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# Weingarten in the Nonunion Workplace: Looking in the Funhouse Mirror

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# WEINGARTEN IN THE NONUNION WORKPLACE: LOOKING IN THE FUNHOUSE MIRROR

**BY ANN C. HODGES,  
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**T**he National Labor Relations Board's extension of the *Weingarten*<sup>1</sup> decision, granting the right to union representation at pre-disciplinary interviews, to the nonunion workplace was recently upheld by the U.S. Court of Appeals for the D.C. Circuit.<sup>2</sup> Section 7's,<sup>3</sup> protection of concerted activity and the symmetrical protection of union and nonunion employees alike renders the decision sensible and supportable. Nevertheless, closer examination of the decision's consequences suggests that the application of the *Weingarten* right in the nonunion workplace results in a distorted reflection of the right's application in the unionized workplace. The situations are not mirror images. Thus, some adjustments to the interpretation of the right in the nonunion workplace are necessary to make it workable and effective.

## **SECTION 7 PROTECTIONS**

Section 7 of the National Labor Relations Act guarantees employees the right to engage in concerted activity for the purpose of mutual aid and protection.<sup>4</sup> An employee exercising Section 7 rights is shielded from adverse employer actions, such as discipline or discharge, as Section 8(a)(1) deems such retaliatory action an unfair labor practice.<sup>5</sup> Because Section 7 protects both union activity and "other concerted activity," groups of nonunion employees enjoy the rights and protections of Section 7, so long

as the activity to be afforded protection is for the mutual aid and protection of the employees.<sup>6</sup>

## **WEINGARTEN**

The Supreme Court, in *NLRB v. J. Weingarten, Inc.*,<sup>7</sup> affirmed the Board's holding that an employer commits an unfair labor practice under Section 8(a)(1) when it denies an employee's request for the presence of a union representative at an investigatory meeting which the employee reasonably believes may result in disciplinary action. The *Weingarten* right, according to the Court, originates in Section 7, and the exercise thereof constitutes "concerted activity for the purpose of . . . mutual aid and protection."<sup>8</sup> In affirming the Board, the Court held that the Board's holding was a permissible construction of Section 7 and the rights and protections guaranteed therein.

### **Limitations**

While recognizing the employee's right to the presence of a union representative at an investigatory interview, the Court articulated four limitations on that right. First, the *Weingarten* right arises "only in situations where the employee requests representation."<sup>9</sup> Second, the right is limited to "situations in which the employee possesses a reasonable belief that the interview may result in disciplinary action."<sup>10</sup> Third, the employee's exercise of the *Weingarten* right may not "interfere with legitimate employer prerogatives."<sup>11</sup> Thus, the employer may offer the employee the choice of attending the interview unaccompanied, or "foregoing any benefit" of an interview while the employer carries on the inquiry without interviewing the employee.<sup>12</sup> Finally, although the employee has the right to have a union representative present, the employer has no corollary obligation to bargain with such representative.<sup>13</sup> The Board has since held, however, that the representative must be afforded the opportunity to participate in the interview.<sup>14</sup> In the Board's view, the Court clearly contemplated that the representative's role was to provide assistance and counsel to the employee facing disciplinary action.

### **Remedy**

Reasoning that an employer should not be required to reinstate an employee even in the event that the employee's *Weingarten* rights are violated, the Board has held that the applicable remedy for a *Weingarten* violation is a cease and desist order.<sup>15</sup> If the employee is terminated for exercising the right, however, rather than for the underlying conduct that led to the investigation in which the right was violated, reinstatement and back pay are appropriate remedies.<sup>16</sup>

## **WEINGARTEN IN NONUNION WORKPLACES**

### **Pre-Epilepsy Foundation cases**

*Weingarten* involved represented employees. Because the Board and the Court based the *Weingarten* right upon the Section 7 statutory protections afforded to both represented and unrepresented employees, the Board was eventually faced with the difficult question of whether the *Weingarten* right is enjoyed by unrepresented employees as well.<sup>17</sup>

The Board first addressed this question in 1982 in *Materials Research*.<sup>18</sup> Concluding that the benefits and protections of the *Weingarten* right could be realized in the absence of a union representative, the Board determined that an unrepresented employee has the right to request the assistance of a fellow employee in the situations contemplated in *Weingarten*.

