

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

Advice Memorandum

DATE: October 21, 2016

TO: Cornele A. Overstreet, Regional Director
Region 28

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

SUBJECT: Blake's Lotaburger, LLC
Case 28-CA-175039

506-4033-3000
512-5072-2400

The Region submitted this case for advice as to whether it presents an appropriate vehicle in which to urge the Board to overturn *IBM Corporation*¹ and recognize employees' *Weingarten*² rights in a non-unionized setting. We conclude that this case is an appropriate vehicle in which to make such an argument. The Region should therefore issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by forcing employees to participate in interviews investigating claims of sexual harassment by an Employer manager, without the assistance of a coworker.

FACTS

Blake's Lotaburger (the Employer) operates fast-food restaurants in Arizona, Texas, and New Mexico. The Employer maintains an employee manual that instructs employees to report complaints of discrimination and/or sexual harassment that the Employer will investigate and treat "with as much confidentiality as possible." The manual notes that "[e]mployees deliberately making false claims are subject to disciplinary action up to and including termination."

In March 2016,³ a group of some 12 employees at one of the Employer's Santa Fe restaurants formed an employee committee to address (b) (6), (b) (7)(C) ongoing sexual harassment of employees. The committee consisted of victims of, and witnesses to, the sexual harassment. On March 22, the committee sent a letter to the Employer,

¹ 341 NLRB 1288 (2004).

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

³ All dates are in 2016.

signed by each committee member, complaining about the harassment. On April 5, the Employer's corporate counsel, along with (b) (6), (b) (7)(C) traveled to the restaurant to interview employees who had complained of being harassed. The Employer asked each employee before his or her interview to sign a "Harassment Investigation Disclosure" form stating that the signatory "will be subject to disciplinary action up to and including termination of my employment" for making "false claims of harassment." The Employer then interviewed (b) (6), (b) (7)(C) of the committee members individually.

On (b) (6), (b) (7)(C) the day after the Employer interviewed the first group of employees, (b) (6), (b) (7)(C) told employees that the Employer's (b) (6), (b) (7)(C) said that employees who had signed the committee's March 22 letter to the Employer would be fired if the sexual harassment allegations proved false.

The Employer's corporate counsel returned to the store on April 13 to interview those employees who had signed the March 22 letter but had not yet been interviewed. That morning, prior to the afternoon interviews, committee members told Employer counsel that they had heard that they were going to be fired the next week. Employer counsel assured employees that they would not be fired and "as long as they were being honest, nothing bad could happen to them for talking to [her]." Later that afternoon, prior to the start of the first interview, committee members approached Employer counsel as a group. According to the Employer, the committee members asked to be interviewed together. One committee member states that the employees asked to be interviewed "as a [committee]" or that the Employer could "ask each person individually but that we could all be present," and that the employees had the right to "a witness" during the interviews. Another employee states that the employees had decided prior to the interviews that day to not participate in the interviews if they were "not allowed to have a witness." That employee told the others to tell Employer counsel that they "were a Committee and that [Employer counsel] could not conduct the interviews without a witness." The Employer insisted that the employees be interviewed individually. Employees claim that Employer counsel told them that she would write down anyone who refused to submit to an individual interview as having not cooperated with the investigation. The Employer then interviewed the employees individually in the restaurant's public dining area.

On April 26, the employee committee filed a complaint with the Human Rights Division of the New Mexico Department of Workforce Solutions and thereafter protested in front of the restaurant. The Region has concluded that the Employer engaged in unlawful conduct, including unlawful surveillance and threatening employees, including with termination, for their participation in the April 26 protest. (b) (6), (b) (7)(C) accused of sexual harassment continues to work for the Employer but (b) (6), (b) (7)(C) at issue in this case.

ACTION

We conclude that the Region should use this case as a vehicle to urge the Board to overrule *IBM Corporation* and 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 employees to participate individually in Employer interviews investigating claims of sexual harassment by a district manager.

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.⁴ 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*.⁵ More recently, however, the Board in *IBM Corporation* 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* was wrongly decided, and, for the reasons stated in *Bayhealth Medical Center*,⁶ the Board should overrule *IBM* and, once again, recognize employees' *Weingarten* rights in a non-union workplace.

⁴ 420 U.S. at 256.

⁵ 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).

⁶ Case 05-CA-157145, Advice Memorandum dated December 15, 2015. As highlighted in *Bayhealth*, *IBM Corporation* 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 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. Here, there is strong evidence that employees had shared concerns about working conditions, including a desire to have coworker presence at investigatory interviews concerning claims by multiple employees of sexual harassment by an Employer official. Indeed, employees' requests for coworker representation grew out of the employees' protected concerted activity of forming a committee to address their unlawful working conditions. The Region should use such evidence to show why *IBM* was wrongly decided and should be overruled.

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.⁷ 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.⁸

In the circumstances of this case, including the employees' ongoing protected concerted activity surrounding their accusations of sexual harassment by [REDACTED], the committee members reasonably believed that the April 13 interviews were investigatory interviews that could result in their own discipline. Thus, each employee was required to sign a "Harassment Investigation Disclosure" form stating that he or she would "be subject to disciplinary action up to and including termination of my employment" for making "false claims of harassment." Thus, employees reasonably believed that they could be disciplined, even terminated, if the Employer concluded that the underlying facts of their claims did not rise to the level of legally sanctionable sexual harassment. Further, the employees' reasonable belief is established by the (b) (6), (b) (7)(C) [REDACTED] warning that the Employer's (b) (6), (b) (7)(C) [REDACTED] had said that employees complaining of harassment would be fired if their complaints proved false. The employees' decision to ask for coworker representation on April 13, after the (b) (6), (b) (7)(C) [REDACTED] warning but not before, confirms the reasonableness of the employees' belief that their participation in the April 13 interviews could result in their discipline.⁹ Thus, although the subject of the

⁷ *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.")

⁸ 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.")

⁹ It is unclear whether (b) (6), (b) (7)(C) [REDACTED] is a supervisor under Section 2(11) or an Employer agent under Section 2(13); regardless of [REDACTED] status, [REDACTED] was disseminating to employees the warning made by the Employer's (b) (6), (b) (7)(C) [REDACTED], who is described by

interviews was ostensibly to investigate the (b) (6), (b) (7)(C) sexual harassment of restaurant employees, the Employer broadened the scope of that investigation to include the possible misconduct of the employee witnesses themselves.

Finally, our conclusion that this case presents a good vehicle to overturn *IBM* is not belied by any arguable concern of the Employer that coworker representatives could influence the interviewee's testimony because of his or her own knowledge of the underlying events under investigation. The Employer has not articulated an interest in maintaining the confidentiality of the interviews and indeed conducted them in the restaurant's public dining area. Nor did the Employer offer to allow the employees to select witnesses who were unfamiliar with the sexual harassment claims.¹⁰

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by refusing to allow employees coworker representation during investigatory interviews and use this case as a vehicle to urge the Board to overrule *IBM* and extend *Weingarten* rights to unrepresented employees.

/s/
B.J.K.

ADV.28-CA-175039.Response.lotaburger (b) (6), (b) (7)(C)

the Employer as a "promising (b) (6), (b) (7)(C)" engaged in "business management," and who is thus an acknowledged Section 2(11) supervisor.

¹⁰ To the extent the Employer understood that the employees asked to be interviewed as a group, it did not offer to allow them the presence of a single coworker witness. Although the employees, often communicating (b) (6), (b) (7)(C), asked to be interviewed "as a [committee]," they also insisted they had a right to "a witness" during the interviews.