United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: December 1, 2016

TO: Nancy Wilson, Regional Director
Region 6

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: General Electric Company
Cases 06-CA-176001 and 06-CA-180016

The Region submitted these cases in accordance with GC Memorandum 16-01 requesting advice as to whether either or both would be an appropriate vehicle to urge the Board to overrule *IBM Corp.*[1] and recognize employees' *Weingarten*[2] rights in a non-union setting. We conclude that the Region should use these cases as vehicles to urge the Board to extend *Weingarten* rights to unrepresented employees and find that the Employer violated Section 8(a)(1) by forcing one employee to submit to an investigatory interview without the assistance of a coworker and by forcing another employee to submit to an investigatory interview in the presence of an anti-Union employee witness unilaterally designated by the Employer.

FACTS

General Electric ("the Employer") manufactures locomotive engines at its Grove City, Pennsylvania facility. Approximately 1000 production and maintenance employees are employed at this plant. The United Electrical, Radio and Machine Workers of America ("UE"), Local 601 ("the Union") filed the charges in the instant cases, but has never been certified or recognized as the exclusive collective-bargaining representative of the employees at the Grove City plant. Rather, the Union has functioned at the plant as a pre-majority labor organization since it was formed by a committee of workers in the fall of 2012. The Union has a constitution and was chartered by the National UE in August 2013. Its stated mission includes addressing issues that impact the interests of the entire workforce such as fair and consistent treatment of workers by the Employer, equal pay for equal work, and protecting

[1] 341 NLRB 1288 (2004).

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

worker benefits. The Union has elected officers, including a network of trained stewards. Union members pay dues, and the Union holds regular membership meetings and engages in organizing drives and leafleting. The Union advises its members regarding avenues that the Employer has in place to address complaints and disciplinary issues. For its part, the Employer has granted the Union limited access to its facility to meet with employees on company property during non-work time and the Union has access to a bulletin board to post materials.

Both employees involved in the cases at issue are Union members. Both were involved in investigatory interviews that led to disciplinary action.

On (b) (6), (b) (7)(C), 2016,[3] Employee 1 ("E1") was operating a machine when a part was damaged that cost the Employer $62,000. On (b) (6), (b) (7)(C), E1 was called to appear before four managers to further address the (b) (6), (b) (7)(C) incident. At the meeting, E1 initially asked if the meeting was disciplinary and, upon receiving no response, requested (b) (6), (b) *Weingarten* rights. The Employer told E1 no such rights existed and proceeded to question (b) (6), (b) (7) about the incident. At the meeting, E1 confessed to damaging the machine on (b) (6), (b) (7)(C) but later stated that (b) (6), (b had provided a false confession of wrongdoing because (b) (6), (b became stressed during the course of the meeting. The following day, on (b) (6), (b) (7)(C), E1 was called to another meeting at which the Employer read a statement of discipline suspending E1 for three days and placing (b) (6), (b) (7) on last chance status for "lying during an investigation" and neglect of (b) (6), (b) (job responsibilities regarding the damaged part.[4]

On (b) (6), (b) (7)(C), Employee 2 ("E2") built an engine that subsequently failed a performance test. On (b) (6), (b) (7)(C), E2 was called to a meeting with the Employer to answer questions about (b) (6), (b) performance and the engine's failure. At some point during the interview E2 requested a *Weingarten* representative although there is some dispute regarding when exactly the request was made.[5] After E2 requested a representative,

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[3] Herein all dates are 2016 unless otherwise noted.

[4] Although not an investigatory interview, E1 requested a *Weingarten* representative by name—and requested an alternate representative by name when the Employer stated that the first representative was not available—at the beginning of the (b) (6), (b) (7)(C) (b) (6), (b meeting. The Employer refused to grant E1 the representative of (b) (6), (b) choice, but, instead, brought in an openly anti-Union employee to listen to the disciplinary meeting.

[5] E2 stated that (b) (6), (b requested a *Weingarten* representative after the Employer started asking questions. The Employer stated that E2 asked for a representative after it was almost finished with its line of questioning. We do not believe the exact timing of the request is relevant because, based on either account, E2 requested a

a supervisor started to get the Union president, who is an employee at the Grove City facility. E2 then requested the president by name, but [redacted] supervisor was told by his superior to get a different employee, who E2 describes as anti-Union. At the conclusion of the interview E2 was told [redacted] would be disciplined and, on [redacted], [redacted] was issued a three day suspension.

