* at 737.

157. *Id.* at 741.

158. *Id.*

159. *Id.* at 743.

160. Owens-Corning Corp. v. Local 244, Allied Workers International Union, 114 Lab. Arb. Rep. (BNA) 1628 (2000) (Franckiewicz, Arb.).

161. *Id.* at 1630.

162. *Id.* at 1630-31.

163. *Id.* at 1631.

164. *Id.*

arguing that the employer failed to contact appropriate personnel, including a union representative, immediately upon discovering the employee in suspicious circumstances, in violation of the employer's protocol.[165] The union contended that the representative and security officer—and not the supervisor—should have determined whether reasonable suspicion existed to require a drug test.[166] The arbitrator rejected the union's contentions, finding that the presence of the employee, alone, in a warehouse full of marijuana smoke, created incontrovertible reasonable suspicion that the employee had ingested an illegal narcotic.[167]

G. *Summary of Existing Law*

In sum, although the issue has never fully been considered by the NLRB, existing decisional law on the issue generally supports the application of *Weingarten* rights to employee drug and alcohol testing, particularly where the testing has been ordered in the overall context of a disciplinary investigation. Applying the scant NLRB law on this issue, most state labor relations boards and labor arbitrators, with a few exceptions, have found that *Weingarten* rights attach where an employer has decided to administer a drug or alcohol test to an employee. As will be addressed in detail below, however, the premise of this Article is that such a conclusion is not supportable either under existing *Weingarten* case law or public policy considerations.

III. *Weingarten* Rights Should Not Apply to Employee Drug and Alcohol Testing

A. *Drug and Alcohol Testing Does Not Constitute an Investigatory Interview*

Any attempt to apply *Weingarten* to employee drug and alcohol testing necessarily must begin with an assessment of

165. *Id.* at 1633. The protocol provided that a supervisor that suspected an employee of intoxication was required to secure a security officer immediately to conduct a related investigation and a union representative or other union official to represent the employee's interests. *Id.* at 1632.

166. *Id.* at 1633-34.

167. *Id.* at 1635-36.

whether such testing triggers the protections under the existing legal framework governing the exercise of *Weingarten* rights. This article takes the position that *Weingarten* has no relevance to and should not be applied to drug and alcohol testing of employees because such tests do not constitute "investigatory interviews;" nor does the presence of a union representative during drug and alcohol testing serve the same purpose as it would in the context of an investigatory interview or other employer questioning of an employee. For these reasons, under existing Board precedent, it is completely inappropriate to provide *Weingarten* protections to employees in the context of employee drug and alcohol testing.

The Supreme Court made clear in *NLRB v. J. Weingarten, Inc.*[168] that the right to union representation applies only where an employee is subjected to an investigatory interview.[169] Following *Weingarten*, the NLRB also has made clear that for an investigatory interview to trigger *Weingarten*, it must involve an element of interrogation or questioning. For example, in the *Baton Rouge Water Works Co.*[170] case, the NLRB limited *Weingarten* rights only to investigatory interviews, rather than disciplinary meetings in which an employee is informed of a disciplinary decision that already has been made.[171] The reasoning behind this distinction is clear: a union representative has no real representation role to play in a meeting in which an employer is merely told of a disciplinary decision.[172] In such circumstances, therefore, the employee has no right to union representation.[173]

Moreover, the NLRB has often made clear that the role of a union representative is to assist an employee *being questioned* by his or her employer:

> The Board has long recognized the Supreme Court's intention in the *Weingarten* decision to strike a careful balance between the right of an employer to investigate the conduct of its employees at a personal interview, and the role to be played by the union repre-

168. 420 U.S. 251 (1975).
169. *Id.* at 256-60.
170. 246 N.L.R.B. 995 (1979).
171. *Id.* at 997.
172. *Id.*
173. *Id.*

> sentative present at such an interview. It is clear from the Court's decision in *Weingarten* that *the role of the union representative is to provide assistance and counsel to the employee being interrogated.* The Court specifically declared, however, that the presence of the representative should not transform the interview into an adversary contest or a collective bargaining confrontation, and that the exercise of the *Weingarten* right must not interfere with legitimate employer prerogatives.[174]

