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Nonunion Employees and the Weingarten Right

INTRODUCTION

The purpose of the National Labor Relations Act ("NLRA")\(^1\) is to ease the industrial strife which burdens and obstructs the free flow of commerce.\(^2\) In order to attain this goal, the NLRA seeks to eliminate the disparity in bargaining power between employers and employees by granting employees the right to freely associate and independently contract with one another.\(^3\) Section 7,\(^4\) the core of the NLRA,\(^5\) provides workers with the right to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."\(^6\) Section 7

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2. Id. § 151. Section 151 states that industrial strife affects commerce by:
   (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce;
   (b) occurring in the current of commerce;
   (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce;
   (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods from or into the channels of commerce.
   Id.
3. Id. Many employees fall beyond the scope of the NLRA. Section 152(3) states:
   The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.
   Id. § 152(3).
4. Id. § 157.
6. 29 U.S.C. § 157 (1982). Not all concerted activities are protected under the NLRA. Unprotected activities include: intermittent work stoppages, UAW Local 232 v. Wisconsin Employment Relations Bd., 336 U.S. 245, 252-65 (1949); unlawful activity, Southern S.S. Co. v. NLRB, 316 U.S. 31, 48 (1942); violent activity, Florida Steel Corp. v. NLRB, 529 F.2d 1225, 1234 (5th Cir. 1976); disloyal activity, NLRB v. Local 1229, International Bhd. of Elec. Workers, 346 U.S. 464, 465-78 (1953); and disruptive activity, Liberty Mutual Ins. Co. v. NLRB, 592 F.2d 595, 604-06 (1st Cir. 1979). See generally Johnson, Protected Con-
guarantees are equally applicable to union and nonunion employees.7

In NLRB v. J. Weingarten, Inc.,8 the Supreme Court held that section 7 guarantees a union9 employee the right to a union representative in an investigatory interview in which an employer confronts the employee with allegations of employee misconduct.10 Two requirements must be met before the Weingarten right is triggered. First, the employee must request the presence

certed Activity Non-Union Context: Limitations on Employers Rights to Discipline or Discharge Employees, 49 MISS. L.J. 839 (1978).

7. The Supreme Court first enunciated this principle in NLRB v. Washington Aluminum Co., 370 U.S. 9, 14 (1962) (the action of seven nonunion employees who left work without permission in protest of the cold temperatures in their work place held to be protected concerted activity).

Circuit courts have recognized the principle in a wide variety of factual contexts. See, e.g., Vic Tanny Int'l, Inc. v. NLRB, 622 F.2d 237 (6th Cir. 1980) (nonunion employee's walk protesting unfair job assignments found protected concerted activity); NLRB v. Empire Gas, Inc., 566 F.2d 681 (10th Cir. 1977) (nonunion employee soliciting support for collective refusal to work held protected concerted activity); United Merchants & Mfrs. v. NLRB, 554 F.2d 1276 (4th Cir. 1977) (work stoppage by nonunion employees protesting discharges found protected concerted activity); United Packinghouse, Food & Allied Workers Int'l Union, AFL-CIO v. NLRB, 416 F.2d 1126 (D.C. Cir.) (nonunion employees acting to establish racially integrated employment conditions held protected concerted activity); cert. denied, 396 U.S. 903 (1969); NLRB v. Puerto Rico Rayon Mills, 293 F.2d 941 (1st Cir. 1961) (unorganized employees protesting discharges found to be protected concerted activity).

Likewise, decisions of the National Labor Relations Board ("the Board") have also extended section 7b guarantees to nonunion employees in diverse factual settings. See, e.g., Red Ball Motor Freight, 253 N.L.R.B. 871 (1980) (employee complaints concerning company's procedures found protected); Go-Lightly Footwear, Inc., 251 N.L.R.B. 42 (1980) (walkout by employees supporting discharged employees and picketing protesting employer premises, scab labor, and minority issues held protected); Savin Business Mach. Corp., 243 N.L.R.B. 92 (1979) (employee discussions concerning commission losses found protected); Steere Dairy, Inc., 237 N.L.R.B. 1350 (1978) (employee's attempt to organize other employees to walk out held protected).

There is, however, one very limited exception. The NLRA does not protect concerted activity of minority employees who seek to bargain with the employer when these employees are covered by a collective bargaining agreement. Emporium Capwell Co. v. Community Org., 420 U.S. 50, 70 (1975).

The term "union employee" is used herein to indicate an employee who is covered by a collective bargaining agreement.


9. A union is a labor organization. The NLRA defines "labor organization" as: "[A]ny organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work." 29 U.S.C. § 152(5) (1982).

10. In the usual scenario, the employer calls the employee to the interview to learn the employee's version of the circumstances surrounding the employee's alleged misconduct. On the basis of the interview and any supplemental information, the employer makes a decision concerning discipline.
of a union representative at the interview. Second, the employee must reasonably believe that the interview will result in disciplinary action. In *Weingarten*, the Court also defined the scope of the right. The representative, functioning as a professional, actively participates in the hearing. He or she may clarify facts or suggest speaking to other employees who may possess relevant facts. The employer, however, need not bargain with the representative. Moreover, the employee's exercise of this right must not interfere with legitimate employer prerogatives.

11. The employee waives this right if he fails to request a representative at the interview. The employee can either waive the right knowingly if he is aware of the right and chooses to forego representation, or unintentionally if he fails to exercise the right because he is unaware of it. *See NLRB v. Climax Molybdenum Co.*, 584 F.2d 360, 362 (10th Cir. 1978).

The employer has the prerogative of presenting the employee with the choice between having the interview without a representative or foregoing the interview. Once the employee waives the right to have a representative present, the employer may continue the interview process without committing an unfair labor practice. *See Weingarten*, 420 U.S. at 257.

12. The employee's reasonable belief is measured by an objective standard, based on the circumstances of the case. The employee's subjective motives are irrelevant. Reasonableness is a question of fact to be determined by the fact-finder. *Weingarten*, 420 U.S. at 258 n.5.

The Board, in *Quality Mfg. Co.*, 195 N.L.R.B. 197 (1972), stated:

[W]e 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.

*Id.* at 199.

13. *Weingarten*, 420 U.S. at 260, 262-65. The Court recognized that the union representative aids the employee because the representative is knowledgeable in the mechanics and negotiation of collective bargaining agreements and experienced in dealing with employers. The representative assists the employee, who may be overwhelmed by the employer.

The Court noted that an employer may be all the more intimidating as a result of the recent growth in sophisticated surveillance techniques. The employer can monitor and investigate the employee's conduct through the use of closed circuit television, lie detectors, and undercover security agents. This raises the question of whether an employee can bring into the interview a co-employee who is neither trained to serve in the capacity of a representative nor familiar with the sophisticated surveillance devices used by employers. *See infra* notes 146-49 and accompanying text.