The Union filed charges regarding each incident and urges the Board to reconsider and overrule *IBM*, and alternatively to find that *IBM* does not apply to the unique facts here. The Employer argues that no violation should be found in either case because it provided both employees with a coworker to witness at least some of the meetings at issue, and urges the General Counsel not to use these cases to attempt to change the law regarding the scope of *Weingarten* rights. The Employer also submits that, should the Board decide to overrule *IBM*, the change in law should not apply retroactively because the Employer relied upon extant Board law in denying *Weingarten* rights to E1 and E2, and retroactive application in this case would result in a manifest injustice.

ACTION

We conclude that the Region should use these cases as vehicles to urge the Board to overrule *IBM* and recognize employees' *Weingarten* rights in non-unionized workplaces. Specifically, the Region should issue complaint, absent settlement, and argue that the Employer violated Section 8(a)(1) by requiring E1 to attend an investigatory interview without the assistance of a coworker representative and by requiring E2 to submit to an investigatory interview with an anti-Union coworker representative who was selected by the Employer.

In *Weingarten*, the Supreme Court held that employees may request the presence of a union representative at an investigatory interview that the employee reasonably believes may result in disciplinary action.[6] Since *Weingarten* was decided, the Board found in two prominent decisions that employees in non-union settings also have a right to have a coworker serve as a representative in investigatory interviews under *Weingarten*.[7] More recently, however, the Board in *IBM* concluded that, in light of

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representative before the investigatory interview was completed and, once requested to do so, the Employer did, in fact, bring a coworker into the meeting as a witness.

[6] 420 U.S. at 256.

[7] *See Materials Research Corp.*, 262 NLRB 1010, 1011-12 (1982); *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676, 677-78 (2000), *enforced in relevant part* 268 F.3d 1095 (D.C. Cir. 2001).

certain policy considerations, the Board would no longer find that employees in non-union workplaces have the right to a coworker representative. Specifically, the Board reasoned that representation in a non-union setting was ill advised because a coworker representative (1) does not represent the collective interests of the entire workforce; (2) cannot redress the power imbalance between employers and employees; (3) does not have the same skills as union representatives; and (4) would compromise the confidentiality of the information received during the interview. We believe that *IBM* was wrongly decided, and, for the reasons stated in *Bayhealth Medical Center*,[8] the Board should overrule *IBM* and, once again, recognize employees' *Weingarten* rights in a non-union workplace.

When analyzing whether an employee has unlawfully been denied a representative, the Board considers whether the employee's belief that the interview will result in discipline is objectively reasonable under all the circumstances of the case, rather than considering the employee's subjective belief that discipline will issue.[9] An employee is entitled to a *Weingarten* representative only when the meeting is investigatory in nature, i.e., one in which the employer seeks additional

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[8] Case 05-CA-157145, Advice Memorandum dated December 15, 2015. As highlighted in *Bayhealth*, *IBM* disregarded the importance of employee solidarity, which is a fundamental principle of the Act. When one employee supports another with respect to an issue that only appears to concern the latter employee, including being present in the investigatory interview of a coworker that might result in discipline, there is an implicit promise of future reciprocation and it does not matter whether those acting in solidarity represent any other employee's interests. It is enough that one employee has made common cause with another. *See Bayhealth* at 16-17. *See, e.g., NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14-16 (1962) (walkout by employees in support of warmer workplace was concerted activity); *Go-Lightly Footwear, Inc.*, 251 NLRB 42, 44 (1980) (walkout and picketing by employees in support of discharged coworker were concerted and protected); *Carbet Corp.*, 191 NLRB 892, 982 (1971) (employee acting as informal spokesperson for employees concerning grievance over ventilation system prior to onset of organizing drive was engaged in concerted and protected activity), *enfd. mem.* 1972 WL 3043, 80 LRRM 3054 (6th Cir. 1972). Here, in addition to the solidarity involved when one coworker assists another in an investigatory interview, the employees' requests for coworker representation grew out of the employees' protected concerted activity of forming an employee organization to address their working conditions.

