

Buonadonna Shoprite, LLC and United Food and Commercial Workers Union, Local 1500. Case 29-CA-29720

March 18, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
AND HAYES

On June 3, 2010, Administrative Law Judge Mindy E. Landow issued the attached decision. The General Counsel, the Charging Party, and the Respondent each filed exceptions and a supporting brief. The Charging Party filed an answering brief to the Respondent's exceptions. The Respondent filed an answering brief to the General Counsel's exceptions, a reply brief to the Charging Party's answering brief, and an answering brief to the Charging Party's exceptions. The Charging Party filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by denying "the request of its employee, Odell Clarke, to be represented by the Union during an investigatory interview" and suspending Clarke "because he refused to submit to the interview." These allegations pertain to Clarke's refusal to provide a statement to the Respondent's district manager, Melissa Buonadonna, during an interview at the Respondent's West Babylon store on the afternoon of Thursday, July 2, 2009.¹ Buonadonna was investigating a claim made by employee Amanda Minghillo that Clarke had sexually harassed her.

Earlier that day, Store Manager Jim Shaw asked Clarke's shop steward, Carol Dunne, to bring Clarke to Shaw's office. Dunne typically serves as the union representative in meetings involving investigations of employee misconduct at the store. When Clarke and Dunne met with Shaw, he asked Clarke to provide a statement regarding the incident with Minghillo. Dunne interrupted, stating that Clarke would not provide a statement until he spoke with Union Representative Joe Castelli. Shaw stated that he would discuss the matter with Buonadonna.

Dunne and Clarke left Shaw's office and called Castelli. Castelli advised them that he would not be available until Monday and that Clarke should not provide a

statement until Castelli was available. As it happened, at the time of this call Castelli and Buonadonna were at the Respondent's Bayshore store. Castelli informed Buonadonna that he had advised Clarke not to make any statement until he was available on Monday. Buonadonna replied that she would not wait to conduct the interview and might suspend Clarke.

That afternoon, Dunne clocked out and was speaking to Clarke when Assistant Manager Scott stated that Clarke was wanted in Shaw's office. Dunne acceded to Clarke's request that she accompany him. They met with Shaw and Buonadonna, who told Clarke that she was not planning to discipline him at "this time," but that she wanted a statement. Clarke replied that Castelli had advised him not to give a statement until Castelli was present. Buonadonna asked Clarke why he needed Castelli when Dunne was present. Buonadonna again insisted that Clarke provide a statement. Clarke stated that it would be disrespectful to go against Castelli's wishes and asked permission to call Castelli. Clarke stated that he wanted to ask Castelli whether he should give a statement. Buonadonna asked Clarke if he knew what would happen if he did not give a statement, and he replied that Dunne had told him that he could be suspended. Buonadonna responded that Clarke was being suspended for insubordination and not providing a statement.

Section 8(a)(1) of the Act provides a union-represented employee with the right to request the active assistance of a union representative at an investigatory interview—an interview that the employee reasonably believes may result in discipline.² The judge found, and we agree, that inasmuch as Dunne was present to represent Clarke, Buonadonna was not required to defer the interview until the next Monday, when Castelli would be available.³ However, the judge nevertheless found that the Respondent violated Section 8(a)(1) by denying Clarke's request to telephone Castelli, then insisting on interviewing Clarke and suspending him for his refusal to submit to the interview. The judge found that Clarke's request to telephone Castelli to seek advice as to whether he should continue with the interview was reasonable and constituted a request "to consult with his designated Union representative."

² See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

³ Member Pearce notes that the General Counsel's theory of violation was that Clarke was entitled to representation by Castelli because, among other things, Union Steward Dunne was unwilling to represent Clarke. Although Member Pearce would find the unwillingness of a union representative relevant in determining whether an employee has been accorded his *Weingarten* rights, he finds this record insufficient to establish a lack of representation on that basis.

¹ Dates hereafter are 2009.

The judge noted that her conclusion was based on a “somewhat different analytical framework” from the General Counsel’s, but she reasoned that her conclusion did not involve a change in the theory of the alleged violation or the litigation of a different set of facts. The Respondent contends in exceptions that the judge’s finding that it violated Section 8(a)(1) by failing to allow Clarke to consult with Castelli by telephone deprived the Respondent of due process, as there was no argument or allegation regarding this issue in either the complaint or at the hearing. We find merit in this contention.⁴

Although a judge may in appropriate circumstances find a violation not alleged in a complaint, the judge should not decide an issue that the judge “alone has injected into the hearing, especially where, as here, the parties were never advised to litigate the issue.”⁵ In determining whether a respondent’s due process rights were violated, the Board has considered the scope of the complaint and any representations by the General Counsel concerning the theory of violation, as well as the differences between the theory litigated and the judge’s theory. See generally *Sierra Bullets, LLC*, 340 NLRB 242, 242–243 (2003) (violation based on broader theory improper and violates due process when The General Counsel expressly litigated case on narrow theory).

The complaint in this case alleged only that the Respondent had denied Clarke’s request “to be represented by the Union during an investigatory interview.” The General Counsel’s opening statement at the hearing made clear that the theory of the complaint was that Clarke had the right to insist that Castelli be his representative at the interview. As previously stated, we affirm the judge’s finding that the Respondent had no obligation under the circumstances to wait until Castelli was available because regular steward Dunne was present and available to represent Clarke. The complaint did not allege, and the General Counsel did not contend at the hearing or in his posthearing brief, that even if Clarke’s request for representation was satisfied by Dunne’s participation, the Respondent was required to permit Clarke to call or otherwise consult with a *second* union representative, Castelli, prior to participating in an investigatory interview. The General Counsel’s representations on the record reasonably led the Respondent to believe

⁴ Accordingly, we need not pass on the merits of the judge’s analysis of the substantive issue she raised *sua sponte*.

