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Manhattan Beer Distributors, LLC and Joe Garcia Diaz. Case 29–CA–115694

August 27, 2015

DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON,
AND MCFERRAN

On May 15, 2014, Administrative Law Judge Steven Davis issued the attached decision. The General Counsel filed exceptions and a supporting brief; the Respondent filed an answering brief; and the General Counsel filed a reply brief. The Respondent filed cross-exceptions and a supporting brief; the General Counsel filed an answering brief; and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified and set forth in full below.²

We agree with the judge, for the reasons he stated and for the additional reasons set forth below, that the Respondent violated Section 8(a)(1) of the Act by denying Joe Garcia Diaz his right to union representation at an investigatory interview that he reasonably believed would result in discipline by directing him to immediately submit to a drug test, notwithstanding his request to have a union representative present. We reverse, however, the judge's dismissal of the allegation that the Respondent violated the Act by discharging Diaz for refusing to take the drug test in the absence of a union representative.

¹ The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent and the General Counsel make various cross-arguments asserting that each other's exceptions or brief do not comply with the Board's Rules and Regulations. We find no merit to these claims. We have reviewed the General Counsel's exceptions and the Respondent's answering brief, and we find that they substantially comply with the Board's Rules and Regulations.

² We shall amend the judge's conclusions of law and remedy and substitute a new Order and notice to conform to our findings, and to the Board's decisions in *J. Picini Flooring*, 356 NLRB No. 9 (2010).

I. RELEVANT FACTS

While working on June 7, 2013,³ Diaz was injured and filed an incident report. The next day, he reported to work and discovered that he was not scheduled to work on any routes but, instead, was listed on the schedule with the notation "Workers' Compensation." Diaz opened the sliding window on the front wall of the delivery office to speak to Delivery Manager Roy Small about the schedule, asking Small why he did not have an assignment. At that time, Small noticed that Diaz "reeked of the smell of marijuana" and that his eyes were glassy and bloodshot. Facility Manager Tony Wetherell, who was standing nearby, asked Diaz to come inside the office. Wetherell asked Diaz how he was feeling. He then commented that Diaz smelled "funny" and asked if he "was doing anything stupid." Small subsequently informed Diaz that he had a route for him, but that Diaz would have to take a drug test first.

Diaz told Small that he did not have a problem taking a drug test, but that he wanted his shop steward present. Diaz then left the office area and called assistant shop steward Joe Henry, but he could not reach him. Diaz then called his shop steward, Joseph Gonzalez, who told Diaz that it was his day off and that he could not accompany him to the drug test. While Diaz was on the phone with Gonzalez, Wetherell drove up and, without regard to Diaz' requests for a union representative, instructed him to get into the car so that Wetherell could take him for his drug test. Diaz replied that he would not take the test without a shop steward. Wetherell advised him that he could drive himself to the test and that they would finish talking there, but Diaz refused, saying "not without a shop steward." When Diaz returned to Small's office, Small again asked Diaz to take a drug test, reminding him that his failure to do so would be treated the same as a positive result, potentially resulting in his termination. Diaz told Small and Wetherell that, although he had no problem taking the test, he felt his rights were being violated because his shop steward was not there, observing that "[s]ince he's not able to be present, I'm not taking the test."

Later on June 8, the Respondent discharged Diaz. On June 12, the Respondent's Director of Operations, Ron Reif, sent an email to certain union officials stating that Diaz was discharged for "his refusal to submit to substance abuse testing based on reasonable suspicion."⁴

³ All dates are in 2013, unless otherwise noted.

⁴ The Respondent prepared a series of disciplinary documents in connection with Diaz' discharge. One of the disciplinary documents, titled "Progressive Disciplinary Report," states that Diaz was discharged because he "refused to go for a drug screening under the reasonable suspicion of substance abuse." In addition, a memo titled

II. DIAZ' RIGHT TO UNION REPRESENTATION

Where an employer insists that an employee submit to a drug and/or alcohol test as part of an investigation into an employee's alleged misconduct, the employee has a right to union representation before consenting to take the test. *Safeway Stores*, 303 NLRB 989 (1991); *System 99*, 289 NLRB 723, 727 (1988). The Board recently reaffirmed this right. See *Ralphs Grocery Co.*, 361 NLRB No. 9 (2014) (employer violated Section 8(a)(1) by requiring an employee to submit to a drug and alcohol test, notwithstanding the employee's request for *Weingarten*⁵ representation). Furthermore, the Board's decision in *Ralphs Grocery*, which issued after the judge issued his decision in this case, and earlier precedent, make clear that an employee has the right to the assistance of an authorized union representative even if that might cause some delay in the administration of the drug or alcohol test. *Id.*, slip op. at 1, 7. Indeed, the Board has held that if a union representative is unavailable, the employer must give the employee time to obtain representation or, if it does not wish to accord the employee this right, proceed on the basis of information it could obtain through other means.⁶ In *Super Valu Stores*, 236 NLRB 1581, 1591 (1978), enf. denied on other grounds 627 F.2d 13 (6th Cir. 1980), the judge, with Board approval, described an employer's options in a *Weingarten* situation when a union representative is not available by stating:

In this circumstance, the employer had the choice of giving the employee time or a postponement to obtain the representation, or as the Supreme Court pointed out in *Weingarten* . . . of advis[ing] the employee that it will not proceed with the interview unless the employee is willing to enter the interview unaccompanied by his representative (internal quotation marks omitted).

See also *Safeway Stores*, 303 NLRB at 996 & 996 fn. 13 (finding that employer violated employee's *Weingarten* rights by proceeding immediately with interview in the absence of a representative where a representatives might have been made available without undue delay), citing *Super Valu Stores*, 236 NLRB at 1581.

In sum, where an employee requests union representation before participating in a disciplinary investigation, the employer has three clearly established options: (1) grant the employee's request; (2) give the employee the option of proceeding without representation; or (3) dis-

continue the interview and make a disciplinary decision based on the information it has available. The Respondent did not abide by any of these options. Instead, after Diaz invoked his *Weingarten* rights and learned that Gonzalez was not available to assist him, the Respondent presented Diaz with an ultimatum: take the test immediately without representation or be treated as if he had tested positive and face termination. Thus, despite Diaz' insistence on the presence of a *Weingarten* representative, the Respondent insisted on continuing the interview—an option not permitted under Board or court precedent. See *Ralphs Grocery*, above.

Our dissenting colleague would nevertheless find that Diaz' phone conversation with Gonzalez satisfied his right to union representation under *Weingarten*. It is clear, however, that *Weingarten* contemplates the physical presence of a union representative in order to actively assist the employee. As the judge found, the Supreme Court in *Weingarten* noted the importance of the physical presence of the union agent who “is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them.” *Weingarten*, 420 U.S. at 260. Moreover, in *Washoe Medical Center*, 348 NLRB 361, 361 (2006), citing *Barnard College*, 340 NLRB 934 (2003), the Board stated that “[i]f the employer grants the request [for representation], the union representative is entitled not only to attend the investigatory interview, but to provide ‘advice and active assistance’ to the employee.” See also *Buonadonna ShopRite*, 356 NLRB No. 115, slip op. at 1 (2011) (a unionized employee has the right to request the active assistance of a union representative at an investigatory interview).

Here, the physical presence of a union representative was reasonably necessary to provide “active assistance” to Diaz. As found by the judge, Facility Manager Wetherell's and Delivery Manager Small's concern that Diaz was under the influence of marijuana was based entirely on their sensory perceptions of Diaz' appearance and odor. At the very least, the physical presence of a union representative was necessary in order to permit the representative to independently observe Diaz' condition and potentially contest the grounds for Wetherell's and Small's suspicions. Moreover, we find it significant that, when Facility Manager Wetherell instructed Diaz to go for a drug test (either by driving with Wetherell or by driving himself), Wetherell told Diaz that they would “finish talking there.” Wetherell thus clearly indicated that the interview—even apart from the drug test itself—would continue, rendering Diaz' brief phone conversation with Gonzales even less satisfactory in the circumstances. Finally, unlike our dissenting colleague, we find

“Termination-of-Employment” indicates that Diaz “refused to go for drug testing under the reasonable suspicion of substance abuse” and “therefore he has been terminated.”

⁵ *NLRB v. Weingarten*, 420 U.S. 251 (1975).

⁶ See *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982).

that the presence of a union representative could have provided Diaz valuable assistance even with respect to the testing procedure itself. For example, the representative could have advised Diaz regarding the standard testing protocol and ensured that those protocols were followed. For those reasons, we disagree with our colleague that the phone conversation with Gonzalez satisfied Diaz' right to union representation.⁷

