

FROM: E. Ryan Hall, Director Labor and Employee Relations

As you all are well aware, interrogations of employees for suspected infractions is an all too common occurrence on this campus. Accordingly, it is useful for us all to be aware of affected employee rights with respect to disciplinary issues and interrogations. The rights of employees covered by Collective Bargaining Agreements have been well established in the Supreme Court opinion of NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). This decision was rendered 40 years ago, but the ruling of the Court is relevant today.

In the above referenced opinion, an individual was employed by a retail chain, and the employees were represented by a Union, and were working under a CBA. The employee in question worked in the kitchen and dining area, and the employer suspected theft of chicken by this employee. The Employee was brought in for questioning about this theft and, when she asked for a union representative or shop steward, she was denied. It was determined through the course of the interrogation that while the affected employee did not purloin chicken, she did admit to taking a free lunch which was against employer policy. The employee made the union aware of her interrogation and litigation commenced.

After several lower court rulings, the case made its way to the Supreme Court, and the Court ruled that the employer had violated the law. Within the opinion, however, the Court provided a test for employers to follow with respect to when a request for union representation is mandatory.

The Court ruled that "The denial of this right, (union representation), has a reasonable tendency to interfere with, restrain and coerce employees in violation of Section 8(a)(1) of the Act. Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeing the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy." Id at 258. The Act referenced is the National Labor Relations Act. In essence, to deny someone union representation is an egregious act, which could be detrimental to an investigation, and compromise discipline or outright termination of an employee.

Accordingly, the Court's test to determine the right to representation is as follows:

1. The Employee has an absolute right to union representation if that employee reasonably fears discipline as a result of the interrogation. PLEASE NOTE: This is not an objective, ordinary reasonable standard, but a subjective reasonable standard. Therefore, if the EMPLOYEE thinks discipline may result, the right is triggered.
2. The right only arises in situations where the employee requests representation. The request may be waived. However, having a union representative present may assist in keeping tempers at bay, and further assist the investigation.

3. The right to representation during the investigatory interview is limited to when the employee thinks discipline is coming. This right can be invoked at any time. Also, note that this particular rule “does not apply to generic discussions on training, needed corrections or work techniques.” *Id.* at 258.
4. If an investigation is ongoing, the employer can still continue to investigate but, if an employee does not acquiesce to an interview without a union representative, there CAN BE NO interview.
5. Finally, management, during the interview of the employee, does not need to bargain with a union representative. The union representative is there to assist the employee, clarify the facts and offer guidance. A good union representative can be useful, in that they may be able to obtain pertinent facts and save time by getting right to the point with the affected employee. The representative, however, IS NOT TO SPEAK ON BEHALF of the employee.

This outline should help the employer when interrogating an employee, as well as apprise an employee of his or her rights during an investigatory interview. It is recommended to management that they inform an employee that the employee has a right to a union representative. Also, if an employee requests a representative, the employer is not required to give them a particular representative, but a shop steward or business agent available at the time. In addition, when scheduling an interview with an employee, the employee cannot continue to delay waiting on a specific representative. The employer has the right to conduct investigatory interviews within a reasonable time.

Moving forward, it is hoped this refresher will apprise all parties of their rights and obligations with respect to investigatory interviews, and assist in fostering solid labor relations campus wide.