Member Pearce agrees with the judge’s finding that the Respondent’s denial of Clarke’s request to telephone Castelli during the afternoon meeting was unreasonable. He agrees with his colleagues, however, that this was not an alleged or litigated theory of violation.

⁵ *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1074 (1st Cir. 1981) (internal quotations omitted), cited with approval in *Mine Workers (Arch of West Virginia)*, 338 NLRB 406, 406 (2002).

that it would not have to defend its insistence that Clarke participate in an interview, and its suspension of Clarke for refusing to do so, on other grounds, and the complaint was litigated based on the General Counsel’s representations. Nevertheless, the judge proceeded to find a violation of the Act on an alternate and unlitigated theory, thereby denying the Respondent due process. The violation predicated on the judge’s theory cannot stand on the present record.⁶ We therefore reverse her finding and dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

Brent Childerhose, Esq., for the General Counsel.
James P. Clark, Esq. (Cullen & Dykman LLP), of Garden City, New York, for the Respondent.

Thomas J. Lilly Jr., Esq. (O’Donnell, Schwartz, Glanstein & Lilly, LLP), of Williston Park, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MINDY E. LANDOW, Administrative Law Judge. Based on a charge in Case 29–CA–29720 filed by United Food and Commercial Workers Union, Local 1500 (the Union) on July 21, 2009,¹ a complaint and notice of hearing (the complaint) issued on January 12, 2010. The complaint alleges that Buonadonna Shoprite, LLC (the Employer or Respondent) violated Section 8(a)(1) of the Act by denying the request of its employee, Odel Clarke, to be represented by the Union during an investigatory interview which he reasonably believed would result in disciplinary action being taken against him and thereafter suspending him for refusing to submit to the interview. Respondent filed an answer denying that it had violated the Act as alleged and raising certain affirmative defenses.² This case was tried in Brooklyn, New York, on March 9, 2010.

⁶ If there were any doubt about whether the judge’s theory of violation was encompassed by the General Counsel’s litigated theory of violation, that doubt was put to rest by the General Counsel’s own argument in support of cross-exceptions. The General Counsel specifically states that the judge “incorrectly rejected the General Counsel’s theory of the violations. The ALJ found that Clarke made a valid request under *Weingarten* only when he requested to telephone his representative Castelli during the second investigatory interview. . . . However, the General Counsel asserts that, under *Weingarten*, Clarke made a valid request for Castelli’s presence at the outset of Clarke’s second interview. Contrary to the ALJ’s position, Respondent therefore could not lawfully proceed with questioning Clarke without his representative Castelli present. . . . While the ALJ and the General Counsel both agree that Respondent violated the Act . . . it is appropriate for the Board to affirm the finding of violations, but amend the ALJ’s decision consistent with the General Counsel’s exceptions.” Member Pearce would not rely on conduct by the General Counsel after the hearing to assess whether the judge’s theory of violation had been alleged or litigated.

¹ All dates hereafter are in 2009 unless otherwise indicated.

² Respondent contends that Clarke was provided with a union representative during his interviews, and that the representative who was

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer, a corporation, with offices and places of business located in Bayshore and West Babylon, New York, is engaged in the operation of retail supermarkets. During the past 12-month period, which is representative of its annual operations in general, Respondent derived gross revenues in excess of \$500,000 and purchased and received at its West Babylon facility goods and materials valued in excess of \$5000 directly from suppliers located outside the State of New York. The Employer admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is admitted, and I further find, that the Union is a labor organization within the meaning of Section 2(5) of the Act

II. ALLEGED UNFAIR LABOR PRACTICES

The Employer operates two retail supermarket stores, in West Babylon and Bayshore New York. The facilities are approximately 9 miles apart. Melissa Buonadonna is the district manager who oversees the operations of both facilities.

Clarke has been employed by Respondent for approximately 6 years, and currently works as a dairy manager at the Bayshore facility. During the period of time relevant to the instant case, Clarke was employed at the West Babylon location where the store manager was Jim Shaw. The shop steward at the West Babylon store is Carol Dunne, who works in the shop-from-home and payroll departments. Dunne has served as shop steward for approximately 14 years, 6 under the Buonadonna ownership. The union representative for both stores is Joe Castelli. Castelli has worked for the Union for 15 years; however, he has been assigned to the Employer's two facilities since June 1.

On or about Monday, June 29, an employee at the West Babylon store, Amanda Minghillo, told Assistant Manager Kenny Scott that Clarke had sexually harassed her. Scott reported the claim to Store Manager Shaw, who in turn notified Buonadonna. She instructed Shaw to obtain a written statement from the complaining employee and then investigate the situation further. Minghillo was not scheduled to work for the next 2 days and, according to Buonadonna, her written statement was obtained on the morning of Thursday, July 2, the next day she reported to work.

On July 2, at approximately 10 am, Store Manager Shaw instructed Dunne to report with Clarke to his office. At this point in time neither Clarke nor Dunne knew what Shaw wanted to speak with them about. Shaw then reported that he had received a complaint from Minghillo, alleging that Clarke had sexually harassed her. Shaw stated that he wanted to get Clarke's side of the story and asked Clarke if he had hugged Minghillo. Clarke

replied that he had not hugged his coworker.³ At this point, Shaw handed Clarke a pen and notepad and stated that he needed a statement about what had happened on the day in question.

By way of background, it should be noted that in her capacity as shop steward, Dunne had previously attended an investigatory interview with another employee accused of similar misconduct. That individual had provided a statement to the Employer and was subsequently terminated. With this in mind, Dunne interjected and stated that Clarke would not be able to provide a statement about the incident until he spoke with Castelli and received advice as to how to proceed. Shaw replied that he would discuss the situation with Buonadonna and instructed Clarke and Dunne to return to work.

