

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

# Advice Memorandum

DATE: March 28, 2002

TO : Paul Eggert, Regional Director  
Catherine M. Roth, Regional Attorney  
Raymond Willms, Assistant to Regional Director  
Region 19

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

SUBJECT: Wal-Mart Stores, Inc.  
Case 19-CA-27720

506-4033-3000  
512-5072-2400

This Weingarten<sup>1</sup>/Epilepsy Foundation<sup>2</sup> case was submitted for advice as to whether a nonunion Employer that violated Section 8(a)(1) by continuing an investigatory interview after an employee requested a witness, further violated Section 8(a)(1) when it sent the employee home to write a statement concerning the subject of that investigatory interview. We conclude that the Employer did not further violate Section 8(a)(1) because the Employer had already terminated the investigatory interview when it sent the employee home to write a statement. Therefore, no Weingarten/Epilepsy Foundation rights were implicated once the Employer terminated the investigatory interview. Even assuming the investigatory interview did continue after the employee was sent home, the Employer did not further violate Section 8(a)(1) since the employee was in his own home, away from any Employer coercion or intimidation, and was free to consult with anyone.

### FACTS

The Employer, part of a chain of Wal-Mart department stores, is located in Wasilla, Alaska. It employs about 400 associates, 26 department managers, seven assistant managers, a co-manager and a store manager.

Charging Party Stanhope was employed by the Employer for five years before the Employer terminated him on March 17, 2001.<sup>3</sup> His termination purportedly resulted from his use of foul language and for creating a hostile work

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1 NLRB v. J. Weingarten, 420 U.S. 251 (1975).

2 Epilepsy Foundation of Northeast Ohio, 331 NLRB No. 92 (2000).

3 All dated are 2001 unless otherwise noted.

environment. Prior to his termination, Stanhope was attempting to organize a union at the Employer.

The events surrounding the Charging Party's Weingarten/Epilepsy Foundation rights are as follow. On March 16, the store's co-manager, Allen Manderson, approached Stanhope and requested that he report to the personnel office. Manderson did not tell Stanhope why he wanted him to report there. Stanhope responded "fine but, if the conversation turns into something I don't like, I will ask someone to be my witness or I'll leave." Manderson replied he did not think that was necessary. They then proceeded to the office where Marlene Munsell, the store manager, was awaiting them.

During the meeting, Munsell told Stanhope that another associate had accused him of using foul language in an intimidating manner, and described the incident as reported to her. Munsell then asked Stanhope for his version of the incident. Stanhope denied knowing anything about the incident and requested a witness. Munsell denied Stanhope's request for a witness, stating that Stanhope had a right to request a witness, but that she had a right to deny his request. Munsell stated that at Wal-Mart, there was an open door policy and they needed to maintain confidentiality.

Munsell and Manderson continued to question Stanhope about the incident, and emphasized that due to the serious nature of the matter, they needed to hear his version of what took place. Manderson then repeated what supposedly took place during the alleged incident and asked Stanhope to tell them his version. Stanhope again denied knowing what they were talking about and again requested a witness.

Since in management's opinion Stanhope was not cooperating with the investigation, Manderson sent him home for the rest of the day to allow him time to think about the incident and to return the next morning ready to discuss it. Manderson and Munsell told Stanhope that while at home, he should prepare a written statement describing his version of the events in question.

The next day, Manderson met Stanhope as he reported to work and requested that he report to the office to discuss the incident. Stanhope refused to go to the office without a witness. Manderson again denied his request for a witness, and Stanhope refused to report to the office. Manderson told Stanhope that if he did not report to the office to discuss the incident, he would conclude the investigation without Stanhope's input; Manderson also asked Stanhope for his written statement. Stanhope denied being asked to write a statement and stated that even if he

had been asked, he would not have complied. After several exchanges, Manderson told Stanhope that he was concluding the investigation and terminating him for using foul language and creating a hostile and intimidating work environment.

The Region has concluded that the Employer violated: Section 8(a)(1) by denying Stanhope's request for a witness during the investigatory interview,<sup>4</sup> and for discharging Stanhope when he was engaged in protected, concerted activity, and violated Section 8(a)(3) by discharging Stanhope in a discriminatory manner. The only question submitted for advice is whether the Employer further violated Section 8(a)(1) by denying Stanhope his Weingarten/Epilepsy Foundation rights when it sent Stanhope home and told him to prepare a written statement describing his version of the incident under investigation.

#### **ACTION**

We conclude that the Employer did not further violate Stanhope's Weingarten/Epilepsy rights when it sent him home to write a statement describing his version of the incident under investigation. Thus, the Employer had already terminated the illegal interview prior to sending Stanhope home. Alternatively, even if the investigatory interview was not viewed as terminated, Stanhope was in his own home, away from any Employer coercion or intimidation, and was free to consult with anyone. In such circumstances, Stanhope had the opportunity to engage in conduct beyond what Weingarten guarantees.