In addition, in representing an employee pursuant to *Weingarten*, the Board has held that a union representative must be allowed to do more than just be a passive observer; indeed, he or she must be allowed "to assist the employee *being interviewed*."[175] As noted by one commentator, union representatives may be able to assist an employee being interviewed "by helping to clarify the situation, the facts, and any collective bargaining agreement clause that might have been implicated by the investigation."[176] Yet another commentator has noted the active policing role a union representative plays in an investigatory interview: "[A] representative may play an active role. This means the representative may speak, may make statements, and may ask clarifying questions. Normally the first question is an attempt to ascertain the nature of the interview, so the employee may be advised how to proceed."[177]

What becomes clear from reviewing NLRB decisions that set forth the role of a union representative under *Weingarten* is that *Weingarten* rights apply only to interviews and other meetings in which employees are subjected to questioning by the employer that ultimately might lead to discipline.[178] Drug and alcohol testing, however, does not involve an interview in any

174. New Jersey Bell Tel Co., 308 N.L.R.B. 277, 279 (1992) (emphasis added) (citations omitted).

175. Barnard College, 340 N.L.R.B. 934, 935 (2003) (emphasis added); *accord* Interstate Security Servs., 263 N.L.R.B. 6, 10 (1982).

176. M. Jefferson Starling III, *Epilepsy Foundation of Northeast Ohio: A Case of Questionable Reasoning and Consequences*, 17 LAB. LAW. 221, 222 (2001).

177. Robert M. Tobias & William Harness, *Federalizing* Weingarten*: An NTEU Perspective*, 31 HOW. L.J. 271, 281 (1988).

178. For an interesting discussion about the application of the Coase Theorem to *Weingarten* rights, *see* Stewart J. Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245, 280-82 (1987) (arguing that the *Weingarten* decision does not affect whether unionized workers have the right to a representative at an investigatory interview; rather, the "right depends on whether the company or the union values it more highly").

normal or reasonable interpretation of the word.[179] Rather, it involves the submission of a breath, urine, blood or hair sample for testing.[180] Generally, there is no questioning or interrogation during such testing; it is merely a medical examination in which some bodily fluid or other sample is collected by a medical technician for future testing by a laboratory. Clearly, the submission of a biological specimen is not the type of interview that was contemplated by *Weingarten*. To the contrary, it is not an interview at all, but rather a medical procedure. In that context, it is unclear what aid, if any, a union representative could provide to an employee. They are not trained to police medical procedures; they are trained to police collective bargaining agreements. Thus, union representatives have no appropriate role to play when an employee is subjected to drug and alcohol testing.[181]

Following this reasoning, in an almost identical context, the NLRB has ruled that a medical examination is not an investigatory interview and, thus, does not trigger the protections of *Weingarten*. Specifically, in *U.S. Postal Service*,[182] the Board determined that a "fitness for duty" medical examination of an employee did not trigger the application of *Weingarten* rights. In so holding, the Board reasoned:

> We agree with the [ALJ] that, on the record in this case, the 'fitness for duty' examinations in question were not part of a disciplinary procedure and do not fall within the purview of *Weingarten*. Thus, while the examinations were prompted by personnel problems such as . . . recommendations respecting the employees'

179. This fact was explicitly noted by the ALJ in Mashkin Freight Lines, Inc, 272 N.L.R.B. 427, 434 (1984).

180. *See* Mark A. Rothstein, *Workplace Drug Testing: A Case Study in the Misapplication of Technology*, 5 HARV. J.L. & TECH. 65, 66-77 (1991) (discussing process of obtaining specimens and testing).