Dunne took Clarke outside and they placed a call to Castelli. Dunne spoke with him first. According to Castelli, Dunne stated that she felt uncomfortable and unqualified to handle this particular type of meeting. Castelli told Dunne that he was not available to come to the facility for a meeting on that day and would speak to Buonadonna about having a meeting on Monday. Clarke then spoke with Castelli and told him that the allegations had no merit; that the situation was, as he phrased it, a "two-way street" and that there were certain female coworkers at the store who would hug and touch him.⁴ Castelli told Clarke to refrain from providing any statements to the Employer until he was present. Clarke agreed, and returned to work.

At the time of this phone call, Castelli was at the Employer's Bayshore location and had commitments there and elsewhere for the remainder of the day. As it happened, Buonadonna was there as well. She had been informed about Shaw's earlier meeting with Clarke and Dunne. Buonadonna and Castelli spoke shortly thereafter. According to Buonadonna, she told Castelli that she was going to West Babylon to investigate the situation. Castelli told Buonadonna that he had advised Clarke not to make any statements until he was available to attend a meeting and that he would be available after the weekend. Buonadonna asserts that she told Castelli that the situation was "in her lap" and she would not wait the entire weekend to investigate it, and that she might suspend Clarke. Castelli testified that he told Buonadonna to make sure she had just cause before she took any disciplinary action against Clarke.

Later that afternoon, at approximately 3 p.m., Dunne clocked out of work. Before leaving the facility she went to speak with Clarke, to remind him of what Castelli had said during their earlier phone conversation. While the two were speaking, Scott came up to them and stated that Clarke was wanted in Shaw's office. Clarke asked Dunne to accompany him, and she did. Shaw and Buonadonna were sitting in Shaw's office. Clarke entered and Dunne stationed herself in the doorway.

Buonadonna told Clarke that she was not planning to discipline him at this time but wanted to find out what happened. She stated that she needed to know everything, and asked if there were witnesses to the occurrence. Clarke told Buonadonna

³ As Clarke acknowledged at the hearing, this was not a truthful response.

⁴ As Clarke acknowledged, Dunne had previously observed this behavior and had warned him about his interactions with certain of his female coworkers.

present has served, without objection from the Union, as a representative during investigatory interviews on multiple occasions prior to the one in question here.

na that he had spoken with Castelli on the phone and had been advised not to say or write anything until Castelli was present. Buonadonna asked Clarke why he would need Castelli when Dunne was present for the meeting.

At this point there is some variance in the testimony about what Dunne may or may not have said. According to Clarke, Dunne stated that she “was not prepared to go down this road again,” and told Buonadonna that even if she did not plan to reprimand Clarke at this time, once Clarke had provided a statement, her attorney would advise her to discharge him. As Clarke testified, the foregoing exchange occurred between Dunne and Buonadonna and, at the time, he was unaware that Dunne was making reference to what had happened to another employee.

When questioned by the General Counsel, Dunne testified that when Buonadonna asked why Clarke needed Castelli when Dunne was present, she replied that she was the shop steward and that she and Clarke had been told by the union representative that he had to be present for the meeting. Although Dunne did later testify that she stated that she was not qualified to handle the matter, such testimony was in response to a leading question from the Union’s counsel, and Dunne did not offer specific testimony about when she might have made such a statement. Buonadonna testified that after she advised Clarke that he was suspended, Dunne apologized for the situation and stated that she felt uncomfortable because of what had happened to the other employee.⁵

In any event, Buonadonna continued to insist that Clarke provide a statement, and he demurred, replying that it would be disrespectful to his union representative to go against his wishes. Buonadonna then stated that she was Clarke’s boss, that she paid his salary and that she needed his statement so she could conduct a proper investigation.

Clarke then asked for permission to call Castelli, and told Buonadonna that he would provide a statement if Castelli authorized him to do so. Clarke said that he was not refusing to cooperate in the investigation, and that he wanted to get Castelli’s confirmation as to whether he should give a statement at this time. Dunne testified that she offered to telephone Castelli, but Buonadonna did not permit it.⁶

Buonadonna asked Clarke if he was aware of what could happen if he did not give a statement, and he replied that Dunne had advised him that he could be suspended. Buonadonna then stated that Clarke was being suspended based on his insubordination and unwillingness to provide a statement at the time. He was advised that he would be suspended for 10 days.

At approximately 3:30 p.m. that afternoon, Dunne called Castelli and informed him that a meeting had been held, that Clarke had refused to participate unless Castelli was present and had been suspended. Castelli contacted Buonadonna on Friday, July 3 and a meeting was scheduled for July 6, the following Monday.

⁵ On July 5, Dunne wrote an email to Castelli about the event, and does not indicate in this communication that she raised any concerns about her willingness to participate in Clarke’s interview or act as his representative on this occasion.

⁶ This testimony is un rebutted by Respondent.

On that day, Buonadonna interviewed Clarke about the sexual harassment allegations. He was then asked to leave the room. Buonadonna and Castelli discussed the suspension and the Union was informed that the Employer was standing by its decision to suspend Clarke for his failure to cooperate in the investigation. Clarke received no discipline relating to the sexual harassment charge. According to Castelli, Store Manager Shaw subsequently told him that he did not understand why Buonadonna could not wait until Monday, when Castelli could be present, to question Clarke.⁷ In fact, Buonadonna failed to offer any specific testimony about why it was imperative to proceed on that day, other than the fact that she now had the employee complaint in writing and felt that she had to proceed with the investigation.