In Weingarten, the Supreme Court upheld the Board's decision that an employer violates Section 8(a)(1) by insisting that an employee attend an interview that the employee reasonably believes could result in disciplinary action without the presence of a union representative requested by the employee. The Court found that this right "inheres in Section 7's guarantee of the right of employees to act in concert for mutual aid and protection."<sup>5</sup> Moreover, the Court stated that the Board's rule was appropriate because it furthers the Act's designed purpose of eliminating the inequality of bargaining power between employees and employers.<sup>6</sup> Thus, under Weingarten and its

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<sup>4</sup> Epilepsy Foundation, 331 NLRB No. 92.

<sup>5</sup> 420 U.S. at 256-257.

<sup>6</sup> Id. at 262.

progeny, after a valid request for union representation at an investigatory interview, the employer's options are to grant the request, discontinue the interview, or give the employee the option to continue with no witness or to end the interview.<sup>7</sup>

The Board extended these Section 7 Weingarten rights to nonunion employees in Epilepsy Foundation, supra. The Board noted that allowing a nonunion worker to have a co-worker present during an investigatory interview "greatly enhances the employees' opportunities to act in concert to address their 'concern that the employer does not initiate or continue a practice of imposing punishment unjustly.'"<sup>8</sup>

We conclude that although the Employer unlawfully denied Stanhope his Weingarten/Epilepsy Foundation right to have a witness during the investigatory interview, the Employer terminated the interview when Stanhope refused to cooperate and tell his version of the events under investigation. In this regard, the Employer sent Stanhope home and instructed him to write a statement about the events. Once Stanhope was no longer being interviewed by management, his Weingarten/Epilepsy Foundation rights were not implicated. As noted above, Weingarten/Epilepsy Foundation rights allow employees to act in concert to ensure that employers do not intimidate or punish unjustly during investigatory interviews when they are actually confronting management officials and which the employee reasonably believes might result in disciplinary action. However, once at home, Stanhope was not subjected to Employer intimidation or coercion and was free to write his statement with or without consultation.

We have found no cases which directly address this issue. However, in Montgomery Ward, supra, the Board addressed the issue of employees providing written statements at their worksite during an illegal investigatory interview. In that case, the Board held that the employer violated Section 8(a)(1) by threatening employees with arrest and prosecution if they persisted in their request for union representation at interviews where those employees reasonably believed the interviews could result in disciplinary action, and insisting on continuing the interrogation of these employees even after their requests for a union representative. During the investigatory interviews, the employer coerced and intimidated the employees into signing statements confessing to theft. One employee was forced to write and

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<sup>7</sup> See e.g., Montgomery Ward & Co., 254 NLRB 826, 831 (1981).

<sup>8</sup> 331 NLRB No. 92, slip op. at 3.

sign his statement in the presence of the security manager. The other employee was left alone while writing his statement, but the security manager entered the room any time the employee attempted to use the phone.

The instant case is clearly distinguishable from Montgomery Ward. Unlike the managers in Montgomery Ward who continued, in a coercive and intimidating manner, to interview the employees, and who refused to terminate the interviews until obtaining written confessions containing statements they insisted upon, here the Employer terminated the interview after attempting, unsuccessfully, to obtain information from Stanhope, and then sent him home to write a statement containing *his* version about the incident. The Employer did not engage in any coercive or intimidating tactics after terminating the interview. Nor did the Employer instruct Stanhope on how to write his statement, or tell him not to consult with anyone. Thus, Stanhope was free to contact the union that was organizing Wal-Mart's employees, any employee who may have witnessed the incident, or anyone else to help him write the statement. In these circumstances, the Employer's actions in demanding a written statement did not implicate Weingarten/Epilepsy Foundation rights.

Furthermore, even assuming that sending Stanhope home to write a statement was a continuation of the investigatory interview process, we conclude for the above reasons that Weingarten/Epilepsy Foundation rights were not implicated during the time Stanhope was at home. As noted, allowing an employee an union representative or other witness during an investigatory interview serves the purpose of balancing the inequities of power in the investigatory process, and protects employees from the type of coercive conduct demonstrated by the managers in Montgomery Ward. Here, the Employer was not present to intimidate or coerce Stanhope when he was supposed to be writing his statement at home. Additionally, Stanhope was free to seek the advice from the union that was attempting to organize, or anyone else, to assist him with writing the statement or with deciding whether to even write the statement.

Finally, we note that the charge in the instant case does not allege this theory of violation, and adding a separate Weingarten allegation for the time Stanhope was at home does not provide any additional remedy to the existing Weingarten violation. In all these circumstances, we conclude that the Region should not additionally allege that the Employer violated Stanhope's Weingarten/Epilepsy Foundation rights when it sent him home to write a statement.

B.J.K.