15. *Id.* at 258. The Supreme Court in *Weingarten* did not define the concept of "legitimate employer prerogatives." By way of example, however, the Court stated that one such prerogative gives the employer the freedom to conduct an investigation without interviewing the employee. Other employer prerogatives must be determined from the common law. Employer authority has been recognized for discharging at will, hiring
employee's denial of this right to have a representative present at the hearing constitutes an unfair labor practice in violation of section 8(a)(1) of the NLRA. This section empowers the National Labor Relations Board ("the Board") to take action against the employer in the event of an unfair labor practice.

It is not clear whether section 7 affords nonunion employees the Weingarten right. In Material Research Corp., the Board held that the right to representation at an investigatory interview applies to nonunion employees because section 7 protects nonunion as well as union employees. Conversely, the Ninth Circuit, in E.I. du Pont de Nemours v. NLRB, held that in a nonunion setting, an individual's request for representation is not concerted activity within the meaning of section 7, and thus the Weingarten right is not applicable to nonunion employees.

standards, setting up working hours, and disciplining employees. See infra text accompanying notes 78-92.


17. Section 10(a) authorizes the Board to take action; it states in pertinent part: "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce." 29 U.S.C. § 160(a) (1982).

Section 10(c) outlines the scope of the available remedies: "an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter." Id. § 160(c).

Section 10(e) allows the Board to petition the federal court in the jurisdiction in which the unfair labor practice occurred for the enforcement of their order. Id. § 160(e).

Section 10(f) grants a person aggrieved by the Board's order the same right as the Board has to petition the court to review the order. Id. § 160(f).

18. See infra text accompanying notes 93-123.


20. Id. at 1010.

21. 707 F.2d 1076 (9th Cir. 1983).

22. Id. at 1079. The Fifth Circuit has also expressed an unwillingness to extend the Weingarten right to nonunion employees. In Anchortank, Inc. v. NLRB, 618 F.2d 1153 (5th Cir. 1980), the court held that an employee's request for representation by a union which had won a challenged election was protected by section 7. The court found the employee's request to be concerted activity because the union stood for all the unit employees. The court explained that, absent the union, the presence of a union representative does not satisfy the Interboro view of the definition of concerted activity.

We conclude that before a representation election is held, the presence of a union representative does not have the effect on other employees essential to satisfaction of the Interboro standard for concerted activity [the most lenient standard,] thus the employee's activity in seeking the presence of a representative at that time does not constitute concerted activity.
Resolution of this issue is critical because there is a need for uniform treatment of the legal rights and duties of employers and employees in the context of the nonunion workplace.\footnote{23}

This note will examine the applicability of the *Weingarten* right to nonunion employees. First, it will address the scope of the *Weingarten* decision with respect to concerted activity and non-interference with legitimate employer prerogatives. Next, the Board’s decision and rationale for applying the *Weingarten* right to nonunion employees will be analyzed. The Ninth Circuit’s refusal to extend the right to nonunion employees will also be examined. This note concludes that the *Weingarten* right should not apply to nonunion employees.

\textit{Id.} at 1161. See \textit{infra} text accompanying notes 70-73 for a discussion of the \textit{Interboro} doctrine.

\footnote{23} See \textit{infra} notes 142-50 and accompanying text. Prior to *Weingarten*, the Board and the courts approached the issue of whether an employee is afforded a representative in a number of ways. For example, in \textit{Ross Gear & Tool Co.}, 63 N.L.R.B. 1012 (1945), the Board held that a union employee is entitled to representation. Relying upon section 7 of the NLRA, the Board reasoned that the worker was entitled to a Board order finding a grievance was not present and that there was therefore no reason to address the issue of representation. NLRB v. \textit{Ross Gear & Tool Co.}, 158 F.2d 607 (7th Cir. 1947). The court determined that the employee was discharged for insubordination. \textit{Id.} at 613-14. Because of the factual setting, this case is not entirely instructive of the Board’s analysis of the right to a representative. One reason the employee was called for an interview was because she was a member of the union committee. \textit{Id.} at 609.

The Board next confronted the issue of representation almost 20 years later in \textit{Dobbs House, Inc.}, 145 N.L.R.B. 1565 (1964). In \textit{Dobbs House}, the Board reversed its initial determination in \textit{Ross Gear}, holding that an employee has no statutory right to request a representative. \textit{Id.} at 1571.

In \textit{Texaco, Inc.}, 168 N.L.R.B. 361 (1967), the Board again deviated from its previous decisions. The Board took the position that an employee has a statutory right to representation based on section 8(a)(5) of the NLRA. Section 8(a)(5) provides that it is an unfair labor practice for an employer to refuse to bargain collectively with representatives of his employees on mandatory subjects of bargaining. 29 U.S.C. § 158(a) (1982). The Board found the meeting at issue disciplinary in nature. Since a condition of employment was involved, there was present a mandatory subject of bargaining. \textit{Texaco’s} rejection of the employee’s request for a union representative violated section 8(a)(5) because Texaco refused to bargain collectively on a mandatory subject of bargaining. 168 N.L.R.B. at 362. The Fifth Circuit reversed the Board’s determination in \textit{Texaco, Inc.} v. NLRB, 408 F.2d 142 (5th Cir. 1969).

The Board switched from a section 8(a)(5) analysis to a section 7 analysis in \textit{Quality Mfg.}, 195 N.L.R.B. 197 (1972). \textit{Quality Mfg.} summarily determined that the denial of a union employee’s request for union representation at an interview is a violation of the employee’s right to act in concert for the mutual aid and protection of the employee group. The Board was quick to apply the section 7 analysis in \textit{J. Weingarten, Inc.}, 202 N.L.R.B. 446 (1973), and \textit{Mobil Oil Corp.}, 196 N.L.R.B. 1052 (1972). Relying on past cases, the Fourth, Fifth, and Seventh Circuits disagreed. See generally NLRB v. \textit{Quality Mfg.}
BACKGROUND

The Weingarten Right

*NLRB v. J. Weingarten, Inc.*,24 involved an employee, Laura Collins, who worked as a sales clerk for a retail food chain. A retail clerks union represented Collins for collective bargaining purposes. After a fellow employee reported that Collins had stolen money from the cash register, the store manager summoned Collins for an interview in order to investigate the accusations.25 Collins requested a union representative at the interview. The store manager denied the request and conducted the interview as scheduled.26 Collins filed an unfair labor practice claim with the Board against the food chain, alleging that she was denied her section 7 right to a union representative.27 The Board agreed with Collins and ordered the company to cease and desist its practices.28 The Court of Appeals reversed, finding the Board’s construction of section 7 impermissible.29

The United States Supreme Court held that section 7 provides a union employee the right to a union representative at an investigatory interview.30 The Court reasoned that an employee’s request for representation fell within the scope of protection afforded by section 7 because the request protects the interests of the entire bargaining unit.31 The Court cited two reasons for