By 1985, a change in Board membership resulted in a re-interpretation of the applicability of *Weingarten* rights in the nonunion setting. In *Sears, Roebuck & Co.*, the Board determined that it had misinterpreted Section 7 of the Act and that, in the absence of a recognized union, the Act could not be interpreted to provide *Weingarten* rights.<sup>19</sup> Three years later, the Board revisited the issue in *E.I. Du Pont de Nemours & Co.*, changing its rationale but reaching the same result.<sup>20</sup> In *Du Pont*, the Board reasoned that the Act did not mandate the conclusion that nonunion employees have no *Weingarten* rights, but decided that the balance of interests between management and labor favored denial of the

right because “many of the useful objectives listed by the Court [in *Weingarten*] either are much less likely to be achieved or are irrelevant” in the nonunion setting.”<sup>21</sup>

### **Epilepsy Foundation**

Over ten years later, the Board revisited the issue again, finding “compelling reasons” to reverse the *Du Pont* decision. *Epilepsy Foundation of Northeast Ohio*<sup>22</sup> involved the termination of two employees. Both employees, Borgs and Hasan, sent a memorandum to their supervisor stating that they no longer required his supervision over their project and a subsequent memo to another officer of the Foundation. Borgs was fired for refusing to meet with employer representatives without his coworker, Hasan, present.<sup>23</sup> Hasan met with the employer without representation and was terminated for insubordination arising out of his drafting and delivery of the memorandum and subsequent refusal to sign performance evaluations.

Determining that the *Weingarten* right is enjoyed by the unrepresented as well as the represented employee, and holding that *Du Pont* was inconsistent with the NLRA and the Supreme Court’s decision in *Weingarten*, the Board overruled *Du Pont* and returned to the rationale of *Materials Research*.<sup>24</sup> Thus, under *Epilepsy Foundation*, an employee in a nonunion environment has the right to have a coworker present at an investigatory interview that the employee reasonably believes may result in disciplinary action.<sup>25</sup> The *Epilepsy Foundation* right enjoyed by nonunion employees is similarly limited by the constraints enunciated by the Court in *Weingarten*.<sup>26</sup> Finding that application of the *Weingarten* rule would not work a manifest injustice, the Board applied its decision retroac-

tively to find the discharge of Borgs unlawful. In support of its decision, the Board noted that there was no evidence in the record to suggest that the employer was relying on the state of Board law when it took action against Borg. Applying the rule served to “correct effects of the imposition of discipline on an employee for availing himself of the right to engage in protected activity, and thus serves the purpose of promoting the right of employees to engage in concerted activity for mutual aid and protection,” said the Board.<sup>27</sup>

The Court of Appeals for the D.C. Circuit affirmed the Board’s decision in November, 2001.<sup>28</sup>

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**A REQUEST FOR A UNION REPRESENTATIVE THAT DOES NOT CAUSE UNREASONABLE DELAY SHOULD BE PROTECTED AND HONORED WHERE ONE IS AVAILABLE, EVEN IF IT MAY NOT BE THE OFFICIAL REPRESENTATIVE OF THE EMPLOYEE.**

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Recognizing that it must affirm the Board’s interpretation of the Act “unless it conflicts with the unambiguously expressed intent of the Congress or is otherwise not a permissible construction of the statute,” the D.C. Circuit upheld the Board’s extension of *Weingarten* rights to nonunion employees.<sup>29</sup> Because the *Weingarten* right was held to be an extension of Section 7,<sup>30</sup>

the question of permissibility revolved around whether the presence of a coworker at an investigatory interview which the nonunion employee reasonably believes may result in disciplinary action is concerted action for mutual aid and protection.<sup>31</sup> The court found no fault with the Board’s recognition that nonunionized employees share an interest in preventing unwarranted discipline. Thus, the Board’s determination that an employee’s request for a coworker’s presence at an investigatory interview is concerted action for mutual aid and protection was reasonable.<sup>32</sup> The court also agreed with the Board that support for the extension of the *Weingarten* right to nonunionized workplaces is found in the *Weingarten* decision itself.<sup>33</sup>