With regard to the issue of Dunne’s qualifications to serve as Clarke’s representative during the interviews, Dunne testified that her role as shop steward is to sit in on meetings between employees and management, to advise employees of their rights and to act as a conduit to the Union. There are certain so-called “zero tolerance” offenses for which the contractual progressive discipline system need not be followed, and an allegation of sexual harassment is one such offense. Dunne testified that if such a zero tolerance situation arises, she is supposed to stop the meeting and advise the employee not to make a statement until the union representative is contacted. Dunne acknowledged on cross-examination that throughout her tenure as shop steward she typically has served as the Union’s representative in meetings involving investigations of employee misconduct and prior to the situation involving Clarke, had never stopped an interview of an employee to await the participation of a union representative. Dunne has received no training in grievance processing from the Union and is not authorized to handle grievances.⁸

Castelli testified generally that he participates in every disciplinary hearing. He also stated, however, that he typically becomes involved once the company has taken action against an employee. Castelli testified that shop stewards should not be involved in investigations, because they are not trained to do so. While Castelli acknowledged on cross-examination that he heard Dunne testify that she has attended investigatory meetings in her capacity as shop steward, he further asserted that she is not qualified to do so. Castelli stated that the Union’s practice is to advise the shop steward to end such an interview so the member can consult with a trained union representative. Castelli acknowledged that he did not know whether this had actually occurred in the West Babylon facility, as he had only been the union representative for that store since June 1, and the Clarke situation was the first time it had come up.

The back cover of the collective-bargaining agreement contains, in pertinent part, the following extra-contractual language:

In a court case known as *N.L.R.B. vs. Weingarten*, the U.S. Supreme Court ruled you have the right to have your Union Representative present when you are interviewed by your

⁷ Shaw did not testify in these proceedings.

⁸ The collective-bargaining agreement specifically provides that shop stewards are not authorized to process grievances.

employer. If you *reasonably* believe the interview may lead to disciplinary action.

YOUR RIGHTS UNDER WEINGARTEN ARE:

1. You have the right to request the presence of a Union Representative or Shop Steward during any investigatory interview you reasonably believe might result in disciplinary action.
2. You have the right not to be interviewed until your Union Representative or Shop Steward is present.
3. Your Union Representative or Shop Steward may assist you during the interview to organize and explain your facts.

III. ANALYSIS AND CONCLUSIONS

1. Applicable legal principles and contentions of the parties

In *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), and a companion decision, *Ladies' Garment Workers v. Quality Mfg. Co.*, 420 U.S. 276 (1975), the Supreme Court, agreeing with the Board, ruled that employee insistence upon union representation at an employer's investigatory interview, which the employee reasonably believes might result in disciplinary action, is concerted protected activity.⁹ In its discussion of this rule, the Court explained that the right arises out of the protections inherent in Section 7 of the Act and that it is limited to situations where the employee requests representation. *Weingarten*, 420 U.S. at 256–257. In addition, the exercise of this right may not interfere with legitimate employer prerogatives, *Id.* at 258. The employer may carry out its inquiry without interviewing the employee, thus leaving to the employee “the choice of having the interview unaccompanied by his representative, or having no interview and forgoing any benefits that might be derived from one.” *Id.* at 259–260. The Board has interpreted *Weingarten* as follows:

Under *Weingarten*, once an employee makes such a valid request for union representation, the employer is permitted one of three options: (1) grant the request, (2) discontinue the interview, or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all. Under no circumstances may the employer continue the interview without granting the employee union representation, *unless* the employee voluntarily agrees to remain unrepresented *after* having been presented by the employer with the choices mentioned in option (3) above or if the employee is otherwise aware of those choices.

Postal Service, 241 NLRB 141, 141 (1979) (emphasis in original) (footnotes and citations omitted).

Here, there is no dispute that Clarke was in a *Weingarten* situation when he was summoned to the two meetings in question. It was apparent to all concerned that the allegation of sexual harassment was a serious one, which clearly could lead to the

⁹ Accordingly, the discipline or discharge of an employee for refusal to cooperate in such an investigatory interview without union representation violates Sec. 8(a)(1) of the Act. See *Quality Mfg. Co.*, 195 NLRB 197, 198 (1972).

imposition of discipline. The General Counsel contends that under *Anheuser-Busch, Inc.*, 337 NLRB 3 (2001), *enfd.* 338 F.3d 267 (4th Cir. 2003), Clarke was authorized to select his representative absent extenuating circumstances, which have not been shown here. Accordingly, the General Counsel argues, Clarke had a right to refuse to participate in the interview conducted by Buonadonna absent Castelli's participation. The General Counsel maintains that faced with Clarke's refusal to be interviewed, Respondent had several ways it could have lawfully proceeded under *Weingarten*: grant Clarke's request for his representative Castelli; afford Clarke the option of going on with the interview unrepresented or waiving the interview; or reject Clarke's request and end the interview. The Charging Party asserts, similarly, that an employee such as Clarke has the right, absent extenuating circumstances, to specify the representative who must be present before any investigatory interview may proceed, and that the Respondent has not shown such circumstances here.¹⁰

The General Counsel and the Union further argue that Respondent could not lawfully rely on Dunne's presence to insist on interviewing Clarke. They argue that Dunne was neither trained or otherwise capable or willing to act as Clarke's representative. In support of this contention, the General Counsel relies on *Consolidation Coal*, 307 NLRB 976 (1992), and *GHR Energy Corp.*, 294 NLRB 1011, 1042 (1989), *enfd.* 924 F.2d 1055 (5th Cir. 1991), for the proposition that the Board has found an employer violates the Act by insisting that an employee proceed with an interview with a less experienced or capable representative when a better qualified representative is available and has been requested. The Union further argues that inasmuch as Dunne was off duty at the time, she could not be compelled to represent Clarke.

Respondent argues that this case represents an attempt by the General Counsel and the Charging Party to expand *Weingarten* rights to a point beyond that previously recognized by the Board. Respondent contends that, at all times, Clarke was accompanied and assisted by Dunne, his shop steward. Respondent further argues that *Weingarten* does not require an employer to postpone an interview because the specific union representative the employee requests is absent, so long as another union representative is available at the time set for the interview. Respondent notes that Dunne has historically served as the Union's representative during investigatory interviews and contends that even if Dunne did not want to serve as Clarke's representative in the matter, given Castelli's unavailability Respondent was under no legal obligation to provide an alternate Representative for Clarke.