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25. Id. at 254.
26. Id.
27. Id. at 256.
29. NLRB v. J. Weingarten, Inc., 485 F.2d 1135 (5th Cir. 1974). The Board construed section 7 to include a union employee’s request for representation, because the request mutually aided and protected the other union employees. *Id.* at 1138. This decision was based on the Board’s decisions in Quality Mfg. Co., 195 N.L.R.B. 197 (1972), and Mobil Oil Corp., 196 N.L.R.B. 1055 (1972).
30. 420 U.S. at 260.
31. *Id.* “The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of section 7 that ‘[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.’” *Id.*
32. For purposes of the NLRA, the phrase “bargaining unit” is a term of art. Prior to an election for representation, the Board must select an appropriate bargaining unit.
its holding. First, the union representative safeguards the interests of other employees by contesting or thwarting an employer’s practice of meting out unjust punishment.\textsuperscript{33} Second, the presence of a representative assures other employees that they too would have the same right under similar circumstances.\textsuperscript{34} Further, the Court indicated that the section 7 protection applies to an employee’s request for a representative at an interview only if the interview is held for the purpose of investigating the employee’s activities, and not if the purpose is to discipline the employee.\textsuperscript{35} The Court stated that representation at an investigatory interview protects and aids other employees, whereas an interview which is conducted to impose discipline on an employee only affects that particular employee.\textsuperscript{36}

In resolving the issue before it, the Court established the scope of the right.\textsuperscript{37} First, an employee may exercise the right only if

\textsuperscript{33} U.S.C. § 159(b) (1982). There is often more than one appropriate bargaining unit; the Board need not choose the best. NLRB v. Burns Int’l Security Serv., 406 U.S. 272, 281 (1972); NLRB v. Hudson River Aggregates, Inc., 639 F.2d 865, 869 (2d Cir. 1981); NLRB v. H.M. Patterson & Sons, Inc., 636 F.2d 1014, 1016 (5th Cir. 1981).

\textsuperscript{34} 420 U.S. at 260-61. “The union representative whose participation he seeks is, however, safeguarding not only the particular employee’s interests, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly.” \textit{Id.}

\textsuperscript{35} Id. at 261. “The representative’s presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview.” \textit{Id.}

\textsuperscript{36} Historically, the Board and the courts have made a distinction between investigatory and disciplinary interviews. In Texaco, Inc., 168 N.L.R.B. 361 (1967), the Board found that a union employee has a right to a disciplinary interview. The Board based its decisions on section 8(a)(5), which defines an unfair labor practice for employers who refuse to bargain collectively with union representatives. \textit{Id.} at 362. Immediately after Texaco, the Board decided Jacobe-Pearson Ford, Inc., 172 N.L.R.B. 594 (1968), in which it announced that sections 8(a)(5) and 8(a)(1) do not afford a union employee the right to a union representative in an investigatory interview. The Fifth Circuit, in Texaco, cited Jacobe-Pearson for this proposition. 408 F.2d at 142 (citing Jacobe-Pearson, 172 N.L.R.B. at 594).

Other NLRB cases also follow this investigatory-disciplinary distinction. \textit{See}, e.g., Lafayette Radio Elecs. Corp., 194 N.L.R.B. 491 (1971); Illinois Bell Tel., 192 N.L.R.B. 834 (1971).

The Supreme Court in \textit{Weingarten} expressly overruled Texaco’s proposition that section 8(a)(1) does not afford a union employee an investigatory interview. 420 U.S. at 264. The Court did not indicate whether Texaco’s holding granting union employees a right to representation at a disciplinary interview is still binding. The status of the issue is therefore unclear. A full analysis of the distinction is beyond the scope of this note. \textit{See generally Comment, Union Presence in Disciplinary Meetings}, 41 U. CHI. L. REV. 329 (1973-74).

\textsuperscript{37} 420 U.S. at 260-61.

\textsuperscript{37} The Court noted, “It is the province of the Board, not the courts, to determine whether or not the ‘need’ [for a representative at an investigatory interview] exists in
he requests representation prior to the interview. Failure to request will result in waiver of the right. Waiver can occur even when the employee does not exercise the right because he is unaware of its existence. Second, the employee's belief that the investigation will result in disciplinary action must be based on objective facts. Third, the exercise of the right may not interfere with legitimate employer prerogatives. An assertion of legitimate employer authority enables the employer to cancel the interview. When the employer asserts such a prerogative, the employer may give the employee the choice between conducting the meeting without representation or not conducting the meeting at all. Finally, the employer need not bargain with the representative; the representative is only there to help clarify an otherwise ambiguous situation.

The Court explained that the right serves to effectuate the goal of the NLRA because the request for representation equalizes the bargaining power between employers and employees, thereby easing industrial strife. Requiring an employee to attend an interview conducted by the employer which the employee believes will result in discipline would perpetuate the imbalance the NLRA was designed to eliminate.

The Scope of Section 7 Concerted Activity

Weingarten held that section 7 affords a union employee the right to request representation at an investigatory interview. In light of changing industrial practices and the Board's cumulative experience in dealing with labor-management relations." Id. at 266.

38. Id. at 257. See supra note 11 and accompanying text.
39. 420 U.S. at 257.
40. Id. at 257-58. See supra note 12 and accompanying text.
41. 420 U.S. at 258-59. See supra note 15 and accompanying text.
42. 420 U.S. at 258-59.
43. Id. at 258. The Court quoted the Board's opinion in Quality Mfg. Co., 195 N.L.R.B. 197, 198-99 (1972), which states that allowing an employee the choice is the only course consistent with the provisions of the Act. This interpretation safeguards the employer's right to run his own shop as well as the employees' right to protection by their exclusive bargaining agent. "It permits the employer to reject a collective course in situations such as investigatory interviews when a collective course is not required but protects the employee's right to protection by their chosen agents." 420 U.S. at 258 (quoting Quality Mfg., 195 N.L.R.B. at 198-99).
44. 420 U.S. at 259.
45. Id. at 262. The NLRA drafters' goal was to eliminate the inequity of bargaining power between employees and employers by allowing employees the freedom to bargain collectively. 29 U.S.C § 151 (1982).
46. Id. at 260.
order to be protected by section 7, an employee must actconcertedly, and this concerted activity must be for the mutual aidor protection of other employees. Both the courts and the Boardhave held that section 7 can apply to nonunion employees aswell as union employees if their activities satisfy this concertedactivity requirement. Commentators have justified section 7'sconcerted activity requirement on two grounds. One suggeststhat Congress deemed a single employee's activity too insignifi-cant to require protection. Another explains that Congressincluded the concerted activity requirement to encourage collec-tive bargaining. Notwithstanding these varying justifications, theconcerted activity component is expressly stated in the statute.

