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National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

S.A.M. DATE: May 31, 2016

TO: Cornele A. Overstreet, Regional Director
Region 28

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

SUBJECT: Wal-Mart Stores, Inc.
Case 28-CA-167277

***Weingarten* Chron**
506-4033-3000
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This case was submitted for advice as to whether it is an appropriate vehicle in which to urge the Board to overrule *IBM Corp.*[1] and to recognize employees' *Weingarten*[2] rights in non-unionized settings.[3] We conclude that the Region should use this case as a vehicle to urge the Board to extend *Weingarten* rights to unrepresented employees. Specifically, the Region should urge the Board to find that the Employer violated Section 8(a)(1) by forcing the Charging Party to participate in a meeting regarding a customer complaint and an unrelated meeting preceding his discharge, without the assistance of a coworker, because both meetings were investigatory interviews.

FACTS

In (b) (6), (b) (7)(C) 2015,[4] the Charging Party began work as a technician in the Tire and Lube Express ("TLE") department at a Wal-Mart ("Employer") store in Gilbert, Arizona. The TLE employees are not represented by a union.

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[1] 341 NLRB 1288 (2004).

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

[3] The Region also asked for advice as to whether the Region should argue that the Board expand *Weingarten* to include a right to a representative at an investigatory meeting where the employee requesting representation reasonably believes that *another* employee could be disciplined as a result of the investigatory meeting. The Region should not allege that the Employer violated Section 8(a)(1) as to that meeting, as we discuss *infra*.

[4] All dates are 2015 unless otherwise noted.

In late (b) (6), (b) (7)(C), a manager asked the Charging Party to attend a meeting in the department's supervisory office to discuss another technician's on-the-job injury. One of the two TLE supervisors was already sitting in the office when the Charging Party and the Manager arrived. As soon as the Charging Party entered the office, [redacted] asked if [redacted] could have a representative sit in with [redacted] so that the meeting could be "two-on-two." The Manager replied, "no, that's not how we do things." The Supervisor said [redacted] was "just there as a witness to make sure nothing happened during the meeting, like no one started yelling or cussing or fighting." The Manager then asked the Charging Party if [redacted] knew how the coworker had hurt [redacted] or if the Charging Party had heard the coworker say anything at the time of [redacted] injury. The Charging Party responded that [redacted] did not know anything about the coworker's injury. At the Manager's request, the Charging Party agreed to write an incident statement following the meeting and, shortly thereafter, the meeting concluded. According to the Charging Party, the Employer was investigating whether the coworker had failed to report an unsafe working environment, which the Charging Party assumed could result in the coworker's discipline.

Although the Employer does not corroborate the above incident, the Employer does state that, in late (b) (6), (b) (7)(C), the Manager convened a meeting with the Charging Party and a supervisor in the Manager's office to discuss a customer's concern about service on the customer's vehicle. According to the Employer, the Charging Party asked if [redacted] could have a witness attend the meeting with [redacted] The Manager denied the request and stated that [redacted] just wanted to ask about service performed on a customer's automobile because the Charging Party had signed the paperwork associated with that vehicle. The Charging Party stated that [redacted] coworker, another service technician, had actually performed the work. The meeting concluded shortly thereafter.

Around (b) (6), (b) (7)(C), the Manager and the Employer's Asset Protection Supervisor called the Charging Party into another meeting in the supervisors' office. When [redacted] arrived at the meeting, the Charging Party once again asked if [redacted] could have "someone sit in" with [redacted]. The Manager responded "no" and told the Charging Party to come into the office and close the door. The Manager stated that [redacted] had noticed a pattern in the Charging Party's time records for the last month and a half demonstrating what appeared to be intentional acts to "steal[ ] time," and that [redacted] was recommending that the Charging Party be terminated. The Asset Protection Supervisor told the Charging Party that they had security camera footage showing that the Charging Party had falsified [redacted] time and, according to the Employer's Position Statement, asked if [redacted] would like to review the video and explain the time adjustments. The Charging Party declined the Employer's offer to provide an explanation. The Charging Party asked if [redacted] should return to [redacted] work and the Manager explained that the termination was effective immediately. The Charging Party left the meeting, gathered [redacted] things, and left the store.