In support of its contention that Buonadonna was not re-

¹⁰ In support of their respective contentions that Respondent has failed to show extenuating circumstances requiring that Clarke's interview go forward on July 2, both the General Counsel and the Union note that the allegation had been raised earlier in the week, and Respondent had taken no action for several days. The General Counsel also points to Castelli's un rebutted testimony that Shaw had stated that he did not see any reason why the interview could not wait until Castelli was present further argues that if the allegations had required imminent action, Respondent could have lawfully suspended Clarke pending an investigation of the incident.

quired to postpone the interview to comply with Clarke's request for representation by Castelli, Respondent relies on *Coca-Cola Bottling Co. of Los Angeles*, 227 NLRB 1276 (1977). In that case, an employee requested representation by a vacationing shop steward, while being aware that another steward was available. The investigatory meeting occurred on a Friday afternoon, and it was understood that the steward requested by the employee would not be available until the following Monday morning. The employee did not request the available representative. The employer denied the employee's request for the vacationing steward and went forward with the interview. The Board held that where there was another union representative who was available, but the employee did not request him, the employer did not violate Section 8(a)(1) of the Act by proceeding with the interview in the absence of a representative:

In agreement with the Administrative Law Judge we find that there is nothing in the Supreme Court's opinion in *Weingarten* which indicates that an employer must postpone interviews with its employees because a particular union representative, here the shop steward, is unavailable either for personal or other reasons, where another representative is available whose presence could have been requested by the employee in the absent representative's place.

227 NLRB at 1276 (footnote with citation omitted). In so concluding, the Board stressed the admonition in *Weingarten* that the right to choose representation should not interfere with "legitimate employer prerogatives" such as conducting investigatory interviews without delay. *Id.* The Board majority also found that the employee had not been compelled to participate in the interview. *Id.* at fn. 6.

Members Fanning and Jenkins dissented:

Our colleagues seem to view the issue here as whether Respondent was forced to delay its investigation of Torres' conduct and its decision to discipline him therefore until the day that Murphy, the representative whose assistance Torres requested, was available, or whether it had a right to proceed without waiting for Murphy. That is not the issue. The issue is whether, given Murphy's absence until Monday, the next working day, Respondent was entitled to require Torres' participation in the investigatory interview without the representation he asked for. As to this, Respondent could have proceeded without Torres' participation; it had no right to compel his participation without representation. For as the Supreme Court noted in *Weingarten*, "The employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative or having no interview and forgoing any benefits that might be derived from one.

Id. at 277 (citation omitted). Thus, it appears that the analytical framework set forth by the dissent in *Coca-Cola Bottling Co.* is, in substance, the position taken by the General Counsel in the instant case.

In *Pacific Gas & Electric Co.*, 253 NLRB 1143 (1981), also relied on by Respondent, the Board concluded that an employee

did not have the right to choose a particular union representative. There, the employer operated two facilities, separated by 20 minutes of driving time. During an interview at one facility, an employee requested a union representative from the other facility, even though the requested representative did not usually represent employees at the interview location. The employer denied this request and called for the representative the union had designated for the facility where the interview was to take place. Under such circumstances, relying on *Coca-Cola Bottling Co.*, supra, the Board found that the employer did not violate the Act by refusing the employee's request. In reaching its conclusions, the Board cited the travel time between the facilities as well as the time required to locate the representative and the potential impact of the delay on the employer's operations. The Board further noted that the union had designated the representative at the facility and that to grant the employee's request would have, in effect, nullified the union's choice of shop steward for that location. *Id.* at 1144.

Subsequently, in *Montgomery Ward & Co.* 273 NLRB 1226, 1227 (1984), enfd. mem. 785 F.3d 316 (9th Cir. 1986), the Board, citing *Coca-Cola Bottling Co.*, addressed the issue as follows:

[W]hen an employee requests a representative who is unavailable, the employer can deny the request and is not required to postpone the interview, secure an alternate representative, or otherwise take steps to accommodate the employee's specific request. The Board has held that in such circumstances the employee has the right and, indeed, the obligation to request an alternate representative in order to invoke the *Weingarten* protections. [(Citation omitted)].

In years subsequent to the above-discussed decisions, the Board has refined its rules regarding employee choice of union representation under *Weingarten*. For example, in *GHR Energy Corp.*, supra, the Board considered a situation where an employee requested a specific union representative who was the international representative. The evidence showed that this individual was available to participate in the interview. Nevertheless, the employer refused the employee's request and required him to accept representation from the shop steward. Under those circumstances, the administrative law judge, affirmed by the Board held that the employer violated the Act by denying the employee his choice of representative. See also *Consolidation Coal Co.*, supra, where the respondent denied an employee's request for representation by an experienced union representative who was available at the time, requiring instead that the employee choose representation from among a group of committeemen, none of whom had represented an employee at an investigatory interview. Adopting the conclusions of the judge, the Board found that the respondent had violated the Act.

Subsequently, in *New Jersey Bell Telephone Co.*, 308 NLRB 277 (1992), enfd. 936 F.2d 144 (3d Cir. 1991), the Board confronted a situation where the union attempted to provide an employee with a particular representative but the employer picked another. The employer contended that, pursuant to *Weingarten*, *Pacific Gas & Electric Co.* and *Coca-Cola Bottling Co.*, it was not obligated to provide the employee with the

representative selected by the union. The administrative law judge rejected this contention, observing that a union has the right to select its own representatives for purposes of collective bargaining. *Oates Bros., Inc.*, 135 NLRB 1295, 1297 (1962); *Arizona Portland Cement Co.*, 281 NLRB 304, 307 (1986). Thus, as the judge found, in the Boards' view, "the circumstances justifying a refusal to meet with particular representatives are, therefore, quite restricted." *Missouri Portland Cement Co.*, 284 NLRB 432 (1987).