47. The history of section 7 sheds little light on its meaning. Common law regarded employee group protests as unlawful conspiracies, the remedy for which was criminal prosecution of the employees, and, later, injunctive relief for the employer. In contrast, individual protests against employment conditions were lawful. See R. GORMAN, BASIC TEXT ON LABOR LAW 2 (1976). The Sherman Antitrust Act, enacted in 1890, codified the substance of the common law. Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. § 1 (1982)).

The Clayton Act of 1914 was Congress's first attempt at exempting certain labor activities from the Sherman Act. Specifically, section 20 of the Clayton Act exempts from injunctive actions peaceful devices such as work stoppages, picketing, and other activity "whether engaged in singly or in concert." 29 U.S.C. § 52 (1982).


50. R. GORMAN, supra note 47, at 299.


The *Weingarten* Court based its holding on its finding that an individual employee's request for representation constituted concerted activity. 53 The employee in *Weingarten*, however, belonged to a union. 54 In addressing the issue of whether the *Weingarten* right should be extended to nonunion employees, courts have examined the scope of concerted activity in various factual settings. 55

Every federal circuit has adopted the basic premise that the activity of an individual employee may under certain circumstances constitute concerted activity. 56 These courts and the Board have developed four standards to determine whether concerted activity, within the meaning of section 7, encompasses an individual's activity. 57

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53. 420 U.S. at 254. The Court failed to address specifically how the one union employee's request for representation constituted a concerted activity. See supra notes 31-34 and accompanying text.

54. 420 U.S. at 254.

55. Once the scope of concerted activity has been determined, one can analyze whether a nonunion employee's request is within the definition. See Anchortank, Inc. v. NLRB, 618 F.2d 1153, 1158 (5th Cir. 1980).

56. See Royal Dev. Co. v. NLRB, 703 F.2d 363, 374 (9th Cir. 1983) (recognized individual concerted activity but not when employee "acted for himself and by himself"); Roadway Express, Inc. v. NLRB, 700 F.2d 687, 694 (11th Cir. 1983) ("The law in this circuit, until stated differently by the court sitting en banc, adheres to the definition of concerted activities announced in *Mushroom Transportation.*"); Scooba Mfg. Co. v. NLRB, 694 F.2d 82, 84 (5th Cir. 1982) ("[T]he mere fact that an employee acts alone does not preclude treatment of his action as a protected activity under the Act."); NLRB v. Town & Country LP Gas Serv., 687 F.2d 187, 191 (7th Cir. 1982) (individual's grievance can be sufficiently related to the union's collective objectives to come within section 7); NLRB v. Lloyd A. Fry Roofing Co., 651 F.2d 442, 445 (6th Cir. 1981) ("It is not necessary that an individual employee be appointed or nominated by other employees to represent their interests."); Wheeling-Pittsburgh Steel Corp. v. NLRB, 618 F.2d 1009, 1017 (3d Cir. 1980) (employees refusal to operated crane for safety reasons deemed to be concerted); Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304, 306 (4th Cir. 1980) ("An action by a single employee may be concerted even though participated in by a single employee."); Kohls v. NLRB, 629 F.2d 173, 175 (D.C. Cir. 1980) (truck driver who refused to drive truck for safety reasons found not concerted because he failed to assert interest on behalf of anyone other than himself); NLRB v. Sencore, Inc., 558 F.2d 433, 434 (8th Cir. 1977) (employee's activity of enlisting support for wage increase was for the mutual welfare of other employees and therefore concerted); NLRB v. Empire Gas, Inc., 566 F.2d 651, 684-85 (10th Cir. 1977) (individual employee's solicitation for others to stop work held concerted); Ethan Allen, Inc. v. NLRB, 513 F.2d 706, 708 (1st Cir. 1975) (employee's pre-union statements to management found concerted because he had other employee's interests in mind); NLRB v. Interboro Contractors, Inc., 388 F.2d 495, 499-500 (2d Cir. 1967) (employee's attempt to enforce collective bargaining agreement found concerted despite non-interest of other employees).

57. See generally Note, Protection of Individual Action as "Concerted Activity" Under
The most restrictive approach holds that an individual acts concertedly only if he or she acts on behalf of, or as a representative of, the other employees.\textsuperscript{58} The determination must rest on a practical basis rather than a theoretical one.\textsuperscript{59} Thus, the employee acting as a spokesman, whether in an elected\textsuperscript{60} or a voluntary\textsuperscript{61} capacity, must represent an actual group of people.\textsuperscript{62} Consequently, application of this standard requires the participation of more than one employee to enable the activity to come within the scope of concerted activity.\textsuperscript{63}

A less restrictive approach, enunciated in \textit{Mushroom Transportation Co. v. N.L.R.B.},\textsuperscript{64} holds that an individual's activity is


\textsuperscript{58} The leading case utilizing this approach is \textit{ARO}, Inc. v. NLRB, 596 F.2d 713 (6th Cir. 1979). In \textit{ARO}, the employee, Williams, worked as a temporary janitor-cleaner. Because of the employer's financial difficulties, Williams was among several employees discharged. Her discharge was pursuant to a company policy to discharge temporary employees before discharging probationary employees hired for permanent positions. After her discharge, Williams made numerous complaints to the company concerning the order of discharge. Later, when the company was able to rehire old employees, the employer refused to give Williams her job back because of her complaints. Williams asserted that her complaints constituted concerted activity because they related to the status of other temporary employees. The court disagreed, holding that Williams made the complaints purely on her own behalf; while they might be related to the other employees' status, they benefited only herself. \textit{Id.} at 715. \textit{Accord Jim Causley Pontiac v. NLRB}, 620 F.2d 122, 123 (6th Cir. 1980); \textit{Ontario Knife Co. v. NLRB}, 637 F.2d 840, 849 (2d Cir. 1980); \textit{Blaw-Knox Foundry & Mill Mach., Inc. v. NLRB}, 646 F.2d 113, 116 (4th Cir. 1981); \textit{Wheeling-Pittsburgh Steel v. NLRB}, 618 F.2d 1009, 1017 (3d Cir. 1980); \textit{Morrison-Knudsen Co. v. NLRB}, 358 F.2d 411, 413 (9th Cir. 1966).

\textsuperscript{59} \textit{ARO}, 596 F.2d at 717.

\textsuperscript{60} \textit{Wheeling-Pittsburgh Steel v. NLRB}, 618 F.2d 1009, 1017 (3d Cir. 1980) (elected union employee representative suspended for acting as spokesman for the safety of the bargaining unit held to have engaged in concerted activity).

\textsuperscript{61} \textit{Pelton Steel, Inc. v. NLRB}, 627 F.2d 23, 30-31 (7th Cir. 1980) (employee's complaints about job rates and overtime held not concerted; court noted that a spokesman need not be formally selected); NLRB v. Guernsey-Muskingam Elec. Co-op, 285 F.2d 8, 12 (6th Cir. 1960) (individual employee's complaints concerning a foreman appointment held concerted activity where one group leader was not selected to voice complaints).