While affirming the Board’s extension of the *Weingarten* right to nonunionized workplaces,

the D.C. Circuit reversed the Board's retroactive application of its holding. In applying the new rule retroactively, said the court, the Board violated the governing principle that when a new law is substituted for an old law that was "reasonably clear," the new law may only have prospective effect so as to "protect the settled expectations of those who had relied on the preexisting rule."<sup>34</sup> The court noted that the Board's policy regarding Weingarten's application was clear and unquestionable at the time the dispute at issue arose—nonunionized employees did not enjoy the right.<sup>35</sup> Considering the clarity of the old rule, as well as the injustice of holding the Foundation liable for what were lawful actions when they were taken, the court refused to enforce the Board's decision on retroactivity.

The final issue decided by the court was whether the Board erred in determining that the Foundation's discharge of Hasan was unlawful because he was engaged in protected concerted activity. Finding that Hasan articulated no objection to any term or condition of employment, but rather rejected supervisory authority and expressed his "feelings and opinions," the court deemed the drafting and delivery of the memorandum an act of insubordination rather than protected activity.<sup>36</sup> The court found no evidence to support a "nexus between the...memo and any protected activity by Hasan concerning the terms and conditions of his employment."<sup>37</sup> Thus, his discharge was lawful.

## THE FUNHOUSE MIRROR

The constraints articulated by the Supreme Court in *Weingarten*, and in subsequent interpretations of the right by the Board, were formulated for situations involving a union-represented employee. While certain of these limitations are easily transferred to the nonunion setting, others seem rather misplaced and difficult to apply in the same manner as contemplated by the Court in *Weingarten* and by the Board. Although there was a brief period when the Board applied *Weingarten* to nonunion employees between the

decision in *Materials Research Corp.* and its reversal three years later in *Sears Roebuck, Co.*, none of these issues was addressed definitively by the Board during that time period.

Representation by the union in a *Weingarten* interview involves assistance of a trained and knowledgeable union representative, at least in ideal circumstances. In a unionized workplace, the union educates employees about their rights, including the *Weingarten* right. The union has an official role in the workplace and owes a duty of fair representation to all employees. The absence of these factors in the nonunion workplace does not make the representation right inapplicable, but it does necessitate consideration of possible adjustments so that the right achieves its purpose without unduly interfering with other important interests in the workplace.

### **Reasonable belief regarding discipline**

As stated above, the *Weingarten* right is only applicable in situations in which the employee *reasonably* believes an investigatory interview may result in disciplinary action. The determination of reasonableness is not based on the employee's good faith. Nor is it based upon the employee's subjective mindset or the employer's subjective intent. Rather, it is based upon a reasonableness standard determined by the objective factors of the situation.<sup>38</sup> Consider, for example, the Board's decision in *Equitable Gas Co.*<sup>39</sup> The Board there stated that it made no difference whether or not the interview actually resulted in disciplinary action. What was determinative of reasonableness was whether the "employee concerned could reasonably anticipate discipline as a possible result."<sup>40</sup> In the *Equitable Gas Co.* situation, the Board found an employer's previous statements indicating an intention to strictly follow company guidelines adequate to create a reasonable fear of disciplinary action.<sup>41</sup> Following the Board's rationale, it would appear that any information the employee is privy to, such as the employer's history of executing disciplinary action, the employee's own history of being disciplined, or previous statements by the employer, may provide evidence to satisfy the reasonable basis test under *Weingarten*.

This aspect of *Weingarten* seems readily transferable to the nonunion setting. While the absence of a union may limit the employee's knowledge regarding the employer's disciplinary history, any existing knowledge will determine whether the employee's belief was reasonable.