According to the Employer's exit interview records, the Charging Party was terminated for "Gross Misconduct-Integrity Issue." The Charging Party has not worked for the Employer since [redacted] discharge.

ACTION

We conclude that the Region should use this case as a vehicle to urge the Board to overrule *IBM Corp.* and to recognize employees' *Weingarten* rights in non-unionized workplaces. In particular, the Region should issue complaint, absent settlement, and argue that the Employer violated Section 8(a)(1) by forcing the Charging Party to participate in the [redacted] meeting regarding a customer complaint and the [redacted] meeting immediately preceding the Charging Party's discharge, without the assistance of a coworker, because both meetings were investigatory interviews under *Weingarten*. The Region should not allege that the meeting concerning another employee's on-the-job injury was unlawful under Section 8(a)(1) because the Charging Party did not reasonably believe that [redacted] could be disciplined as a result of that meeting and therefore it was not an investigatory interview under *Weingarten*.

In *Weingarten*, the Supreme Court held that employees may request the presence of a union representative at an investigatory interview that the employee reasonably believes may result in disciplinary action.[5] Since *Weingarten* was decided, the Board found in two prominent decisions that employees in non-union settings also have a right to have a coworker serve as a representative in investigatory interviews under *Weingarten*.[6] More recently, however, the Board in *IBM Corp.* concluded that, in light of certain policy considerations, the Board would no longer find that employees in non-union workplaces have the right to a coworker representative. We believe that *IBM Corp.* was wrongly decided, and, for the reasons stated in *Bayhealth Medical Center*,[7] the Board should overrule *IBM Corp.* and, once again, recognize employees' *Weingarten* rights in a non-union workplace.

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[5] 420 U.S. at 256.

[6] *See Materials Research Corp.*, 262 NLRB 1010, 1011-12 (1982); *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676, 677-78 (2000), *enforced in relevant part* 268 F.3d 1095 (D.C. Cir. 2001).

[7] Case 05-CA-157145, Advice Memorandum dated December 15, 2015. As highlighted in *Bayhealth*, *IBM Corp.* disregarded the importance of employee solidarity, which is a fundamental principle of the Act. When one employee supports another with respect to an issue that only appears to concern the latter employee, including being present in the investigatory interview of a coworker that might result in discipline, there is an implicit promise of future reciprocation and it does not matter whether

1. Meetings Regarding A Customer Concern and Preceding the Charging Party's Discharge were Investigatory and the Charging Party Had a Right to a Representative

When analyzing whether an employee has unlawfully been denied a representative, the Board considers whether the employee's belief that the interview will result in discipline is objectively reasonable under all the circumstances of the case, rather than considering the employee's subjective belief that discipline will issue.[8] Additionally, an employee is entitled to a *Weingarten* representative only when the meeting is investigatory in nature, i.e., one in which the employer seeks additional information from the employee to establish or further support the disciplinary action being considered, rather than where the employer is merely disclosing a previously made disciplinary decision.[9] However, even where an employer states that the meeting is merely to dispense discipline, a *Weingarten* right attaches if the employer asks the employee to defend or explain the conduct in question or otherwise indicates that the meeting is investigatory in nature.[10] For example, in *El Paso Electric Co.*, the ALJ, specifically affirmed by the Board, determined that the employee had a right to representation because, although the employer gave the employee a disciplinary notice when the meeting began, the

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those acting in solidarity represent any other employee's interests. It is enough that one employee has made common cause with another. *See Bayhealth* at 16-17. In this case, the evidence indicates that employees had shared concerns about working conditions, including a desire to have a co-worker present at investigatory meetings. The Region should investigate further to establish what led to these concerns and use such evidence, if available, to show why *IBM Corp.* was wrongly decided and should be overruled.

[8] *Weingarten*, 420 U.S. at 257; *see also Consolidated Edison Co. of New York*, 323 NLRB 910, 910 (1997) ("*Weingarten* [ ] requires an employer to evaluate an investigatory interview situation from an objective standpoint—i.e., whether an employee would reasonably believe that discipline might result from the interview.")

[9] *See Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979) ("[U]nder the Supreme Court's decision in *Weingarten,* an employee has no Section 7 right to the presence of his union representative at a meeting with his employer held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision.")