\textsuperscript{62} The group need not be in existence at the time. \textit{See Hugh H. Wilson v. NLRB}, 414 F.2d 1345, 1349 (3d Cir. 1969) (employee's formation of a group to discuss a grievance held concerted); \textit{Morrison-Knudsen Co. v. NLRB}, 358 F.2d 411, 413 (9th Cir. 1966) (employee's conduct in joining group action complaining about work conditions found to be concerted activity).

\textsuperscript{63} \textit{ARO}, 596 F.2d at 717.

\textsuperscript{64} 330 F.2d 683 (3d Cir. 1964). In \textit{Mushroom Transportation}, Keeler, a non-regular employee of the company, habitually advised other employees of their rights. The conver-
concerted if the object of that activity is to initiate, induce, or prepare for group action in the interest of the employees. This approach recognizes that concerted activity must start with some type of communication.\(^{65}\) If the NLRA denies this initial communication, the employee's section 7 guarantees of the right to organize and bargain collectively will never come to fruition.\(^{66}\) A problem arises in distinguishing an employee's activity intending to induce group action from "mere griping."\(^{67}\) Courts refuse to characterize "mere griping" as concerted activity.\(^{68}\) Thus, under the *Mushroom Transportation* approach, an individual making a direct appeal to other employees is protected under section 7 if the communication rises above the level of everyday complaining. By contrast, the activity of an employee who protests solely for his own benefit does not fall within the protective scope of concerted activity even if the activity protects other employees' benefits.\(^{69}\)

A more inclusive approach, the *Interboro* doctrine,\(^{70}\) protects individual activity under section 7 if the employee's actions attempt to implement an existing collective bargaining agreement.\(^{71}\) This interpretation affords section 7 protection even if the employee is acting for his own personal benefit, without...
regard for the interests of the other employees.\textsuperscript{72} The \textit{Interboro} court reasoned that activities involving attempts to enforce provisions of a collective bargaining agreement are an extension of the concerted activity which gave rise to the original collective bargaining agreement.\textsuperscript{73} Accordingly, a person seeking to enforce a collective bargaining agreement does so by the express will of those employees who are also under contract.

Early decisions by the Board represent the most expansive interpretation of the scope of concerted activity.\textsuperscript{74} An employee's activity was deemed concerted if it was of \textit{any} potential benefit to his co-employees. No showing of group action or of an existing collective bargaining agreement was necessary.\textsuperscript{75} According to the Board, the group benefits when one person acts for a common cause. This group benefit is sufficient to bring the activity within the scope of section 7.\textsuperscript{76} The circuits have refused to adopt this approach.\textsuperscript{77}

\textsuperscript{72} \textit{Id.} "[A]ctivities involving attempts to enforce the provisions of a collective bargaining agreement may be deemed to be concerted for purposes even in the absence of such interest by fellow employees." \textit{Id.}

\textsuperscript{73} \textit{Id.} at 499. \textit{See also} ARO, Inc. v. NLRB, 596 F.2d 713, 716 (6th Cir. 1979); Keokuk Gas Serv. Co. v. NLRB, 580 F.2d 328, 333 (8th Cir. 1978).

\textsuperscript{74} \textit{See}, e.g., St. Joseph's High School, 236 N.L.R.B. 1623, 1625 (1978), \textit{vacated on other grounds}, 248 N.L.R.B. 901 (1980) (teacher's action of circulation of report critical of school shortly before accreditation team visited the school held to be concerted activity); Pink Moody, Inc., 237 N.L.R.B. 39, 40 (1978) (employee's complaint about defective brakes on employer's truck and refusal to drive truck found to be concerted); Akron Gen. Medical Center, 232 N.L.R.B. 920, 920 (1977) (employee's complaint directly to employer, not to state agency, concerning excess of lint and dust in the hospital laundry found to be concerted); Alleluia Cushion, 221 N.L.R.B. 999, 1000 (1975) (employee's complaint to the California Occupational Safety and Health Agency concerning plant violations of state safety regulations found to be concerted activity). \textit{See also} R. GORMAN, \textit{supra} note 47, at 299.

The Board has since overturned this expansive interpretation of concerted activity in Meyers Indus., 268 N.L.R.B. 73 (1984). In \textit{Meyers}, the Board adopted an objective standard of concerted activity, stating that it is no longer sufficient in a showing of concerted activity to set out the subject matter that is of alleged concern to a theoretical group. \textit{Id.} at 75.


\textsuperscript{76} \textit{See} Bighorn Beverage, 236 N.L.R.B. 736, 752-53, \textit{enforcement denied}, 614 F.2d 1238 (9th Cir. 1980); Alleluia Cushion Co., 221 N.L.R.B. 999, 1000-01 (1975).

\textsuperscript{77} The only courts which have considered [it] have flatly rejected any rule that where the complaint of a single employee relates to an alleged violation of federal or state safety laws and there is no proof of a purpose enlisting group action in support of the complaint, there is "constructive concerted action." Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 305, 309 (4th Cir. 1980) (citing NLRB v. C.I. Air Conditioning Inc., 496 F.2d 977 (9th Cir. 1973)).
Legitimate Employer Prerogatives

In addition to concerted activity, Weingarten requires that the request for representation not interfere with legitimate employer prerogatives.\(^7\)\(^8\) Under the common law, an employer has the authority to discharge at will,\(^7\)\(^9\) absent the applicability of some specific protection for the employee.\(^8\)\(^0\) This means that an employer may discharge an employee without reason or even for a reason which is morally wrong.\(^8\)\(^1\) The employment at will doctrine is based upon a rule of contract law\(^8\)\(^2\) that requires a mani-

78. 420 U.S. at 258-59. See supra notes 41-43 and accompanying text.
79. This common law rule of termination at will first appeared in H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877).
80. In addition to section 7, the NLRA contains other provisions that protect employees against inappropriate employer activities. For example, section 8(a) of the NLRA insulates employees from employer behavior as follows:
8(a) It shall be an unfair labor practice for an employer—
   (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
   (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ;
   (3) by 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 . . . ;
   (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;
   (5) to refuse to bargain collectively with the representatives of his employees, subject to the provision of section 9(a).
Title VII of the Civil Rights Act of 1964 establishes an additional statutory protection in the Equal Employment Opportunity Commission, which is vested with the authority to prevent discrimination in employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e (1982).
The employee also has a contractual right to negotiate a just cause clause. See generally Feinman, The Development of the Employment At Will Rule, 20 AM. J. LEGAL HIST. 118 (1976).
An analysis of the wide range of employee protections is beyond the scope of this note. For a discussion of this issue, see generally Blades, Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 COLUM. L. REV. 1404 (1967).
81. Examples of application of the discharge at will doctrine in American jurisprudence are countless. See generally, Blades, supra note 80, at 1404; Note, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 HARV. L. REV. 1816 (1980); Comment, Protecting The Private Sector At Will Employee Who “Blows The Whistle”: A Cause of Action Based Upon Determinant of Public Policy, 42 WIS. L. REV. 103 (1977).
82. During the eighteenth century in England and the United States, the hiring of menial servants was presumed to be yearly. Employment relationships carried with them duties and responsibilities for both master and servant. The master had the obligation to
The doctrine can work to the employee's benefit as well. While the employer has the option to discharge employees as he chooses, the employee may quit in response to harsh working conditions or to seek more gainful employment.