### **Employee request**

The *Weingarten* right arises only upon the employee's request for representation, and an employer has no duty to inform an employee of the existence of such right. The unrepresented employee, generally less knowledgeable on the applicability of the NLRA and the protections afforded by the Act, will likely remain uninformed as to the *Weingarten* right and will fail to exercise the right when necessary for protection. In the nonunion workplace, the right will most likely be asserted by unrepresented employees who are involved in a union organizing campaign and have been informed by the union about the right.

The Board could enhance the value of the right by requiring employer notice to employees, either generally through posting of a workplace notice, or at the time of the interview. While the Board has not traditionally required notice of rights in the absence of a finding that an employer or union has violated the Act, many employment law statutes enacted in more recent years require some affirmative notice to employees of their rights. The likely assumption at the time the NLRA was passed, when the percentage of union membership was much higher, was that employees would be informed of their rights by their unions. In the largely nonunion workforce of today, such an assumption is unwarranted. A notice requirement also would remove the risk to the employee who refused to participate in the interview without representation only to find later, after discharge or discipline, that the Board deems the assessment that the interview was likely to lead to discipline unreasonable, thereby rendering the refusal unprotected.

Even with the requirement of notice, the right would impose little restraint on managerial freedom. The employer still retains the right to forego the interview if it does not wish to pro-

ceed with a representative present. If the employer denies representation and proceeds without it, the cease and desist remedy is a small price to pay. Only if the employer terminates the employee for refusing to participate in the interview without representation is there risk of the more substantial penalty of reinstatement and back pay. The employer may always terminate the employee for the underlying misconduct if warranted. Where there is no requirement of just cause for termination, the employer need only take care that the termination does not run afoul of discrimination laws or the NLRA's prohibition on termination for engaging in union or protected concerted activity. Moreover, notification would be consistent with the NLRB's move toward requiring notification of employee rights in other contexts, such as the right to refrain from union membership and the right to object to expenditures of union dues not germane to the union's representational duties.<sup>42</sup>

### **Chosen representative**

Under *Weingarten*, the Board has held that if the employee's chosen union representative is unavailable but another is able to attend, the employee must proceed with the available representative.<sup>43</sup> Does the employee in the nonunion setting have the same obligation to accept the presence of any representative—any coworker—who is available? Further, it remains uncertain as to whether or not the unrepresented employee may request the presence of a union official at an investigatory interview before the union is selected as majority representative, during an organizing campaign for example, or where other employees in the facility have union representation.

*Weingarten* made clear that the role of the representative is greater than mere presence. The representative is to provide assistance and counsel to the employee facing possible disciplinary action. The denial of such assistance is deemed a "serious violation of an employee's individual right to mutual aid and protection."<sup>44</sup> Attempting to clarify the representative's role, the Board has stated that the purpose of the

representative is to provide the more “experienced assistance” that a union steward may be able to offer.<sup>45</sup> The union representative may clarify issues, bring out the facts and policies at issue in the interview, and provide assistance to an employee who is unable to express herself.<sup>46</sup>

Considering the Court’s holding that the right contemplates more than the mere presence of the representative, and the Board’s clarification of the possible roles of the representative, it may be argued that the unrepresented employee may need a particular coworker who has the requisite knowledge and skill to provide the type of assistance contemplated by the Court and the Board. Certainly, requiring an employee to accept the “assistance” of a coworker who may not possess the knowledge and skill necessary for the realization of the *Weingarten* right could be construed as a denial of the right—a denial the Court held to be a “serious violation.”<sup>47</sup> Taking into account the employer’s interest in a prompt investigation, however, an unreasonable delay to wait for the best representative will not likely be required.

Since most coworkers would be unable to fulfill the role described by the Board in *Southwestern Bell*, an employee may find it necessary to have the presence of a union representative in order to fully realize the right. In many cases, denying the presence of a union representative if one is available may effectively render the *Weingarten* right a right to the presence, and not the assistance, of a representative. A request for a union representative that does not cause unreasonable delay should be protected and honored where one is available, even if it may not be the official representative of the employee. Clearly, however, since the employer has no obligation to bargain with the certified representative in the unionized setting, there is no obligation to bargain with the uncertified representative in the nonunionized setting.