[10] *See, e.g., El Paso Electric Co.*, 355 NLRB 428, 429 n.5, 441 (2010) (employee had right to *Weingarten* representative where employer "went beyond merely handing out discipline and collected additional evidence"), *enforced* 681 F.3d 651 (5th Cir. 2012).

meeting transformed into an investigatory interview when the employer invited the employee to speak and share his side of the story.[11] Although the employee declined to explain [redacted] the Board found that the supervisor's "open-ended invitation . . . could have had the effect of providing evidence to bolster [the] disciplinary decision or to convince [the employer] not to impose discipline," thereby making it an "investigatory" meeting for which the employee was entitled to union representation.[12]

Here, the Region should argue that the Charging Party had a right to have a coworker attend his [redacted] meeting, involving a customer concern about work performed on their vehicle, because the meeting was an investigatory interview that an employee would reasonably believe could result in [redacted] or [redacted] discipline.[13] A customer complaint is clearly the sort of circumstance that could lead an employer to impose discipline.[14] In this regard, the Employer's stated purpose of this meeting was to determine what exactly had occurred that led the customer to complain, and the Employer specifically pointed out that it was the Charging Party who had signed the vehicle paperwork. Thus, the Charging Party would reasonably believe that [redacted] could receive some type of discipline if the Employer decided that the vehicle was not properly serviced. In these circumstances, where the Charging Party reasonably believed that [redacted] could have been disciplined as a result of the meeting, and the purpose of the meeting was to determine what led to the customer's issue with the service received, we conclude that it was an investigatory interview to which *Weingarten* rights apply and the Charging Party had a right to have a coworker present.

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[11] 355 NLRB at n.5, 441.

[12] *Id.* at 441; *see also Titanium Metals Corp.*, 340 NLRB 766, 766, 774 (2003) (while purpose of meeting was to inform employee of predetermined discipline for distributing newsletter critical of the employer, employer went beyond that purpose and interrogated employee regarding whether he had any newsletters in his possession, before union representative arrived, in violation of Section 8(a)(1)), *enforcement denied in part on other grounds* 392 F.3d 439 (D.C. Cir. 2004).

[13] The Region should ensure that the Charging Party corroborates that this meeting took place and generally follows the description provided by the Employer. If the Region uncovers conflicting evidence, the Region should re-submit for further advice.

[14] *Cf. Caesar's Atlantic City*, 344 NLRB 984, 991, 993-95, 1003 (2005) (Board adopted ALJ's finding that employer terminated union supporter based in part on customer complaints, rather than in retaliation for union activity), *enforced mem. sub. nom. LoManto v. NLRB*, 196 F. App'x 59 (3rd Cir. 2006).

The [redacted] meeting, in which the Employer ultimately discharged the Charging Party, was also an investigatory interview that the Charging Party reasonably believed might result in discipline. Thus, after stating at the outset that the Charging Party "appeared" to be stealing time, the Employer asked the Charging Party if [redacted] wanted to review the security camera footage and "explain the time adjustments."[15] The Employer did not simply hand the Charging Party a termination notice or inform the Charging Party that [redacted] was being terminated. Through that overture, the Employer, prior to finalizing its disciplinary decision, gave the Charging Party the opportunity to present [redacted] case and provide some explanation in [redacted] defense. Thus, we reject the Employer's assertion that it decided to discharge the Charging Party before the meeting and that the sole purpose of the meeting was only to dispense that discipline. By opening the door and soliciting information from the Charging Party, the meeting became the type of interview in which the Board has found that a right to union representation applies.[16] Although the Charging Party declined to explain [redacted] time adjustments, the Employer's invitation to the Charging Party to explain [redacted] conduct could have had the effect of providing evidence to either reinforce the Employer's disciplinary decision or to convince the Employer not to impose that discipline.[17] Therefore, we conclude that this meeting was an investigatory interview to which the Charging Party would have been entitled to a *Weingarten* representative and therefore should have had the right to have a coworker accompany [redacted] and act as [redacted] witness.

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[15] The Region should ensure that the Charging Party corroborates that the Employer gave him the opportunity to review the security footage and explain his time adjustments.