The administrative law judge further reasoned that representing an employee at a *Weingarten* interview is clearly one of the features of collective bargaining. Thus, the judge concluded that in order to deny the employee's request for a particular representative, the employer was obliged to "establish some significant business or operational concerns, or other reasons valid in law" to deny such a request. 308 NLRB at 307. On review, the Board concluded that: "When two union officials are equally available to serve as a *Weingarten* representative . . . the decision as to who will serve is properly decided by the union officials, unless the employer can establish special circumstances."¹¹

Subsequently, in *Anheuser-Busch, Inc.*, supra, the Board affirmed, without comment, the findings of the administrative law judge, as follows:

Although I would agree with the Respondent in this case that *Coca-Cola Bottling Co.*, supra and *Pacific Gas & Electric Co.*, supra, clearly support the proposition that *Weingarten* does not give the employee the right to select a specific representative, that proposition has been changed by the Board as set out above in *Consolidation Coal Co.*, supra, *New Jersey Bell Telephone Co.*, supra and *GHR Energy*, supra. The law appears to me to be that in a *Weingarten* setting, an employee has the right to specify the representative he or she wants, and the employer is obligated to supply that representative absent some extenuating circumstances.

337 NLRB at 8.

In *Anheuser-Busch*, the judge found that the requested representative was available at the time of the interview, and that had the employer honored the employee's request, the interview could have proceeded with only minimal delay, which was not sufficient to deny the employee the representative he wanted. Id. And, as Respondent notes in its posthearing brief, on review the Fourth Circuit made a specific point of this issue:

An employer need not always summon a requested representative. The employer may deny an employee's request for a particular representative, forgo the interview process and render a decision based on the information it has already obtained. Or, if extenuating circumstances exist (i.e. if the requested representative is unavailable), the employer may reject the employee's request and proceed accordingly.

¹¹ In *New Jersey Bell Telephone Co.*, the Board, disagreeing with the judge, found that the requested representative had exceeded the scope of appropriate representation in a previous interview and the employer properly had him excluded. Thus, the employer had established special circumstances for the denial of the employee's chosen representative.

Anheuser-Busch, Inc. v. NLRB, 338 F.3d 267, 275 (4th Cir. 2003).

Subsequently, in *Barnard College*, 340 NLRB 934, 935 (2003), the Board held that: "The selection of an employee's representative belongs to the employee and the union, in the absence of extenuating circumstances, and as long as the selected representative is available at the time of the meeting." (citing *Anheuser-Busch, Inc.*, supra and *Pacific Gas & Electric Co.*, supra.)¹²

As the above-discussed cases show, while Board law is clear that employees have a voice in the selection of their *Weingarten* representatives, it is also the case that such a selection continues to be evaluated in light of whether the requested representative is available at the time selected by the employer for the interview.

2. Application to the instant case

In sum, for the reasons discussed below, I have concluded that Board law does not support the General Counsel's position on whole. Rather, I find that at the outset of Clarke's second interview, Respondent was not obliged to delay the interview and could lawfully require Clarke to proceed. While the Board has held that an employee is entitled "to specify the union representative he want[s] to assist him at the [investigatory] interview," *GHR Energy Corp.*, supra at 1042, it continues to find that an employee may not insist on the presence of a representative who is not "readily available." *Pacific Gas & Elec. Co.*, supra at 1143; *Barnard College*, supra.

Notwithstanding the foregoing, I also find that the circumstances attending the interview and Respondent's concomitant legal obligations shifted when Clarke requested, and was denied, the opportunity to consult telephonically with Castelli. After this occurred, and in the absence of evidence that Castelli would have been unavailable for such consultation or that other extenuating circumstances existed, Respondent was no longer privileged to compel Clarke's participation without Castelli's representation.¹³

Returning to the contentions of the General Counsel and the Union, I do not find that the record is sufficient to show that Dunne was not capable or not authorized to represent Clarke, or that Respondent had any reason to think she would not be qualified to do so. Rather, the evidence established she had been a shop steward for 14 years and had, admittedly, assisted employees at other investigative interviews throughout this period of time, which included at least one other zero-tolerance situation. Moreover she had never previously terminated an interview to seek the intervention of a union representative. General

¹² In *Barnard College*, supra at 936, the Board concluded that the employees' demands for representation not by one, but by two union representatives were not protected conduct; thus, the employer did not violate Sec. 8(a)(1) of the Act by suspending them for their refusal to participate in the interview.

¹³ While my conclusions represent a somewhat different analytical framework from that which has been urged by the General Counsel, they do not involve a change in the theory of the violation alleged. Nor do my findings involve the litigation of a different set of facts which, as the parties conceded during the hearing, are largely uncontested. See generally *AKAL Security, Inc.*, 354 NLRB 122, 126, fn. 8 (2009).

Counsel cites to the collective-bargaining agreement which provides, in relevant part, that shop stewards shall not handle grievances. However, restrictions which pertain to the grievance process become applicable when a grievance is filed and no grievance relating to Clarke was pending at the time of the interview.