### **Employee waiver**

It is clear from *Weingarten* that an employee may forego the representation right at the time of the interview by either failing to request a representative or deciding to proceed without a represen-

tative when the alternative is to relinquish the opportunity for the interview. The Supreme Court has held that the *Weingarten* right serves to protect the exercise of the full freedom of association and self-organization for the purpose of mutual aid and protection—what the Court termed the most fundamental purpose of the NLRA.<sup>48</sup> Even though the Court found the existence of the *Weingarten* right in the “mutual aid and protection” language of Section 7, lower courts have interpreted the right as an individual right. The Fifth Circuit found the *Weingarten* right to be an individual right based on the fact that an employee may waive the right by not invoking it, and held that a union may contractually waive the *Weingarten* right.<sup>49</sup> The Board subsequently agreed that the union could waive the right.<sup>50</sup>

After *Epilepsy Foundation*, it is questionable whether an unrepresented employee may contractually waive *Weingarten* rights. The answer to this question might depend on the interpretation of the right. If the Fifth Circuit’s interpretation were to prevail, then it would seem logical that an employee could waive the *Weingarten* right. Since the purpose of the right, as enunciated by the Supreme Court, is the protection of the employee’s right to mutual aid and protection, the answer is uncertain. Although the Court has held that a union may waive individual rights, it may do so because the employees have had the opportunity to join together and organize a union for the purpose of mutual aid and protection. In other words, the purpose of *Weingarten* has been realized at the time of the waiver. The situation is completely different for the unrepresented employee. There is no union and thus no organization for mutual aid and protection. The *Weingarten* right is a means for the nonunion employee to realize the protections of Section 7. Under this analysis, because the employer cannot require an employee to waive the right to Section 7 protection, it would seem that requiring an unrepresented employee to waive *Weingarten* rights would be prohibited as well.

### **Pay for the representative**

In the unionized workplace, the collective bargaining agreement usually will address whether

employees will be paid for time spent on union business and at what rate. The agreement may also specify how employees will be relieved to perform union business to minimize disruption of work. In the nonunion context, no collectively-bargained agreement exists to deal with such issues. To avoid the question, the employer may schedule the interview after work or at another time that would be unpaid and limit work disruption. Alternatively, the safest course is for the employer to follow any existing practice regarding scheduling and payment for similar activities. Any differential treatment for concerted

activity would certainly lead to an argument that the employee was being penalized for engaging in activity protected by the statute. For example, the disciplinary interview might be analogized to other work-related meetings. Since the employee's presence is being requested by a co-employee rather than the employer, the employer might plausibly contend that it is not obliged to pay the co-employee for time spent attending the meeting. The cost of paying the co-employee for attending the interview during work time, however, particularly where the time can be determined by the employer, seems a small price to pay for avoiding what could be a protracted legal dispute.

### **Defamation**

Two potentially more difficult and somewhat intertwined issues are the confidentiality of the information revealed in the interview and the risk of defamation claims. An investigatory interview is likely to involve discussion of allegedly improper, if not illegal, actions by the employee, which would damage his or her reputation. Where the representative is from the certified union, the union's role eases reso-

lution of these issues. The employer would be privileged to disclose potentially defamatory information to the union in its role as representative of the employee in the interview. In addition, the union has a duty to represent any

other employees in the bargaining unit who might be discussed in the interview. Because of this duty, as well as the democratic realities of holding union office, union representatives have an incentive to use information learned in the investigation only as necessary in their representative role. A coworker may have no such incentive. Further, one of the reasons for the holding in *Epilepsy*

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*Foundation* is that a coworker representative may help protect against unfair discipline. To serve that purpose, the representative will necessarily need to discuss the facts underlying the discipline with others.