[9] *Weingarten*, 420 U.S. at 257. *See also Consolidated Edison Co. of New York*, 323 NLRB 910, 910 (1997) ("*Weingarten* [ ] requires an employer to evaluate an investigatory interview situation from an objective standpoint—i.e., whether an employee would reasonably believe that discipline might result from the interview.")

information from the employee to establish or further support the disciplinary action being considered, rather than where the employer is merely disclosing a previously made disciplinary decision.[10]

This right arises only when the employee requests such representation.[11] The employee requesting *Weingarten* representation is entitled to his preferred representative, rather than a representative assigned by the employer, so long as his selection does not delay the employer's investigation.[12] Thus, absent delay or other extenuating circumstances, the employee is not required to proceed with a less desirable representative of the employer's choosing.[13] Conversely, if the employee requests an unavailable representative, it is the employee's obligation to request an alternative available representative in order to remain under *Weingarten*'s

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[10] *See Baton Rouge Water Works Co.*, 246 NLRB 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.")

[11] *See Weingarten*, 420 U.S. at 257.

[12] *Compare Fry's Food Stores*, 361 NLRB No. 140, slip op. at 2, 8 (Dec. 16, 2014) (employer unlawfully denied employee choice of preferred and available union representative at investigatory interview); *Anheuser-Busch, Inc.*, 337 NLRB 3, 8, 11-12 (2001) (employee has right to specify *Weingarten* representative absent extenuating circumstances such as delay), *enfd.* 338 F.3d 267 (4th Cir. 2003), *cert. denied* 541 U.S. 973 (2004); *GHR Energy Corp.*, 294 NLRB 1011, 1042 (1989) (employee had a Section 7 right to select an available international union representative as his *Weingarten* representative instead of steward where no delay would result), *enfd.* 924 F.2d 1055 (5th Cir. 1991) *with Buonadonna Shoprite, LLC.*, 356 NLRB 857, 857 (2011) (employer not required to delay investigation for employee's preferred representative when qualified representative was available and present); *Pacific Gas & Electric Co.*, 253 NLRB 1143, 1143-44 (1981) (employee could not delay investigation by requesting steward at another facility when qualified steward was immediately available); *Coca-Cola Bottling Co. of Los Angeles*, 227 NLRB 1276, 1276 (1977) (employee not entitled to delay investigation by waiting for return of preferred representative from vacation).

[13] *See Consolidation Coal Co.*, 307 NLRB 976, 977-78 (1992) (employer violated Section 8(a)(1) by forcing employee to select from among inexperienced union committeemen where employee's preferred representative, an experienced executive board member, was available at the time of the interview).

protections; the employer is not required to postpone the interview, secure an alternate representative, or otherwise accommodate the employee's specific request.[14] The employer, however, is not permitted to unilaterally choose an alternative to the employee's original request for representation, thereby effectively foreclosing the employee from making further requests.[15]

In the instant case, E1 requested and was denied a *Weingarten* representative at the (b) (6), (b) (7)(C) investigatory interview, which, based on the Employer's request to discuss the (b) (6), (b) (7)(C) incident, (b) (6), (b) reasonably believed would, and in fact did, result in discipline. If the Board reinstates the principles of *Epilepsy Foundation,* the Employer infringed on E1's *Weingarten* right in violation of Section 8(a)(1) by forcing E1 to participate in the meeting without the assistance of a coworker. E1 asked upfront whether the meeting was disciplinary and, after receiving no response, immediately requested a *Weingarten* representative. Once E1 made a valid request for representation, the Employer had three options: (1) grant the request; (2) discontinue the interview; or (3) offer E1a choice between continuing the interview without a representative or having no interview.[16] Thus, it was unlawful for the Employer to deny E1's request for a *Weingarten* representative and proceed to question (b) (6), (b) (7)(without first giving E1 the option to forego the interview or go forward without representation.