I do not credit Castelli's testimony that shop stewards are unauthorized to represent employees at investigatory interviews. It is inconsistent with other testimony that Castelli typically becomes involved in a situation once an employer has taken disciplinary action against an employee. Further, it is inherently improbable that a union would insist that a representative with responsibilities for any number of facilities, rather than an onsite shop steward, would be responsible for attending every investigatory interview. Moreover, there is no evidence that this was the practice at Respondent's facilities. Castelli's testimony is further undermined by other record evidence, in particular the public representations made by the Union to employees who may find themselves confronted with a *Weingarten* situation. As noted above, a *Weingarten* notice on the cover of the collective-bargaining agreement advises employees that they should seek assistance from a union representative or a shop steward.¹⁴

General Counsel has cited *GHR Energy Corp.*, supra and *Consolidation Coal Co.*, supra, for the proposition that an employee has the right under *Weingarten* to request a more experienced representative. What General Counsel appears to have overlooked, however, is the fact that in those cases the requested representatives were present and ready to go forward. In *Consolidation Coal Co.*, the administrative law judge, citing *GHR Energy Corp.* and *Coca-Cola Bottling Co.*, specifically noted that it would not have been a violation of the Act for the respondent to have denied the employee's request for representation by his chosen representative if that individual was not present and to grant the request would have forced a postponement of the interview. 307 NLRB at 977. The judge's order in that case, as adopted by the Board specifically states that the respondent shall cease and desist from denying the request of its employees for representation if the representative is "readily available" to provide such representation. Id. at 978.

The Union further argues that, inasmuch as Dunne had clocked out for the day, the Employer could not lawfully compel her to remain behind to represent Clarke. The Union cites

¹⁴ The General Counsel and the Union on one hand and Respondent on the other disagree over whether and when Dunne made it apparent to the Employer that she was unwilling to represent Clarke. I found overall that Clarke was a credible witness who testified in a straightforward manner and I credit his detailed account of what Dunne told Buonadonna. I also find it inherently plausible, under the circumstances. I note that Dunne did not specifically corroborate Clarke's account of events, but I found her to be, generally, a reticent witness. More significantly, however, as discussed in further detail below, there is no dispute that it had been made clear to Respondent on two prior occasions that Castelli had been designated to handle the matter and both Clarke and Dunne reiterated that selection when Clarke was called into the second interview.

no Board authority for this proposition.¹⁵ I note that Shaw did not inform Dunne about or specifically summon her to the second interview and it appears that her attendance was merely a consequence of the fact that she remained at the facility after her work shift to speak with Clarke. Thus, the record demonstrates that this second meeting was scheduled without apparent regard as to whether any union representative would be present to assist Clarke. In any event, the evidence shows that Dunne remained behind voluntarily, if unwillingly. I do not find that her status as an off-duty employee rendered her unable to represent Clarke in this matter. See, e.g., *Anheuser-Busch Inc.*, supra at 5 and at fn. 5, where the administrative law judge found that the desired representative was available for an investigatory interview notwithstanding the fact that he would be obliged to curtail his lunch period and, further, that both representatives testified that they had done so in the past.¹⁶

Considering the circumstances of the instant case in light of the foregoing precedent, in agreement with Respondent, I have concluded that at the outset of Clarke's second interview, Respondent was not obliged to wait until Monday for Castelli to become available and could lawfully proceed with Clarke's interview in the presence of another union representative. *Montgomery Ward*, supra; *Pacific Gas & Electric Co.*, supra; *Barnard College*, supra. See also *LIR-USA Mfg. Co.*, 306 NLRB 298, 305 (1992) (noting the General Counsel's concession that by providing the employee a union shop steward who was available, instead of a union business agent who was not readily available, the employer fulfilled its obligation to provide the employee with union representation). However, for the following reasons, I find that the situation changed when Clarke asked to be allowed to consult with Castelli by telephone and Buonadonna denied this request.

As an initial matter, I find that when Dunne and Clarke were summoned to Shaw's office for the morning meeting on July 2, Dunne, acting in her capacity as the representative of the Union at that time, made it clear that the Union was designating Castelli to handle the matter. *Pacific Gas & Electric Co.*, supra; *New Jersey Bell Telephone*, supra. As has been found, a union representative may speak for an employee he or she represents and invoke that employee's rights under *Weingarten*. *Postal Service*, 303 NLRB 463, 463 fn. 1, 467 (1991); *Pacific Telephone & Telegraph Co. v. NLRB*, 711 F.2d 134, 137 (9th Cir. 1983). Moreover, as the Board has made clear, as a general matter the selection of the representative belongs to the union and the employee. *GHR Energy Corp.*, supra; *Consolidation Coal Co.*, supra; *New Jersey Bell Telephone Co.*, supra; *Anheuser-Busch, Inc.*, supra; and *Barnard College*, supra.

Castelli's designation as representative was reiterated when he spoke with Buonadonna at the Bayshore store. Thus, even

¹⁵ In its posthearing brief, the Union suggests that this would be a violation of Dunne's constitutional rights.

¹⁶ In this regard, I note that the collective-bargaining agreement between the Employer and the Union contains the following access provision: "The Employer agrees to permit and authorize representatives of the Union to visit any of the Employer's places of business at any time during normal working hours for the purpose of ascertaining whether this Agreement is being properly observed, provided that there shall be no interruption of, or interference with, the Employer's business."

prior to Buonadonna's attempt to obtain a statement from Clarke, Respondent knew that Castelli would be Clarke's representative in this matter.

I find that Clarke's request that he be allowed to telephone Castelli to seek his guidance as to whether to proceed with the second interview was a reasonable one, and constituted a specific request that he be allowed to consult with his designated union representative prior to participating in an investigatory interview, which he reasonably believed might result in discipline. As the Board has held, an employee has such a right under *Weingarten*.¹⁷ See *Climax Molybdenum Co.*, 227 NLRB 1189 (1977), enf. denied 584 F.2d 360 (10th Cir. 1978), *Pacific Telephone & Telegraph Co.*, 262 NLRB 1048, 1049 fn. 11 (1982), enf. 711 F.2d 134 (9th Cir. 1983); *Postal Service*, supra at 469. In this regard, it is apparent that while Castelli was not physically present, it is reasonable that he might well have been available by telephone to consult with and then to assist Clarke during the interview. Moreover, Respondent has presented no evidence as to why it could not have accommodated this request.