The right to representation as enunciated in *Epilepsy Foundation* would seem to provide the employer with several defenses to any defamation claim. The privilege to communicate information should extend to the coworker representative by virtue of the decision. Since the privilege can be lost if the employer acts with reckless disregard for the truth or falsity of the statements, the employer should always be cautious with respect to the reliability of information that forms the basis of an investigation. Caution is necessary regardless of *Epilepsy Foundation*, however, for any disciplinary action taken by the employer and communicated to anyone poses a risk of a defamation action if the privilege is lost. *Epilepsy Foundation* simply adds one additional person to whom the communication is made. Another possible argument should a defamation issue arise, at least with respect to the employee that is being investigated, is that



the representative is an agent of the employee and thus there has been no publication.

### **Confidentiality**

The sensitive nature of any disciplinary inquiry gives rise to concerns about confidentiality, both for the employee who is the subject of the investigatory interview and others who might be discussed during the interview. The most problematic issue involves investigation of sexual harassment claims. An employee concerned about confidentiality of any accusations may simply refrain from requesting a representative or choosing a trustworthy coworker. An employer concerned about confidentiality may forego the interview if the employee insists on representation. That may not be a realistic option for an employer faced with a sexual harassment allegation. If the harasser and subject of the interview is a supervisor, no *Weingarten* right attaches to the interview as supervisors are not covered by the NLRA, but if the accused harasser is an employee, he has a *Weingarten* right in an investigatory interview if he reasonably believes that it might result in disciplinary action. Since the employer may be liable under Title VII for sexual harassment by a coworker if the employer knew about the harassment and failed to take appropriate remedial action, an accusation of harassment will trigger an obligation to investigate.

The confidentiality at greatest risk is that of the victim of the harassment. Employees who are sexually harassed frequently are reluctant to report the harassment. The necessary presence of a representative for the accused may exacerbate the already existing fear that the allegations may become the subject of office gossip and, thus, discourage reporting even further. And unlike the union representative in that situation, the coworker representative is not constrained by any legal or political representational duties.

The employer could certainly encourage the representative to be discreet, but any express restrictions on disclosure may impede

the objectives of the *Weingarten* right, as discussion may be necessary to determine whether discipline was warranted and fairly meted out. At most, however, the addition of the representative gives knowledge about the investigation to an additional person who may breach confidentiality. Currently, nothing prevents the accused from disclosing the accusations of harassment, except his own desire for privacy. A union representative could also disclose such information without legal ramifications unless the representative owed a duty to the victim as a member of the same bargaining unit and the publication established arbitrary or discriminatory treatment of the victim. Nevertheless, the inhibiting effect of additional exposure might warrant Board approval of a requirement that the representative agree not to disclose anything learned in the course of the meeting unless it was necessary to assist the accused in his defense. While such an agreement might lead to additional litigation, it seems warranted to accommodate the Title VII interest in eliminating sexual harassment with the Section 7 right to make common cause with coworkers to avoid arbitrary and unfair employer treatment.

### **CONCLUSION**

Since the NLRB's decision in *Epilepsy Foundation*, the presidential election has resulted in another significant change in Board membership. Given prior shifts in the law regarding nonunion employee representation rights, another change may be in the offing. If not, when applying *Epilepsy Foundation*, the Board should consider the distortions in the mirror when *Weingarten* rights are applied in the nonunion sector. To ensure that the decision accomplishes its purpose of providing nonunion employees with assistance in an interview and protecting employees from unjust discipline without intruding unnecessarily on management prerogatives, the Board must modify the doctrine to take into account the differences between union and nonunion workplaces. ▲