181. It might be argued that the union representative could act to police the procedure itself so that the testing is conducted fairly and appropriately. However, this is not a compelling reason for extending *Weingarten* rights to drug and alcohol testing for two reasons. First, such reasoning would extend *Weingarten* well beyond its intended purpose, as there are numerous situations in which union representatives could observe and monitor an employer's treatment of an employee that do not presently implicate *Weingarten*. Second, the introduction of a third party into a sensitive medical testing process such as drug or alcohol testing creates the potential for interference by the union representative with the completion of the test.

182. 252 N.L.R.B. 61 (1980).

> future work assignments, there is insufficient evidence establishing that these examinations were calculated to form the basis for taking disciplinary or other job-affecting actions against such employees because of past misconduct. *Noteworthy also is the absence of evidence that questions of an investigatory nature were in fact asked at these examinations.* In addition these particular medical examinations do not meet with the tests set forth in the *Weingarten* line of cases, or the rationale underlying these tests *which envision a "'confrontation'" between the employee and his employer.*[183]

Although it could be argued that a drug test is more closely related to a disciplinary interview than a fitness-for-duty medical examination in that such tests are often ordered in the context of a potential disciplinary infraction, the logic supporting the Board's decision in *U.S. Postal Service* should apply with equal force in drug and alcohol testing.[184] Indeed, drug and alcohol tests of employees do not involve any questioning or classic 'confrontation' between employer and employee, as envisioned by *Weingarten*.[185] Rather, they involve a medical procedure, which is generally conducted by a laboratory technician with no supervisory authority over the employee, without conducting any questioning or interrogation. Such a medical procedure is a far cry from the employer disciplinary interrogation envisioned by the Supreme Court in *Weingarten*.[186] At the very least, the Board should explain why its reasoning in *U.S Postal Service* does not apply in the context of employee drug and alcohol testing.

Additional support for excluding employee drug and alcohol testing from the protections of Weingarten may be found in

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183. *Id.* at 61 (emphasis added).

184. Obviously, that is not the case in the context of a random drug test, where an employee is subjected to testing completely outside of a disciplinary investigation.

185. *Id.* Indeed, in many instances, the individual performing the testing is not even an employee of the employer, but instead is a medical professional who works for a hospital or drug testing facility.

186. The fact that discipline may result from the results of the drug or alcohol does not change this result. As acknowledged by the Board, the results of the fitness for duty examinations in *U.S. Postal Service* also could result in discipline if the doctor is unable to substantiate an employee's claimed cause of disciplinary problems such as excessive absenteeism. *Id.* at 62-63. As in *U.S. Postal Service*, the technicians performing the tests generally do not make any disciplinary recommendations. *Id.*

Consolidated Casinos Corp.[187] In that case, the Board held that *Weingarten* rights apply where an employer utilizes polygraph testing on its employees.[188] In finding that *Weingarten* rights applied to the polygraph testing process, the ALJ noted that a polygraph examination differs from a medical examination or some other procedure "such as the taking of fingerprints *or a blood sample.*"[189] Thus, the ALJ found significant the fact that polygraph examinations involve questions and interrogation, "much like the participation required of an employee at a 'normal' disciplinary or investigatory interview."[190] Again, as with *U.S. Postal Service*, the Board's reasoning in *Consolidated Casinos Corp.* should apply with equal force in the context of drug and alcohol testing which, by definition, only involves procedures such as the collection of blood samples.

In addition, as outlined above, the few NLRB decisions that have addressed this issue provide very little legal support and even less analysis to support a finding that *Weingarten* should apply in the context of employee drug and alcohol testing. Indeed, strangely, the Board's cases addressing *Weingarten* rights in the context of employee drug and alcohol testing do not even address the issue of why *Weingarten* should be applied outside the context of an investigatory interview. The *Mashkin* decision goes so far as to assume that the gathering of any evidence, whether it is through questioning or the taking of blood, constitutes an interview.[191] Such an assumption constitutes ridiculous overreaching. After all, as noted above, the Board's decisions in *U.S. Postal Service* and *Consolidated Casino Corp.* specifically undercut this assumption.[192]

In fact, the ALJ decision in *Safeway Stores* goes so far as to note the absence of employee questioning during drug or alcohol testing—perhaps the hallmark of any "interview"—and yet still

187. 266 N.L.R.B. 988 (1983).