[16] *Baton Rouge Water Works*, 246 NLRB at 997 (where an employer informs an employee of a disciplinary action and "then seek[s] facts or evidence in support of that action," the employee's right to representation attaches).

[17] *See El Paso Electric*, 355 NLRB at 429 n.5, 441 (although employee declined employer's invitation to share his side of the story, interview found to be investigatory nonetheless because questioning indicated employer was interested in supporting case for discipline or would consider altering pre-determined discipline); *cf. Public Service Co. of New Mexico*, 360 NLRB No. 45, slip op. at 24-26 (Mar. 27, 2014) (Board adopted ALJ's finding that employee had no right to union representative in meeting where employer only informed employee of statements attributed to her by a coworker and where employer stated she would not be disciplined).

2. Conversely, the Meeting Regarding Another Employee's Injury Was Not Investigatory under *Weingarten* and the Charging Party Did Not Have a Right to a Representative

In contrast, there is no evidence that the (b) (6), (b) (7)(C) meeting concerning another employee's on-the-job injury was an investigatory interview that could have resulted in the Charging Party's discipline, or that the Charging Party reasonably believed that [redacted] could be disciplined as a result of the meeting. There is no evidence that the Employer conveyed to the Charging Party, or that the Charging Party believed, that the meeting concerned the Charging Party's own work performance or behavior.[18] Rather, the Employer's stated purpose of the meeting was to determine whether the Charging Party knew anything regarding the circumstances of [redacted] coworker's on-the-job injury. Although there may be some circumstances in which a supervisor's statement that [redacted] was there to make sure that "no one started yelling or cussing or fighting" might lead an employee to reasonably believe that the meeting could result in their own discipline, that is not the case here. The Charging Party here asked for a representative *before* the supervisor made that statement. And, after the supervisor's statement, the discussion during the meeting only concerned the coworker and [redacted] on-the-job injury, not the Charging Party. Finally, the Charging Party acknowledged that [redacted] was concerned only that *the coworker* could be disciplined as a result of the investigation[19] and there is no evidence that the Charging Party believed that [redacted] would be disciplined as a result of the meeting.[20] In these circumstances, there is no basis to conclude that the Charging Party reasonably believed that the meeting could

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[18] *Cf. Consolidated Edison*, 323 NLRB at 910, 913-14, 916 (employee reasonably believed that interview with employer's security officer concerning robbery of employer property could result in employee's discipline where employee had previously been disciplined for losing employer property and had failed a drug test).

[19] The Region also asked for advice as to whether the Region should argue that the Board expand *Weingarten* to include a right to a representative based solely on the employee's belief that *another* employee could be disciplined as a result of the investigatory meeting. As this case seeks to overturn *IBM Corp.* and extend basic *Weingarten* rights to a non-union setting, we do not believe it is an appropriate case to consider another expansion of *Weingarten* rights.

[20] *Cf. Consolidated Casinos Corp.*, 266 NLRB 988, 1009 (1983) (*Weingarten* rights attach to pre-polygraph interviews where management agents asked employees if they themselves had stolen from the employer, engaged in other improper conduct, or knew of others who had engaged in misconduct) (*pro forma* adoption of violation).

result in [redacted] discipline or in fact that it was an investigatory interview that could have led to the Charging Party's own discipline.[21]

In sum, the Region should issue complaint, absent settlement, on the basis of the two investigatory interviews described above wherein the Charging Party was denied a coworker representative. In doing so, the Region should argue that the Board overrule *IBM Corp.* for the reasons stated in *Bayhealth Medical Center*,[22] and recognize employees' *Weingarten* rights in a non-union workplace.

/s/
B.J.K.

ADV.28-CA-167277.Response.Wal-Mart.[redacted]

[21] *Cf. NV Energy, Inc.*, 355 NLRB 41, 41 & n.5, 44-45 (2010) (Board concluded that employee lacked reasonable belief that he could be disciplined as a result of meeting, where employer met with employee in response to employees' complaints regarding their training instructors and no evidence that any employee faced discipline or retaliation for such complaints) (two-member Board decision).

[22] Case 05-CA-157145, Advice Memorandum dated December 15, 2015.