## ENDNOTES

- <sup>1</sup> NLRB v. J. Weingarten, Inc., 420 U.S. 251, 76 LC (CCH) ¶10,662 (1975).
- <sup>2</sup> Epilepsy Foundation of Northeast Ohio, 331 NLRB 676, 2000-01 CCH NLRB ¶15,508 (2000), enf'd in part, Epilepsy Foundation of Northeast Ohio v. NLRB, 268 F.3d 1095, 144 LC (CCH) ¶11,129 (2001).
- <sup>3</sup> 29 U.S.C. § 157 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."
- <sup>4</sup> *Id.*
- <sup>5</sup> 29 U.S.C. § 158(a)(1) provides: "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."
- <sup>6</sup> *Epilepsy Foundation*, 331 NLRB 676, 2000-01 CCH NLRB ¶15,508 (2000), citing *Glomac Plastics, Inc.*, 234 NLRB 1309, 1311, 1978 CCH NLRB ¶19,087 (1978)
- <sup>7</sup> 420 U.S. 251 (1975).
- <sup>8</sup> *Id.*
- <sup>9</sup> *Id.* at 276.
- <sup>10</sup> *Id.* at 257-8.
- <sup>11</sup> *Id.* at 258.
- <sup>12</sup> *Id.* at 258-9.
- <sup>13</sup> *Id.* at 259-60.
- <sup>14</sup> *Southwestern Bell Tel. Co.*, 251 NLRB 612 (1980).
- <sup>15</sup> *Taracorp Industries*, 273 NLRB 221 (1984).
- <sup>16</sup> *Id.* at 223 n. 12.
- <sup>17</sup> THE DEVELOPING LABOR LAW 195 (Patrick Hardin & John E. Higgins, Jr., eds., 4th ed. 2001).
- <sup>18</sup> 262 NLRB 1010, 1982-83 CCH NLRB ¶15,031 (1982).
- <sup>19</sup> 274 NLRB 230, n. 5, 1984-85 CCH NLRB ¶17,039 (1985).
- <sup>20</sup> 289 NLRB 627, 1987-88 CCH NLRB ¶19,477A (1988).
- <sup>21</sup> *Id.* at 629.
- <sup>22</sup> 331 NLRB 92, 2000-01 CCH NLRB ¶15,508 (2000).
- <sup>23</sup> *Id.* at 676.
- <sup>24</sup> *Id.* at 678-79.
- <sup>25</sup> *Id.* at 679.
- <sup>26</sup> *Id.* at 679, *Materials Research*, 262 NLRB at 1015-16.
- <sup>27</sup> *Id.* at 680.
- <sup>28</sup> *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095 (D.C. Cir. 2001).
- <sup>29</sup> *Id.* at 1098-99 (quoting *Yukon-Kuskokwim Health Corp. v. NLRB*, 234 F.3d 714,716 (D.C. Cir. 2000)).
- <sup>30</sup> 420 U.S. at 256, 266-7.
- <sup>31</sup> 268 F. 3d at 1099.
- <sup>32</sup> *Id.* at 1100.
- <sup>33</sup> *Id.*
- <sup>34</sup> *Id.*
- <sup>35</sup> *Id.*
- <sup>36</sup> *Id.* at 1104.
- <sup>37</sup> *Id.* at 1105.
- <sup>38</sup> 420 U.S. at 257 n. 5; *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403 (9th Cir. 1978), enforcing in part, 229 NLRB 757 (1977); *Consolidated Edison Company*, 323 NLRB 910, 910 (1997).
- <sup>39</sup> 227 NLRB 800 (1977).
- <sup>40</sup> *Id.*
- <sup>41</sup> *Id.*
- <sup>42</sup> See *Yellow Freight System of Indiana*, 327 NLRB 996 (1999); *California Saw & Knife Works*, 320 NLRB 224 (1995).
- <sup>43</sup> *Coca-Cola Bottling Co. of Los Angeles*, 227 NLRB 1276, 1277 (1977).
- <sup>44</sup> 420 U.S. at 256.
- <sup>45</sup> *Southwestern Bell Tel. Co.*, 251 NLRB 612 (1980).
- <sup>46</sup> *Id.*
- <sup>47</sup> 420 U.S. at 256.
- <sup>48</sup> 420 U.S. at 261.
- <sup>49</sup> *Prudential Insurance Co. of America v. NLRB*, 661 F.2d 398, 401 (5<sup>th</sup> Cir. 1981).
- <sup>50</sup> *Prudential Insurance Co.*, 275 NLRB 208 (1985).