188. The unfair labor practice charge giving rise to the case involved an allegation that an employee had been terminated after refusing to submit to a polygraph test during an investigation without having a lawyer (or some other representative) present. *Id.* at 1008-09.

189. *Id.* at 1009 (emphasis added).

190. *Id.*

191. *See* Mashkin Freight Lines, Inc., 272 N.L.R.B. 427 (1984).

192. *See* U.S. Postal Serv., 252 N.L.R.B. 61 (1980); Consol. Casino Corp., 266 N.L.R.B. 988 (1983).

applies *Weingarten*. In doing so, the ALJ relied mainly on the fact that it was reasonable for the employee to assume that discipline might result from the test.[193] That, however, is beside the point. *Weingarten* rights arise out of employees' rights to engage in concerted activity for other mutual aid or protection. It is not a handholding exercise for employees who find themselves in the midst of a disciplinary investigation.[194] Union representatives have the ability to aid and/or protect employees while they are being interviewed. There is no comparable role to be played during a drug or alcohol test. If the possibility of discipline was the sole trigger for the application of *Weingarten* rights, then *U.S. Postal Service* was wrongly decided, as it clearly holds that *Weingarten* should not be applied to a physical examination, the results of which may lead to discipline.[195] Nor do any of the other NLRB, state labor relations board or arbitrator decisions provide compelling support for extending *Weingarten* protections to employee drug and alcohol testing. Rather, they simply assume it to be the case without actually closely scrutinizing the issue. Even a cursory review of the board's decision-making in this area reveals a clear intent to avoid having to directly deal with the issue, let alone analyze it. This is a trend that, in and of itself, strongly suggests that the Board recognizes it is treading on dangerous ground.[196]

In short, the existing framework for the exercise and application of *Weingarten* rights clearly does not support the extension of *Weingarten* rights to employee drug and alcohol testing. A drug or alcohol test does not involve questioning and is not the type of confrontational interview or interrogation implicated by the Supreme Court's decision in *Weingarten*. Moreover, based on the Board's decisions setting forth the proper role of a union representative under *Weingarten*, it is unclear what purpose, if any, that representative could serve before or during

193. *See* Safeway, 303 N.L.R.B. 989 (1991).

194. See NLRB v. J. Weingarten, Inc., 420 U.S. 251, 262-63 (1975), for a discussion of role of union representative during investigatory interview.

195. *See U.S. Postal Serv.*, 252 N.L.R.B. at 61.

196. As the ALJ concluded in *Turner Construction Co.*, the issue is "fairly arguable." Turner Constr. Co., 339 N.L.R.B. 451, 455 (2003).

such a test.[197] Finally, the Board's reasoning in the cases addressing the application of *Weingarten* to employee medical examinations and polygraph testing also supports this conclusion. Drug and alcohol testing is much more akin to a return-to-work medical examination than it is to polygraph testing.[198] For these reasons, any attempt by the Board to extend *Weingarten* rights to drug and alcohol testing represents a significant expansion of the scope of such rights that cannot be supported under the reasoning of the *Weingarten* decision and its progeny.

B. *Public Policy Concerns Also Weigh in Favor of Not Applying* Weingarten *to Employee Drug and Alcohol Testing*

One of the most widely-quoted passages from the *Weingarten* decision is the Supreme Court's admonition that the "exercise of [*Weingarten* rights] may not interfere with legitimate employer prerogatives."[199] In the context of employee drug and alcohol testing, however, that is exactly what the application of *Weingarten* has the potential to do. In fact, as discussed above, there are many legitimate employer objectives that may be achieved through the testing of employees for drug or alcohol use while on-duty, including greater efficiency and productivity,

197. Indeed, union representatives are not medical personnel and, thus, seemingly would have very little to add in supervising the collection of blood or urine or some other medical procedure.

