The Burger Court Opinion Writing Database

NLRB v. J. Weingarten, Inc.

420 U.S. 251 (1975)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: The Chief Justice

Circulated: JAN 29 '75

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

Nos. 73-1363 AND 73-765

National Labor Relations Board, Petitioner, 73-1363 *v.* J. Weingarten, Inc.	On Writ of Certiorari to the United States Court of Court of Appeals for the Fifth Circuit.
International Ladies' Garment Workers' Union, Upper South Department, AFL-CIO, Petitioner, 73-765 *v.* Quality Manufacturing Company et al.	On Writ of Certiorari to the United States Court of Court of Appeals for the Fourth Circuit.

[February —, 1975]

MR. CHIEF JUSTICE BURGER, dissenting.

Today the Court states that, in positing a new § 7 right for employees, the "Board has adequately explicated the basis of its interpretation." *Ante*, at 16. I agree that the Board has the power to change its position, but since today's cases represent a major change in policy and a departure from Board decisions spanning almost 30 years the change ought to be justified by a reasoned Board opinion. The brief but spectacular evolution of the right, once recognized, illustrates the problem. In *Quality Mfg. Co.*, 195 N. L. R. B. 197, 198 (1972), the Board distinguished its prior cases on the ground, *inter alia*, that "none of those cases presented a situation where an employee or his representative had been disciplined or discharged for requesting, or insisting on, union representation in the course of an interview." Yet, soon afterwards the Board extended the right without explanation

Footnote 3 deleted

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marsh...
Mr. Justice Black...
Mr. Justice Powel...
Mr. Justice Rehnq...

From: The Chief Justice

Circulated: _____

Recirculated: FEB 12

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 3, 1975

Dear Bill:

Please join me in

73-1363, NATIONAL LABOR RELATIONS BOARD v. WEINGARTEN, INC.

WILLIAM O. DOUGLAS

Mr. Justice Brennan

cc: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Circulated: 1/6/75

Recirculated: _____

No. 73-1363

National Labor Relations Board, Petitioner, v. J. Weingarten, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1975]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The National Labor Relations Board held in this case that respondent employer's denial of an employee's request that her union representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action constituted an unfair labor practice in violation of § 8 (a)(1) of the National Labor Relations Act,[1] because it interfered with, restrained and coerced the individual right of the employee, protected by § 7 of the Act, "to engage in . . . concerted activities for . . . mutual aid or protection . . . ."[2]

[1] Section 8(a)(1) provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U. S. C. § 158 (a)(1).

[2] Section 7, 29 U. S. C. § 157, provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a)(3) of this title."

pp 3, 7, 15

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1363

National Labor Relations Board, Petitioner, *v.* J. Weingarten, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January —, 1975]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 17, 1975

Re: No. 73-1363, NLRB v. Weingarten

Dear Lewis,

Please add my name to your dissenting opinion in this case.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 8, 1975

Re: No. 73-1363 - NLRB v. J. Weingarten, Inc.

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Brennan

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 6, 1975

Re: No. 73-1363 -- National Labor Relations Board v. J. Weingarten, Inc.

Dear Bill:

Please join me.

Sincerely,

T. M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 20, 1975

Re: No. 73-1363 - NLRB v. J. Weingarten, Inc.

Dear Bill:

Please join me.

Sincerely,

Harry

Mr. Justice Brennan

cc: The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Powell, J.

No. 73-1363

Circulated: JAN 17 1975

Recirculated: _____

National Labor Relations Board, Petitioner, v. J. Weingarten, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

[January —, 1975]

MR. JUSTICE POWELL, dissenting.

Section 7 of the Act guarantees to employees the right to "engage in . . . concerted activities for the purpose of collective bargaining or for other mutual aid or protection." The Court today construes that right to include union representation or the presence of another employee[1] at any interview the employee reasonably fears might result in disciplinary action. In my view, such an interview is not *concerted activity* within the intendment of the Act. An employee's right to have a union representative or another employee present at an investigative interview is a matter that Congress left to the free and flexible exchange of the bargaining process.

The majority opinion acknowledges that the NLRB has only recently discovered the right to union representation in employer interviews. In fact, as late as 1964—after almost 30 years of experience with § 7—the Board flatly rejected an employee's claim that she was entitled to union representation in a "discharge conversation" with the general manager, who later admitted that he

[1] While the Court speaks only of the right to insist on the presence of a union representative, it must be assumed that the § 7 right today recognized, affording employees the right to act "in concert" in employer interviews, also exists in the absence of a recognized union. Cf. *NLRB* v. *Washington Aluminum Co.*, 370 U. S. 9 (1962).

pp 1, 2, 4, 5, 6

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

2nd DRAFT

From: Powell, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 73-1363

Recirculated: JAN 21 1975

National Labor Relations Board, Petitioner, *v.* J. Weingarten, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

[January —, 1975]

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, dissenting.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 15, 1975

Re: No. 73-1363 - NLRB v. Weingarten, Inc.

Dear Bill:

I voted with you at Conference on this case and have not changed my mind. I am of the opinion, as you so persuasively demonstrate in your opinion, that the Board's construction is certainly a permissible one under the Act. I also feel that it is by no means a necessary construction, and my reading of your opinion leads me to think that you do not disagree with that view. Would you have any objection, on page 15, to adding the language underlined below to the sentence beginning on the eighth line from the bottom of the page:

> "But the Board's construction here, while it may not be required by the Act, is at least permissible under it, and insofar as the Board's application of that meaning engages in the 'difficult and delicate responsibility' of reconciling conflicting interests of labor and management, the balance struck by the Board is 'subject to limited judicial review.'"

Sincerely,

Mr. Justice Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 16, 1975

Re: No. 73-1363 - NLRB v. Weingarten

Dear Bill:

Please join me.

Sincerely,

WHR

Mr. Justice Brennan

Copies to the Conference