

Appeals Court Vacates NLRB Decision, Rejects Credibility Findings

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Labor Relations

The National Labor Relations Board (NLRB) incorrectly found an employee invoked *Weingarten* rights and misapplied the *Wright Line* burden-shifting framework in finding an employee was unlawfully terminated, the federal appeals court in D.C. has held. [*Circus Circus Casinos, Inc. v. NLRB*](#), No. 18-1201 (D.C. Cir. June 12, 2020). The Court also took the unusual step of overruling some witness credibility findings made by the Administrative Law Judge (ALJ) after an unfair labor practice trial.

Named after *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), “*Weingarten* rights” refers to an employee’s right to request union representation during an investigatory interview that the employee reasonably believes could lead to the employee’s discipline.

Background

The employee was a journeyman carpenter working in the employer’s engineering department, assigned to upgrade doorjamb in hotel guest rooms.

The employer required employees to submit to a medical exam the Occupational Safety and Health Administration (OSHA) mandates, related to the need to wear a respirator to minimize exposure to airborne hazards. The employee refused to complete the intake paperwork at the onsite medical clinic, demanded to speak to the doctor first, and left when clinic staff told him he needed to do the paperwork before he could see the doctor.

The employer suspended the employee pending an investigation into why he refused to complete the OSHA medical exam.

Human Resources scheduled an investigatory interview with the employee and gave him the union’s telephone number for the union in case he wanted to ask a representative to attend. On the day of the interview, the employee claimed and announced, “I called the Union three times [and] nobody showed up. I’m here without representation.” The employer completed the interview without a union representative in attendance. At a second meeting, with a union steward present, the employer terminated the employee for insubordination related to the refusal to complete the paperwork and for refusing to complete the mandatory OSHA exam.

In addition, the employee alleged that, during one of the engineering department’s mandatory weekly safety meetings held several weeks before the medical exam issues, he and another engineer raised concerns about testing positive for illegal drugs based on secondhand exposure to marijuana smoke in guest rooms. Management told the employees that that level of exposure would not lead to a positive drug test result. The employees were not satisfied with this response and pressed the manager. The employee claimed the manager became angry and told the employee, “you know what, maybe we just won’t need you anymore,” and walked out of the meeting.

The employee filed unfair labor practice charges and ultimately an unfair labor practice

complaint was issued. The complaint alleged three violations of the National Labor Relations Act (NLRA): (1) the manager's statement at the safety meeting interfered with employees' Section 7 rights to raise concerns regarding terms and conditions of employment; (2) the investigatory meeting without union representation violated the employee's *Weingarten* rights; and (3) the termination was in retaliation for protected activity (claiming the employee was fired because of his comments at the safety meeting, not because of the medical exam).

After a trial, an ALJ held the employer violated the NLRA as alleged. On appeal, the NLRB adopted the ALJ's decision. The employer petitioned the federal appeals court for review.

Court Vacated NLRB Order

The appellate court granted the employer's petition and vacated the NLRB's order.

On the *Weingarten* issue, the Court held, "[T]he Board acted in an arbitrary and capricious manner by significantly altering the test for valid *Weingarten* requests to cover the facts of this case."

The Court found the employee's statement ("I called the Union three times [and] nobody showed up. I'm here without representation.") was not a valid, affirmative request for union representation. Instead, it was simply a statement of facts. (The NLRB had found a *Weingarten* request was "subsumed" in this statement.) However, the Court found "an affirmative request is an indispensable element of a *Weingarten* violation" because, if representation is supplied where not requested, this would "expand[] the reach of *Weingarten* without accounting for employee choice, a central policy of the NLRA." Thus, the Board vacated the finding of a *Weingarten* violation.

The Court also found the NLRB did not correctly apply the *Wright Line* framework [251 NLRB 1083 (1980)], because it did not consider the employer's rebuttal case. The NLRB had reasoned, in part, that if the employer's "true concern" was the employee needed to complete the OSHA exam, "he would have been allowed to speak to the doctor prior to testing, or, at a minimum, sent back for testing." The Court found the NLRB's speculation was irrelevant to the question whether the employer terminated the employee for protected conduct. It stated the NLRB did not answer the relevant question: Whether the employer reasonably believed the employee committed the misconduct. Here, the employer "had no reason to doubt the reports of medical personnel [about the employee's conduct at the clinic] and was therefore entitled to rely on them."

The Court recognized an employer:

is entitled to a policy of strict enforcement of its rules related to insubordination and compliance with testing policies. The Board cannot second guess an employer's legitimate and consistently enforced policies for safety and discipline in the workplace. To do so exceeds the Board's expertise and authority under the Act.

The Court also found *Wright Line* had been misapplied because the NLRB did not assess whether the employer's decision to terminate the employee was consistent with the employer's policy and practice. ("Insubordination" and "refusal to submit to a physical examination" were terminable offenses under the employer's policies.) The Court remanded this allegation to the NLRB to determine "whether the record supports an unlawful termination finding under the correct standard."

Witness Credibility

Finally, the Court vacated the allegation the manager threatened the employee at the safety meeting. In doing so, the Court found this was “the rare case” where it was appropriate to set aside the ALJ’s credibility determinations. The Court held the ALJ’s finding that the manager made the threatening statement to the employee was “patently insupportable.” The employee’s testimony regarding the meeting was “materially contradicted [at trial] by six witnesses, union members and non-members alike, who remember only an ordinary discussion that concluded without any threats.” Noting “[l]egitimate adjudication requires evenhanded assessment of testimony offered on behalf of the employer and the employee,” the Court overruled the witness’s testimony and vacated the related unfair-labor-practice finding.

Please contact a Jackson Lewis attorney with any questions about this case or the NLRB.

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