This employment-at-will concept functioned well to further economic growth and entrepreneurship in the nineteenth century. In the twentieth century, however, the economic and political strength of the employer flourished, while that of the employee diminished. When the present power of an employer is compared to that of an individual employee, a potential flaw emerges in the employment-at-will rule which places the employee in a position in which he must provide food, shelter, and security for the servant while the servant was obligated to perform the work for which he was hired.

The onset of the emerging theory of employment governed by contract law recast the traditional relationship between master and servant. The new contract approach was to bargain for each element of the employment relationship. The new theory forced the employee to bear the responsibilities of his own needs and assume the risks of his own job injuries. In addition to these added responsibilities, and based on contract theory, the master-servant relationship emerged as terminable at will. See generally 2 J. Kent, Commentaries on American Law 258-66; Feinman, supra note 80, at 118.

If an employee desires a "just cause" provision, he must demand that it be provided for in a written contract. The doctrine can work to the employee's benefit as well. While the employer has the option to discharge employees as he chooses, the employee may quit in response to harsh working conditions or to seek more gainful employment.

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somewhat inequitable bargaining position. An employer can discharge an employee arbitrarily, but an employee, for practical reasons, is often restricted from quitting.89

Unions and courts have made inroads into the employment at will doctrine which safeguard both union and nonunion employees against this potential inequity. Union employees are protected against arbitrary discharge by just cause provisions typically found in collective bargaining agreements.90 For nonunion employees, the tort of retaliatory discharge provides a measure of protection.91 This tort grants an employee a cause of action if his employer discharges him in contravention of public policy.92

**INCONSISTENT APPLICATION OF THE WEINGARTEN RULE TO NONUNION EMPLOYEES**

**Materials Research**

The Board first squarely faced the issue of whether Wein-
The Materials Research Corporation had given its nonunion employees a new work schedule, to commence the following day. During their lunch break, three employees together spoke to the supervisor and department manager and suggested a group meeting between employees and management to discuss the sudden change in procedure. Both the supervisor and the department manager denied their request. Later that afternoon, after discovering that one of the employees, Steve Hochman, had organized the other two employees to speak with management, the supervisor summoned Hochman for an interview to investigate why Hochman had organized the other two employees. The supervisor denied Hochman’s request for representation at the investigatory interview.


To date, E.I. du Pont is the only case which has been overturned on appeal. See 707 F.2d 1076 (9th Cir. 1983); infra notes 111-23 and accompanying text. The Board and the courts had addressed this issue in cases decided prior to Materials Research, but none of the cases involved the specific question of whether a nonunion employee is allowed the Weingarten right. See, e.g., NLRB v. Columbia Univ., 541 F.2d 922 (2d Cir. 1976) (union employee’s right to investigatory interview upheld); O.C. & Atomic Workers Int’l Union, AFL-CIO v. NLRB, 547 F.2d 575 (D.C. Cir. 1976) (employee’s right to union representation upheld where neither a union contract existed nor established grievance procedure); Illinois Bell Tel., 251 N.L.R.B. 932 (1980) (employer allowed a representative at employee’s investigatory interview but stated that the representative had to be a union steward and not merely a fellow union employee); Anchortank, Inc., 239 N.L.R.B. 430 (1978), affirmed, 618 F.2d 1153, 1157-58 (5th Cir. 1980) (court recognized employee’s right to union representation at an investigatory interview held during the hiatus between the union’s challenged victory in a representative election and its subsequent certification as a bargaining representative); Glomac Plastics, Inc., 234 N.L.R.B. 1309 (1978), remanded on other grounds, 592 F.2d 94 (2d Cir. 1979), aff’d, 241 N.L.R.B. 248, enforced, 600 F.2d 99 (2d Cir. 1979) (employee’s right to a union representative in contested union victory upheld); Newton Sheet Metal, Inc., 238 N.L.R.B. 970 (1978), enforced, 598 F.2d 478 (8th Cir. 1979) (employee’s right to union representative when union representational status is in question upheld).
and section 7 covers both union and nonunion employees. The Board concluded that the right therefore extended to nonunion as well as union employees. The requisite concert element of section 7 was found to exist in the effect of Hochman’s request for representation. Specifically, the Board found that the representative’s protection against arbitrary or unjust action and the assurance to other employees that they may also obtain the assistance of a representative in an investigatory interview, created the concert element. The Board determined that this effect did not change in the context of nonunion workers, and, therefore, the activity of the nonunion employees also possessed the necessary concert element. Thus, the Weingarten right was held to apply to Hochman.

The Board also stated that the application of the right to nonunion employees effectuates the fundamental purpose of the NLRA. Since the purpose of the NLRA is to eliminate the inequality of bargaining power between employers and employees, the employees’ right to freely associate and independently organize is protected. Representatives help to eliminate the inequality by providing support for the employee who must face management alone. The Board held that the need for representation does not depend on whether the employee belongs to a union. The need for support in an investigatory interview may be even greater for nonunion workers because they have neither the benefit of a collective bargaining agreement nor the protection of arbitration procedures.

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garten use of the term “union representative” merely depicts the facts presented in the case. The use of the term, the Board found, in no way was intended to limit the right recognized in Materials Research, 262 N.L.R.B. at 1012.

99. See supra note 7 and accompanying text.

100. 262 N.L.R.B. at 1011. The Board did not inquire into why the union employee’s request for representation in Weingarten fell within the scope of section 7. The Board neglected to investigate why a union employee’s request for representation constitutes concerted activity. A fuller analysis reveals that the union activity is the very reason why the request constitutes concerted activity. The nonunion activity lacks this element. See infra notes 117-23 and accompanying text.

101. 262 N.L.R.B. at 1013.

102. Id. at 1010.

103. Id. at 1014.


105. 262 N.L.R.B. at 1014. The Board relied on its previous decision in Glomac Plastics, Inc., 234 N.L.R.B. 1309 (1978). “Our own reading of Weingarten and Quality persuades us that the Court’s primary concern was the right of employees to have some measure of protection against unjust employer practices, particularly those which threaten job security. These employee concerns obtain whether or not the employees are repre-
Although the need for support was apparent, the Board recognized that, in the absence of a union, nonunion workers look to each other for their mutual aid and protection. Further, the Board asserted that a co-employee acting in a representative capacity can serve the same purpose as the union representative: to prevent the employer from overpowering a lone employee. The Board reasoned that a co-employee fulfills this purpose even if he does nothing more than witness the interview.