198. For an interesting discussion of the Board's jurisprudence interpreting the NLRA's protection for "concerted" employee activity for "mutual" aid or protection, *see* Richard Michael Fischl, *Self, Other, and Section 7: Mutualism and Protected Protest Activities under the National Labor Relations Act*, 89 COLUM. L. REV. 789 (1989). Professor Fischl argues for a broader interpretation of the Act's protections that would "forthrightly protect solidarity as well as self-interest." *Id.* at 865. It could be argued that the application of *Weingarten* rights to employee drug and alcohol testing involves a mere assertion of one employee's self-interest—the employee to be tested—as the fact that drug and alcohol use in the workplace raises serious safety concerns that might place other bargaining unit employees in jeopardy. *But see* Sarah Helene Duggin, *The Ongoing Battle over* Weingarten *Rights for Non-Union Employees in Investigative Interviews: What Do Terrorism, Corporate Fraud, and Workplace Violence Have to Do With It?*, 20 NOTRE DAME J. L. ETHICS & PUB. POL'Y 655, 716-17 (2006) (arguing that terrorism and workplace violence, among other dangers, do not provide support for the denial of *Weingarten* rights to employees in investigatory interviews).

199. *Weingarten*, 420 U.S. at 258.

decreased absenteeism, decreased workers' compensation expenses, and other workplace improvements.[200]

Perhaps the most important employer objective served by an employer's decision to institute a drug and alcohol testing program for employees is the protection of employees and the general public from accidents or other safety incidents caused by an individual who is under the influence of drugs or alcohol while he or she is working.[201] The Supreme Court's discussion of the dangers of employee drug and alcohol use in the railroad industry in *Skinner v. Railway Labor Executives' Ass'n*[202] compellingly makes this point:

> The problem of alcohol use on American railroads is as old as the industry itself, and efforts to deter it by carrier rules began at least a century ago. For many years, railroads have prohibited operating employees from possessing alcohol or being intoxicated while on duty and from consuming alcoholic beverages while subject to being called for duty. More recently, these proscriptions have been expanded to forbid possession or use of certain drugs. . . .
>
> In July 1983, the FRA expressed concern that these industry efforts were not adequate to curb alcohol and drug abuse by railroad employees. The FRA pointed to evidence indicating that on-the-job intoxication was a significant problem in the railroad industry. The FRA also found, after a review of accident investigation reports, that from 1972 to 1983 'the nation's railroads experienced at least 21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor,' and that these accidents resulted in 25 fatalities, 61 non-fatal injuries, and property damage estimated at $19 million. . . . The FRA further identified an additional 17 fatalities to operating employees working on or around rail rolling stock that involved alcohol or drugs as a contributing factor.[203]

Without a doubt, as the Supreme Court's discussion in *Skinner* makes clear, employers have a significant health and

200. *See supra* note 4.

201. *Id.*

202. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989). The *Skinner* case involved a Fourth Amendment challenge to the Federal Railroad Administration's ("FRA") regulations on the drug and alcohol testing of employees. *Id.* at 606. The Court held in *Skinner* that the FRA's regulations were reasonable and did not violate the Fourth Amendment of the U.S. Constitution. *Id.* at 633-34.

203. *Id.* at 606-07.

safety interest in eliminating the employee use of drugs or alcohol in the workplace.[204]

Employers have a' compelling interest in safeguarding the health and safety of its employees, customers, and the general public. By applying *Weingarten* rights to employee drug and alcohol testing, that employer objective may be thwarted. More specifically, the assertion of *Weingarten* rights in the context of employee drug and alcohol testing, in many instances, will delay the testing of an employee. The *Safeway Stores* case is a good example of this problem.[205] As set forth at length above, in *Safeway*, the employee that the employer sought to have drug tested requested a union representative before submitting to the test.[206] However, the union's offices were 27 miles away and it was unclear whether there even was a representative available at that time.[207] Assuming there was a representative available, if the employer in *Safeway* had been forced to wait for a union representative, the amount of time it would have taken for a representative to arrive would have significantly delayed the test. Such delay has the capacity to interfere with the effectiveness of employee drug and alcohol testing.[208]

