

To determine the proper remedy for a Weingarten violation, the Board considers the underlying reason for the employee's termination, i.e., whether the employee's misconduct or any other nondiscriminatory reason is the cause of his or her discharge or discipline. When the Employer discharges the employee for cause, rather than for having asserted a Weingarten right, the standard remedy is an order to cease and desist.⁴ The remedy may be different when the employee's assertion of a Weingarten right is a factor in causing the disciplinary action in addition to his or her misconduct, i.e., where a mixed motive caused the discharge. In that circumstance, the employer has the burden to prove that it would have instituted the disciplinary action even if the employee had not asserted a Weingarten right. If this burden is not met, the appropriate remedy is to make the employee whole.⁵ Further, we have concluded that discharging an employee for conduct engaged in during an unlawful Weingarten interview or investigation also requires a make whole remedy unless the employer can meet a similar mixed motive burden, showing that it would have discharged the employee independent from his or her conduct during the unlawful interview.⁶

The Employer gives three reasons for terminating the Charging Party: failure to take responsibility for her poor communication; job performance; and her conduct during the meeting. Thus, the Employer admits that one of the reasons for terminating the Charging Party was her conduct during the meeting. We conclude that this case therefore

⁴ Taracorp Industries, 273 NLRB 221-222 (1984). Conversely, where the employee was discharged solely for having asserted a Weingarten right, and not for cause, the remedy would include backpay and reinstatement.

⁵ Transportation Management Corp., 462 U.S. 393, 103 S.Ct. 2469 (1983); Wright Line, 251 NLRB 1083 (1980), enfd. 662 F2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); Temp-Rite Air Conditioning Corp., 322 NLRB 767 (1996).

⁶ In National Rehabilitation Hospital, Case 5-CA-24870, Advice Memorandum dated February 28, 1995, after the Employer denied the employee his Weingarten right and accusing him of misconduct, the employee lost his temper during the interview. The Employer terminated him for the conduct during the interview, which was a direct result of denying the Weingarten right. Therefore, a make-whole remedy was appropriate for the violation.

presents a mixed motive discharge. Consequently, the Employer must carry its burden to show that the termination would have resulted regardless of the Charging Party's conduct at the unlawful meeting.⁷ We find insufficient evidence for the Employer to carry its burden.

During a previous meeting, there were no plans to take disciplinary action against the Charging Party and the meeting ended without any such actions being taken. Further, the supervisors and the General Manager discussed what action to take before meeting the second time with the Charging Party. The pre-meeting agenda for that May 2 meeting did not include any issues that would address disciplinary action. In sum, there is no evidence indicating that, absent the Charging Party's conduct during the meeting, termination would have resulted. To the contrary, the Employer discharged the Charging Party during the meeting in a contemporaneous reaction to her meeting conduct.⁸ Therefore, the appropriate remedy in the instant case is a make-whole order.

Finally, we would apply Epilepsy to this case. The Board's "customary practice is to apply new policies and standards to 'all pending cases at whatever stage.'"⁹ However, the Board diverges from its "usual practice" and declines to apply retroactively in some cases.¹⁰ In this regard, an exception to the practice of applying changes retroactively applies where a "manifest injustice" occurs.¹¹ In determining whether a manifest injustice would result, the Board applies the model formulated by the Supreme Court which requires a balancing of the ill effects retroactivity might produce with the "mischief of producing a result

⁷ Compare National Rehabilitation Hospital, supra, where the employer discharged the employee solely because of his conduct during the unlawful Weingarten meeting.

⁸ Compare Temp-Rite Air Conditioning, supra, at note 5.

⁹ Electrical Workers IUE Local 444 (Paramax Systems), 311 NLRB 1031, 1042 (1993), enf. den., IUE v. NLRB, 41 F.3d 1532(D.C.Cir. 1994) quoting Deluxe Metal Furniture Co., 121 NLRB 995, 1006-1007 (1958).

¹⁰ Dresser Industries, Inc., 264 NLRB 1088 (1982).

¹¹ Paramax Systems, 311 NLRB at 1042 quoting Pattern Makers (Rite Industrial Model), 310 NLRB 929 (1993).

which is contrary to a statutory design of the legal and equitable principles."¹²

The Board balances three factors in determining whether retroactive application would work a manifest injustice: (1) the reliance of the parties on preexisting law; (2) the effect of retroactivity on accomplishment of the purposes of the underlying law which the decision refines; and (3) any particular injustice to the losing party under retroactive application of the change of law.¹³ The Board, in deciding whether there will be a particular injustice to the losing party under retroactive application, expects that the losing party may have relied to some extent on the old rule; and further, that retroactivity may result in some additional burden on the affected party.¹⁴

We conclude that retroactive application of Epilepsy to the instant case would not result in a "manifest injustice" under the Chevron test. Regarding the first factor, the Employer's General Manager credibly asserts that he knew and relied upon the Board rule that Weingarten rights did not extend to non-unionized employees. However, even if the Employer did rely upon previous Board law, the Board's shifting positions within three years and its internal disagreement on this point arguably should have put the Employer on notice that its reliance on such a dynamic point was not necessarily secure.¹⁵

¹² SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

¹³ Chevron Oil Company v. Huson, 404 U.S. 97, 106-07 (1971). In Chevron, the balancing factors were specifically set forth regarding retroactivity. See also, Pattern Makers (Michigan Model Mfrs.), 310 NLRB at 931, quoting from NLRB v. Bufco, 899 F.2d 608, 609 (7th Cir.1990).

¹⁴ See Pattern Makers, 310 NLRB at 931. ("no great injustice" to the union in requiring it to rescind the fine against the employee and reimburse him for his legal fees; rather, it worked a "greater hardship to saddle [the employee] with the burden of paying a substantial fine" for exercising his Section 7 rights").

¹⁵ NLRB v. Ensign Electric Division of Harvey Hubble, Inc., 767 F.2d 1100, 1102-1103 (4th Cir. 1985) (law not settled and change in Board law not "great surprise" due to cases decided over vocal dissents), quoting Local 900,

Applying Epilepsy retroactively to the instant case certainly accomplishes the underlying purpose of the Epilepsy holding. The instant case, like Epilepsy, involves the denial of a Weingarten right. In each case, the conduct of an employee, because this right was denied, resulted in termination. Additionally, the instant case, like Epilepsy, involves a mixed motive burden placed on the Employer that is not met.¹⁶ Thus, the retroactive application here, as there, would promote the same right to engage in concerted activity for mutual aid and protection. Third, we find no injustice or undue burden resulting from the application of Epilepsy in the instant case. Like in Epilepsy, the appropriate remedy for violating Section 8(a)(1) of the Act, under these circumstances, is reinstatement and backpay. Thus, there is no additional burden placed on the losing party, only the proper corrective step for this type of violation.

Accordingly, the Region should issue complaint, absent settlement, seeking reinstatement and backpay.

B.J.K.

International Union of Electrical Workers v. NLRB, 727 F.2d 1184, 1194-1195 (D.C. Cir. 1984).

¹⁶ 331 NLRB No. 92, above, note 1 at 6.