The dissent, however, reasoned that a nonunion employee's representative would not be able to fulfill the function of a representative as set out by the court in Weingarten. The dissent stated that a nonunion employee would be likely to choose a friend to represent him at the investigatory interview who would be just as unskilled as the employee under investigation and who also would be emotionally involved. The dissent concluded that a co-employee possesses no more ability to confront management, clarify issues, or expose facts concerning the investigation than the employee requesting the representative.

E. I. du Pont de Nemours

The Board decided Materials Research and E. I. du Pont de Nemours v. NLRB on the same day. E. I. du Pont had docked an employee's pay because the employee visited a doctor on company time without authorization. The employee, Henry Burke, was working in a nonunion shop, and refused to sign his

sent by a union . . . ." Id. at 1311.

106. [E]mployees in an unrepresented unit must look to each other for whatever mutual aid or protection they can muster in the face of unjust or arbitrary employer action. Indeed, when confronted with the prospect of an investigatory interview which might result in discipline, the only assistance readily available to the unrepresented employee lies in fellow employees, and an employee attempt to enlist that type of protection is precisely what the act is designed to safeguard.

262 N.L.R.B. at 1014.

The Board also used this reasoning in Glomac Plastics, 234 N.L.R.B. at 1311.

107. 262 N.L.R.B. at 1015.

108. Id. at 1014-15.

109. Id. at 1021 (Hunter, J., dissenting).

110. Id.

111. 262 N.L.R.B. 1040 (1982). The Board affirmed the administrative judge's ruling without discussion, noting its decision of Materials Research.

112. E.I. du Pont de Nemours & Co. v. NLRB, 707 F.2d 1076, 1077 (9th Cir. 1983).
timecard acknowledging the deduction. Burke was subsequently suspended. The following day, a supervisor summoned Burke for an interview, in which he read to Burke his record of performance deficiencies. Burke attended the interview, but refused to acknowledge that he had been read the contents of the performance record. The supervisor then called a second-level manager to witness the interview. Burke requested that he be provided with either a copy of the performance deficiencies or an employee witness. The supervisor denied the request.

Based on its analysis in *Materials Research*, the Board held that Burke was entitled to a representative at the interview. The Ninth Circuit denied enforcement of the Board’s order, finding that the nonunion employee’s request did not come within the definition of concerted activity. The court interpreted section 7 to require, as separate elements, both concerted activity and mutual aid or protection. As in *Weingarten*, the mutual aid or protection element was established by the benefit the request for representation conferred on the other employees. According to the Ninth Circuit, however, the isolated conduct of a single nonunion employee in requesting representation did not establish the concert element, even though the conduct may aid and protect other employees. In contrast to the nonunion employee’s conduct, the court explained that a union employee’s request for representation constituted concerted activity simply as a result of the presence of the union. Employees organized the union through concerted activity and the union presently guar-

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113. Id. at 1077.
114. Id.
115. Id.
116. 262 N.L.R.B. at 1016.
117. 707 F.2d at 1079.
118. Id. at 1078. The court stated that it was following the Ninth Circuit’s precedent in requiring the separate elements of concerted activity and mutual aid and protection, citing NLRB v. Bighorn Beverage, 614 F.2d 1238 (9th Cir. 1980). In *Bighorn Beverage*, an employee’s filing of a safety complaint concerning carbon monoxide fumes in the workplace was held not to be concerted activity. The court found that the complaint properly alleged the element of mutual aid and protection, but because the employees acted alone, the concerted activity element was lacking. Id. at 1242.

The court also dealt with one commentator’s criticism of the artificiality of the construction of section 7 that results in protection for an activity engaged in by two employees, whereas the same activity engaged in by one employee is unprotected. The artificiality, the court responded, “is one decided upon by Congress when it drafted section 7. It is not a choice that can be undone by courts for policy reasons.” 707 F.2d at 1078.
119. 707 F.2d at 1078.
anted that concerted activity would follow a request for help. The union employee's request for a representative constituted concerted activity because it was supported by the group activity of the union.120

The court expressly stated that the decision did not necessarily preclude a finding of concerted activity in a nonunion setting.121 A nonunion employee must show a backdrop of group activity, however, to convert his individual request for representation into concerted activity.122 Since section 7 applies to nonunion employees, the court reasoned that the backdrop of group activity would be necessary to transform the nonunion employee's request into concerted activity. The E. I. du Pont employee did not establish evidence of group activity. Thus, the court denied enforcement of the Board's order.123

ANALYSIS:  
THE WEINGARTEN RIGHT AS APPLIED TO NONUNION EMPLOYEES

Four reasons militate against applying the Weingarten right to nonunion employees. First, a request for representation, absent a union or other group activity, is not concerted activity within the definition of section 7.124 Second, the right interferes with an employer's prerogative to discharge employees at will.125 Third, a co-employee lacks the ability to perform the professional function required of a representative at an investigatory interview.126 Finally, the right may actually work to the detriment of both employer and employee.127

In order to come within the protection of section 7, an employee must act both for the mutual aid or protection of other employees and in concert with other employees.128 The Weingarten court determined that an employee's request for representation at an investigatory interview satisfies section 7's requirements129 be-

120. Id.
121. Id. at 1079.
122. Id.
123. Id. at 1080.
124. See infra notes 128-41 and accompanying text.
125. See infra notes 142-45 and accompanying text.
126. See infra notes 146-50 and accompanying text.
127. See infra note 150 and accompanying text.
cause the representative safeguards the interests of the entire bargaining unit by contesting the employer’s procedure for meting out punishment. Additionally, the court noted that a representative assures the employees of the bargaining unit that they may also obtain the aid of a representative if they are summoned to attend an investigatory interview.\textsuperscript{130} Although these assurances satisfy the mutual aid or protection requirement of section 7, they do not appear to satisfy the requirement of concerted activity.\textsuperscript{131} It is unclear why the \textit{Weingarten} Court considered the request for representation as constituting concerted activity; however, it is probable that the presence of the union established the concerted component.

A union employee’s request for a union representative constitutes concerted activity because of the inherent nature of unions. A union is defined as employees acting in concert.\textsuperscript{132} The majority of the employees must vote for and consent to a union representative.\textsuperscript{133} As a result, the union acts as the exclusive bargaining agent of the employees in the bargaining unit.\textsuperscript{134} A union therefore epitomizes the concert element.

Because nonunion employees who request representation lack this built-in concert component, an employee must establish the concert element through alternative means.\textsuperscript{135} As noted above, the Board and reviewing courts have adopted varying interpretations of the meaning of “concerted activity.”\textsuperscript{136} It is necessary to examine all four interpretations of concerted activity to determine whether it is appropriate for a court to define a nonunion employee’s request for representation as concerted activity.