It is axiomatic that the closer in time to the suspicious behavior that an employer can get an employee tested for drug or alcohol usage, the more likely it is that the test results will be accurate.[209] This is particularly true in the area of testing for

204. That interest also was recognized by Congress in the Drug Free Workplace Act of 1988, which requires that federal contractors and grant recipients certify that they will have a drug-free workplace. 41 U.S.C. § 701 *et seq.* Many states also have passed statutes recognizing that interest as well. *See* Mark A. de Bernardo & Gina M. Petro, GUIDE TO STATE AND FEDERAL DRUG-TESTING LAWS (12th ed. 2004).

205. Safeway Stores, Inc., 303 N.L.R.B. 989 (1991).

206. *Id.* at 993.

207. *Id.* at 992-93.

208. Indeed, many employer drug tests often take place after on-the-road accidents by drivers and delivery-persons. In such circumstances, where an employee is located in a remote area without immediate access to the employer's facility or a union representative, a request for *Weingarten* representation has the potential to significantly delay testing.

209. *See, e.g.*, Willis v. State of Maryland, 488 A.2d 171, 180 (Md. 1985) ("[I]t is generally agreed that a person's blood alcohol content decreases with the passage of time.") (citing Schmerber v. California, 384 U.S. 757 (1966)); *see also* Mark Schneider, *Human Physiology vs. Chemical Breath Testing in Michigan*, 1998 DET. C.L. REV. 1113, 1135-37 (1998) (discussing a Michigan court decision that deals with effects of passage of time on the admissibility of results of alcohol testing).

employee alcohol use, where the passage of a relatively short period of time can greatly diminish the accuracy of a test for consumption of alcohol.[210] Thus, nearly any employee invocation of *Weingarten* rights has the potential to impact the employer's ability to get an accurate test result.[211] This is not only true in the situation where a union representative is located in an area remote from the employee to be tested, but also where the union representative is local. This is due to the fact that the Board has made clear that the employee and union representative have to be provided an opportunity to meet in advance of the interview.[212] Such a meeting also has the potential to delay the testing of an employee.[213]

Accordingly, the application of *Weingarten* rights to employee drug and alcohol testing has the potential to delay the performance of the test, significantly in some circumstances. In an area in which every second counts when it comes to procuring accurate test results, the application of *Weingarten* rights clearly does not further the public policy of eradicating drug and alcohol use in the workplace. To the contrary, in some instances, it may thwart that policy and the employer's interest in eradicating such behavior from its workforce.

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210. *Id.*

211. To prove this point, one need look no further than the existing decisions addressing the application of *Weingarten* rights in the context of employee drug and alcohol testing, many of which demonstrate clearly the potential for delay of testing when an employee requests union representation: System 99, 289 N.L.R.B. 723, 727 (1988) (ALJ noted that a delay could result from time it takes to locate a union representative); Safeway Stores, 303 N.L.R.B. 989, 993 (1991) (union representative 27 miles away); Chicago Park District, 17 Pub. Employee Rep. of Ill. (Lab. Rel. Press) ¶ 3,021 (L.L.R.B. 2001) (after search, employer discovered that employee's requested union representative was not available); Coca-Cola Bottling Group v. Local 952, Gen. Truck Drivers, 97 Lab. Arb. Rep. (BNA) 343 (1991) (Weckstein, Arb.) (employee unable to reach union representative); and Integrated Distrib. Sys. v. Local 878, International Brotherhood of Teamsters, 108 Lab. Arb. Rep. (BNA) 737(1997) (Neas, Arb.) (employer was unable to locate union representative).

212. *See* U.S. Postal Serv., 288 N.L.R.B. 864 (1988).

213. Such a meeting could be lengthy if, for example, an employee chooses to recount the entire circumstances that led to the incident that gave rise to the reasonable suspicion testing, as well as any personal behavior that may cause the employee to suspect that the result of the test will be positive.