Of course, it is unwarranted to speculate as to whether, after consulting with Castelli, Clarke would have proceeded with the interview or whether Castelli could have successfully prevailed upon Buonadonna to wait until the following Monday, or whether the situation would have resulted in the same outcome. Nevertheless, I find under the circumstances presented by this case, Respondent was required to acknowledge Castelli's selection as Clarke's representative absent his demonstrated unavailability or other "extenuating circumstances." *Anheuser-Busch, Inc.*, supra; *Barnard College*, supra.¹⁸

At the time Clarke asked to telephone Castelli, both Clarke and Dunne had specifically designated him as the union representative who would be responsible for representing Clarke in the matter, which involved a serious allegation of misconduct. Buonadonna had advised Clarke that she was his employer and paid his salary and, in essence, demanded that Clarke provide a statement. As Clarke testified, he was aware that a refusal to provide a statement might, in and of itself, result in the imposi-

¹⁷ While I have concluded that the evidence does not support the contention that Dunne was unauthorized or unable to represent Clarke, I find that the preference that Castelli do so is encompassed by *Weingarten*, supra, where it was noted that, "a knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview." 420 U.S. at 263.

¹⁸ The Board has previously attributed some relevance to whether or not a union representative is available for telephone consultation. See *Meharry Medical College*, 236 NLRB 1396 (1978), where the Board found it unnecessary to decide the issue of whether medical evaluations are within *Weingarten*, as the employee involved telephonically consulted with the union's attorney before taking the examination and thus was not denied union representation. Cf. *Williams Pipeline*, 315 NLRB 1, 5 (1994), where, in the absence of exceptions, the Board adopted the conclusion of the administrative law judge that, where the employee had requested the presence of the only steward assigned to the facility, and that steward was unavailable and could not be reached by telephone, the employer acted unlawfully by forcing the employee to submit to an investigatory interview with a fellow employee, who was not a union representative, as a witness.

tion of discipline. In this regard, I find that Castelli's prior communications with Clarke do not obviate the significance of Clarke's request to telephone Castelli at this point in time. The situation had changed: Clarke had been summoned to a second interview, and was now directly confronted with the possibility of discipline should he refuse to cooperate.

Moreover, Respondent has failed to show that allowing Clarke to telephone Castelli would have been futile or would cause any appreciable delay in conducting the interview. Further, there is no evidence of extenuating circumstances under *New Jersey Bell Telephone Co.*, *Anheuser-Busch, Inc.*, or *Barnard College* which would sanction a refusal to allow Clarke to consult with Castelli. This is especially the case given the ease with which one now can communicate by cellular telephone or other communications devices.¹⁹ I conclude therefore, that by requesting to telephone Castelli to seek his guidance as to how to proceed in the second interview Clarke made a *valid* request for union representation. See *Postal Service*, 241 NLRB 141, fn. 5 (1979) (distinguishing *Coca Cola Bottling Co.*, supra).

Confronted with a valid request for union representation under *Weingarten*, Respondent was faced with an altered set of options and obligations: it could grant Clarke's request, terminate the interview or afford Clarke the choice between having an interview unassisted by his chosen representative or having no interview and forgoing any benefit that might be derived from one. *Postal Service*, supra (and cases cited therein).

Instead, Respondent chose to continue the interview without advising Clarke of his options and affording him the requisite choice. Accordingly, I find that Respondent's insistence on interviewing Clarke under these circumstances violated Section 8(a)(1) of the Act. I further find that Respondent's suspension of Clarke, admittedly for refusing to submit to this unlawful interview, is violative of Section 8(a)(1) as well.²⁰

CONCLUSIONS OF LAW

1. The Respondent, Buonadonna Shoprite, LLC, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by:

(a) Refusing to allow Odel Clarke to be represented by a union representative of his choosing during an investigatory interview in which he had reason to believe that discipline might be taken against him, absent a demonstration of that representa-

¹⁹ It has been noted that the Board can, and has, adapted its rules under *Weingarten* in response to changing circumstances. In *NLRB v. Anheuser-Busch, Inc.*, supra at 278, the Fourth Circuit noted that: "Beginning in 1977 with its *Coca-Cola* decision, the Board has simply modified and reformed its standards on the basis of accumulating experience" as authorized and approved by the Court in *Weingarten*." (quoting 420 U.S. at 265). See 420 U.S. at 265-266 (explaining that "[t]o hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking."

²⁰ Respondent has argued that while Clarke's suspension was nominally for 10 days he was, in fact, only suspended for 6 working days. This matter should be addressed during the compliance portion of these proceedings.

tive's unavailability or extenuating circumstances, in violation of his rights under Section 7 of the Act.

(b) Suspending Clarke because he refused to participate in an investigatory interview under the circumstances described above in violation of his rights under Section 7 of the Act.

4. The Unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having discriminatorily suspended Odel Clarke, it must make him whole for any loss of earnings and other benefits, computed on a quarterly basis less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).²¹ I further recom-

²¹ In the complaint the General Counsel seeks interest computed on a compounded quarterly basis for monetary compensation owed to

mend that the Employer be ordered to, within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspension and within 3 days thereafter notify Clarke in writing that this has been done and that the suspension will not be used against him in any way. I further recommend that Respondent post at its West Babylon facility an appropriate notice to employees.²²

[Recommended Order omitted from publication.]

Clarke. I deny the General Counsel's request as that is not the current law. *Cox Ohio Publishing Co.*, 354 NLRB 271, 271, fn. 5 (2009); *Glen Rock Ham*, 352 NLRB 516, 516, fn. 1 (2008), citing *Rogers Corp.*, 344 NLRB 504 (2005).

²² In the complaint the General Counsel seeks, in addition to the standard notice posting remedy, that Respondent be required to post a notice to employees via its internet, email or other electronic procedures. Under extant law, in the absence of any evidence that Respondent customarily utilizes such methods to communicate with its employees, the General Counsel's request is denied. *Nordstrom, Inc.*, 347 NLRB 294, 294 fn. 5 (2006).