If the Board reinstates the principles of *Epilepsy Foundation,* the Employer also violated Section 8(a)(1) by denying E2 the right to select (b) (6), (b) *Weingarten* representative. We reject the Employer's argument that it did, in fact, provide E2 a representative, and that E2 did not have a right to request a specific employee. The Board has made clear that "an employee has the right to specify the representative he

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[14] *See Montgomery Ward & Co.*, 273 NLRB 1226, 1227 (1984) (citing *Coca-Cola Bottling Co. of Los Angeles*, 227 NLRB 1276 (1977)), *enfd.* 785 F.2d 316 (9th Cir. 1986).

[15] *See Montgomery Ward & Co.*, 273 NLRB at 1227 (employee foreclosed from suggesting alternative representative where employer determined that a tape recording of the investigatory interview would serve as the employee's protection). *See also Westside Community Mental Health Center,* 327 NLRB 661, 661 n.2, 665-66 (1999) (ALJ, enforced by the Board, notes that employee who was denied *Weingarten* representation was not required to "further antagonize the employer and jeopardize his job by walking out of the meeting or refusing to answer questions") (quoting *Williams Pipeline Co.*, 315 NLRB 1, 5 (1994)); *Super Valu Stores*, 236 NLRB 1581, 1591 (1978), *enfd. denied* 627 F.2d 13 (6th Cir. 1980).

[16] *See, e.g., Menorah Medical Center*, 362 NLRB No. 193, slip op. at 2 (Aug. 27, 2015).

or she wants, and the employer is obligated to supply that representative absent some extenuating circumstances."[17] Although the Employer stated that E2's chosen representative was unavailable at the time,[18] it was for E2, and not the Employer, to select an alternate representative.[19] Furthermore, E2 was not required to proceed with a less qualified—in this case anti-Union—representative.[20] Nor was E2 required to insist on another representative after the Employer unilaterally determined that the anti-Union employee would serve as [redacted] witness, because the Employer's conduct "was preemptive and effectively prohibited [E2] from making a further request for representation" by making it clear that the decision had already been made and further discussion regarding E2's request for representation was futile.[21] The fact that E2, and likewise E1, participated in their interviews without the assistance of their chosen *Weingarten* representatives does not constitute a waiver of their right to be represented.[22]

Finally, there are unique factors present in these cases that make the argument to overrule *IBM* even more compelling here. The Union has been functional, albeit as a pre-majority labor organization, for the past three years at the Employer's Grove City facility. As such, it has a network of trained stewards who are subject to the UE's constitution and bylaws requiring fair representation of their coworkers. The Union's stated goals include addressing collective concerns such as fair and consistent treatment of workers by the Employer, equal pay for equal work, and protecting worker benefits. Thus, the concerns expressed in *IBM* regarding coworker

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[17] *Anheuser-Busch, Inc.*, 337 NLRB at 8. *See also Fry's Food Stores*, 361 NLRB No. 140, slip op. at 2, 8.

[18] It is not clear that E2's chosen representative was unavailable. The Employer asserts only that [redacted] was "working." If the Region determines that E2's chosen representative was in fact available, it should argue a violation under that theory as well.

[19] *See, e.g., Montgomery Ward & Co.*, 273 NLRB at 1227; *Coca-Cola Bottling Co. of Los Angeles,* 227 NLRB at 1276.

[20] *See, e.g., Consolidation Coal Co.*, 307 NLRB at 977-78.

[21] *Montgomery Ward & Co.*, 273 NLRB at 1227.

[22] *See Westside Community Mental Health Center,* 327 NLRB at 665-66.

representation, although largely unfounded in any non-union workplace, have even less traction in the circumstances presented by these cases.[23]

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by denying E1 a representative altogether and by unilaterally designating an anti-Union representative for E2 rather than allowing E2 to choose his representative.[24]

/s/
B.J.K.

ADV.06-CA-176001.Response.GE (b) (6), (b) (7)

[23] We would not, however, argue that the Union here—which has not yet attained majority status—be regarded as though it were the certified representative of the employees. Instead, as discussed above, we would argue that the facts presented here provide added support for overruling *IBM* and bringing unrepresented employees back under the cloak of *Weingarten*'s protection.

[24] The Employer's argument that any change of law should not be applied retroactively is without merit. Retroactive application would serve the underlying purposes of the Act, and there is no evidence that it would result in manifest injustice to the Employer's financial or managerial interests. *See, e.g., Epilepsy*, 331 NLRB at 679.