IV. The Application of *Weingarten* Rights to Employee Drug and Alcohol Testing Is Unnecessary, as Remedies Already Exist to Deal With Employees who Have Been Improperly Tested

Given that an employee drug or alcohol test does not involve an "interview" or questioning within the normal understanding of *Weingarten*, there is very little that a union representative can do to legitimately advance the interest of an employee during the testing process.[214] It may be argued, however, that one legitimate purpose a union representative could serve is to advise the employee, and communicate with the employer, about whether or not the employer actually has a valid basis to test an employee under the collective bargaining agreement or an established past practice.[215] Such a situation may provide the best opportunity for a union representative to safeguard the rights of an employee—by preventing an employee from being forced to undergo a drug or alcohol test that was improper based on the facts and circumstances surrounding the employer's decision to test. However, such an argument provides little support for applying *Weingarten* to employee drug and alcohol testing.

Initially, in nearly all instances, the employer has unilateral discretion to determine whether reasonable suspicion testing will take place.[216] Thus, when an employee is informed of the employer's decision to test that individual, it is more akin to a meeting where an employee is informed that a disciplinary decision has already been made, rather than an investigatory interview. Therefore it is arguable, to say the least, whether *Weingarten* should even be implicated in that context. It is settled law that such a meeting does not implicate *Weingarten*.[217]

In any event, arguing for the application of *Weingarten* rights to employee drug and alcohol testing because it will prevent employees from being forced to undergo unwarranted drug

214. *See supra* notes 27-28 for a discussion of the role of union representatives during investigatory interviews.

215. *See supra* note 2 for a discussion of reasonable suspicion testing.

216. *See, e.g.*, Cowan, *supra* note 2, at 134-37; Turner v. FOP, 500 A.2d 1005, 1008 (D.C. Ct. App. 1985) (noting that, "all members of the force may be 'ordered' to submit to" drug testing "if suspected of drug use").

217. *See* Baton Rouge Water Works Co., 246 N.L.R.B. 995, 997 (1979).

and alcohol tests is meritless. There is an existing remedy for an employee who tests positive in such a situation: arbitrators routinely reinstate employees to employment if they tested positive for drugs or alcohol as the result of an improperly-ordered reasonable suspicion drug test.[218]

Thus, a remedy already exists for an employee who is forced to undergo a drug or alcohol test that is not warranted. Accordingly, as the prevention of such a test appears to be one of the few legitimate purposes a union representative could serve in the testing arena; it does not provide a compelling reason for the application of *Weingarten* rights to employee drug and alcohol testing.

V. Conclusion

The correct answer to the question posed by the scenario in the Introduction of this article is that the driver has no *Weingarten* right to demand union representation before submitting to drug and alcohol testing. The employer's decision to test was mandatory and a union representative would serve no purpose other than to delay the inevitable or to interfere with the test. Indeed, during the testing process, the employee will not be subjected to any questioning by the employer with which the representative can assist. Moreover, the potential delay created by the assertion of *Weingarten* rights may even make it more difficult for the employer to ascertain whether the accident resulted from the fact that the employee reported to work under the influence of alcohol. Put simply, *Weingarten* has no place in employee drug and alcohol testing. At the very least, the NLRB should directly consider and rule upon the issue, analyzing all of the ramifications of applying *Weingarten* in the context of employee drug and alcohol testing. Given the serious safety issues raised by employee use of drugs or alcohol in the workplace, the

218. *See, e.g.*, U.S. Enrichment Corp., 123 Lab. Arb. Rep. (BNA) 44, 53-54 (2006) (Cohen, Arb.) (reinstating employee who was found to have undergone drug test without reasonable suspicion); Namasco Corp., 123 Lab. Arb. Rep. (BNA) 110, 115-17 (2006) (Wolff, Arb.) (same). Some arbitrators also may make the employee's completion of successful drug or alcohol rehabilitation an element of the reinstatement. This article does not take a position as to the propriety of such a remedy where an employee has tested positive for drug or alcohol use while on-duty.

issue warrants much closer consideration than it has received from the NLRB at the present time.