The most restrictive interpretation of concerted activity requires that the employee act on behalf of, or as a representative of, other employees.\textsuperscript{137} The employee’s activity does not come within the protection of section 7 if it benefits the others in a merely theoretical sense. That the most restrictive interpretation of con-
certed activity does not apply to a nonunion employee’s request for representation is best illustrated as follows: An employee who is called in for an investigation interview regarding allegations of theft is concerned about saving his job. To combat the allegations of theft, the employee seeks a representative for support against the power of management. Since his primary concern is saving his own job, helping his fellow employees is, at best, a peripheral consideration. Any benefit accruing to other employees from his actions is, in all likelihood, purely theoretical. The most restricted interpretation of concerted activity therefore does not encompass a nonunion employee’s request for representation because any connection between such a request and any actual benefit which might accrue to his fellow employees is too attenuated to deserve section 7 protection.

The *Mushroom Transportation* definition of concerted activity includes conduct by an individual employee for the purpose of initiating, inducing, or preparing for group action.\(^{138}\) A typical activity which comes within this definition occurs when an employee calls for a machine shutdown or strike.\(^{139}\) In contrast to this definition, the employee in the previous example is not trying to initiate, induce, or prepare for group action. Rather, he requests help to defeat allegations of his own misconduct with the sole aim of saving his job. He anticipates no group action to combat the claims against him. *Mushroom Transportation* thus does not afford this nonunion employee the right to request representation because his activity involves no group action.

The *Interboro* doctrine provides that an individual’s actions constitute concerted activity if the individual seeks the enforcement of a collective bargaining agreement.\(^ {140}\) Because no collective bargaining agreement exists in the above example, the *Interboro* doctrine would not grant this nonunion worker the right to representation.

The most expansive approach formerly adopted by the Board recognizes concerted activity where the effect of the individual’s activity benefits the other employees.\(^ {141}\) *Weingarten* held that

\(^{138}\) See *supra* notes 64-69 and accompanying text.

\(^{139}\) See, e.g., Pelton Pastrel, Inc. v. NLRB, 627 F.2d 23 (7th Cir. 1980); Ontario Knife Co. v. NLRB, 637 F.2d 840 (2d Cir. 1980); NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714 (5th Cir. 1973).

\(^{140}\) See *supra* notes 70-73 and accompanying text.

\(^{141}\) See *supra* notes 74-77 and accompanying text.
the effect of the request for a representative benefitted other employees by contesting an employer practice of punishing unjustly and by assuring other employees the same right of representation. Therefore, this earlier interpretation of concerted activity encompasses a nonunion employee’s request for representation. Although the Board’s former interpretation grants nonunion employees the Weingarten right, the Board misinterpreted section 7 by considering only whether the effect of the request benefitted other employees, therefore satisfying only the mutual aid or protection component. The Board simply did not address the concert element of section 7.

Even if the courts were to adopt the Board’s former interpretation of concerted activity, further analysis demonstrates the inapplicability of the Weingarten right to nonunion employees. Weingarten held that the request for representation may not interfere with employer authority. The right of a nonunion employee to request a representative, however, interferes with the legitimate employer prerogative to discharge an employee at will.142

The employer’s common law right to deal with employees unilaterally gives the employer the right to discharge his employees at will.143 If a nonunion employee were to possess the Weingarten right to request representation, however, the employer could not discharge the employee for exercising that right.144 Expanding the Weingarten right to include nonunion employees thus carves out an exception to the common law rule. Weingarten expressly stated that interference with an employer’s legitimate prerogatives terminates the right.145 The right to fire at will is such a prerogative.

In addition to circumventing the employer prerogative to fire at will, the nonunion employee’s representative, typically a co-employee, is not likely to have the knowledge or ability to fulfill the functions of a representative as contemplated by Weingarten.146 The Weingarten court referred to the representative as

142. Weingarten, 20 U.S. at 258. See supra notes 78-92 and accompanying text.
143. See supra notes 78-92 and accompanying text.
144. Generally, union employees cannot be discharged at will because most collective bargaining agreements include just cause provisions. Therefore, this consideration only comes into play with respect to nonunion employees. See Blades, supra note 80, at 1408.
145. 420 U.S. at 258.
146. Id.
knowledgeable. The representative is supposed to assist the employee who lacks the ability to confront management by clarifying facts and supporting the employee. In all probability, a nonunion employee who would act as representative lacks the knowledge and experience for which the union representative is trained. As articulated in Materials Research, the nonunion employee is likely to choose a friend to represent him who is as unskilled as the employee requesting the representative.

Finally, the Weingarten right inhibits the employer's ability to fire ineffective employees. Because the requirement of a representative operates in derogation of the common law employment at will rule, an employer would be faced with a built-in just cause provision for the nonunion worker. This could weigh heavily on the employer because employees could threaten to file suit for frivolous reasons. An employer's ability to run a business profitably and efficiently would be greatly inhibited if he feared an impending suit and punitive damages every time he discharged an employee. As a result of this fear, the employer could be saddled with an ineffective employee.

The nonunion employee is also placed in a less equitable position as a result of the Weingarten right. If an employer discharges a nonunion employee subsequent to the employee's request for representation, the employer may face charges of violating section 7. Under Weingarten, an employer who wants to avoid possible unfair labor practice charges can simply abolish the interview altogether. Absent the interview, although the employer is left to other less reliable means to investigate the situation, the employee is also without an opportunity to answer the accusations. For example, the employee in Weingarten would not have been afforded the chance to explain the circumstances surrounding the alleged stealing; the employee in E.I. du Pont would not have been able to explain his reasons for going to the doctor. Worse yet, the employer who does not want to deal with a representative at an interview can instead fire at will any nonunion employee who he suspects is causing trouble. In contrast, if the employee did not possess the Weingarten right, the employer

147. Id.
148. Id.
149. Materials Research, 262 N.L.R.B. at 1019.
would not be threatened with a possible section 7 violation for denying representation and could thus hold an interview with the unrepresented employee. At the interview, the employee could explain any allegations of misconduct. With the right, the policy of the NLRA to eliminate the inequality of bargaining power is thereby hindered rather than helped.

CONCLUSION

*Weingarten* held that a union employee is afforded the right to request a representative because the request is concerted activity, it does not interfere with employer prerogatives, and the union representative is knowledgeable. These considerations are not present when applied to a nonunion employee. The request for representation, absent a union, is not a concerted activity within the section 7 definition. The request interferes with the nonunion employer’s prerogative to discharge at will. The co-employee is not likely to function as the knowledgeable professional required in *Weingarten*. Additionally, the right works to both the employee’s and employer’s detriment. Nonunion employees, therefore, should not be entitled to the *Weingarten* right.

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