In making that finding, we have given due consideration to employers' legitimate need to conduct drug and alcohol testing in a timely manner. As indicated in *Ralphs Grocery*, we acknowledge that an employer cannot delay testing indefinitely while an employee seeks out an available union representative. But, as described, our precedent in this area of the law, as in others, requires that we seek a reasonable accommodation of employers' legitimate management interests and employees' legitimate Section 7 interests, rather than serve one at the complete expense of the other.⁸ So, here, our position is *not* that the Respondent was required to postpone indefinitely a drug test of Diaz, but rather that the Respondent was required to afford Diaz a reasonable period of time to obtain union representation, which it did not. Notably, in addition to calling Gonzalez, Diaz attempted to contact Assistant Shop Steward Henry, who was at work that day, but the Respondent did not allow Diaz sufficient time to determine whether Henry might become available. Also relevant here, as noted by the judge, is the Respondent's own witness's acknowledgment that marijuana stays in an employee's system for 3 months, lessening the urgency of an immediate drug test in this particular case. Indeed, the Respondent itself never communicated to Diaz that taking a drug test was time-sensitive, nor does it argue that point in its exceptions.⁹ And, last,

⁷ We also observe that Diaz' statement to Wetherell and Small—"[s]ince [Gonzales is] not able to be present, I'm not taking the test"—did not constitute a waiver of his *Weingarten* rights. See *Westside Community Mental Health Center*, 327 NLRB 661, 665–666 (1999) (that employees continued to answer the employer's questions after the employer refused to grant employees' requests for a union and/or legal representative did not constitute waivers of their *Weingarten* rights).

⁸ As in many areas of labor policy, "[t]he ultimate problem is the balancing of the conflicting legitimate interests." *NLRB v. Truck Drivers*, 353 U.S. 87, 96 (1957).

⁹ The Respondent expressly acknowledges that it did not instruct Diaz to submit to an alcohol test because it did not have a reasonable suspicion that Diaz was under the influence of alcohol. Accordingly, the dissent's emphasis on the time-sensitive nature of alcohol testing, reflected in our decision in *System 99*, 289 NLRB 723 (1988), has no bearing on this case.

Moreover, the Respondent's own witness's testimony and its failure to communicate to Diaz that time was of the essence indicate that the Respondent itself did not consider the matter particularly time-sensitive, which, in turn, is relevant to whether the Respondent gave

there is no evidence that the Union was attempting to frustrate the Respondent's investigation of Diaz or otherwise cause delay. In fact, the relevant events, from the time Diaz walked into the facility until the time he was sent home, occurred over a less than 2-hour period.¹⁰

For these reasons, and for those given by the judge, we find that the Respondent violated Section 8(a)(1) by denying Diaz the right to have union representation present at an investigatory interview that he reasonably believed could result in discipline.

III. DIAZ' DISCHARGE

The judge found, and our dissenting colleague would agree, that the Respondent did not violate the Act by terminating Diaz. Applying *Wright Line*,¹¹ the judge found that the General Counsel failed to show that the Respondent bore animus against Diaz' protected concerted activity of requesting union representation during the Respondent's investigation into his suspected drug use. Instead, the judge found the Respondent's decision to discharge Diaz was based on his failure to take the drug test as well as his physical conditions that led to the conclusion that Diaz had reported to work under the influence. Citing *Taracorp Inc.*, 273 NLRB 221 (1984), and *System 99*, 289 NLRB at 723, the judge concluded that the General Counsel failed to show a nexus between the denial of Diaz' *Weingarten* right and his discharge.

Contrary to the judge and our colleague, we find that the Respondent violated Section 8(a)(1) of the Act by discharging Diaz for his refusal to take a drug test without having a union representative present.¹² The Board's recent decision in *Ralphs Grocery*, above, 361 NLRB No. 9 (2014), is directly on point. In that case, the Board adopted the judge's finding that the employer violated Section 8(a)(1) by suspending and discharging an employee for his refusal to submit to a drug and alcohol test without the presence of his union representative. *Id.*, slip

Diaz a reasonable opportunity to obtain union representation under the circumstances.

¹⁰ Although we shall continue to take careful account of the particular circumstances of each case, we observe that, to the extent employers (and unions) remain concerned about ensuring timely testing of employees suspected of working under the influence of drugs or alcohol, they remain free to negotiate appropriate procedures through collective bargaining. The parties might agree, for example, that at least one union representative will be readily available or on call during all working hours to attend investigative interviews that might include such testing.

¹¹ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

¹² Although the complaint alleges that Diaz' discharge violated Sec. 8(a)(3) as well as Sec. 8(a)(1), we find it unnecessary to address this allegation because it would not materially affect the remedy. See, e.g., *Ralphs Grocery*, 361 NLRB No. 9, slip op. at 8–9 (finding it unnecessary to address whether employee's discharge also violated 8(a)(3)).

op. at 1, 5. The employer's termination report stated that the employee "was terminated for insubordination and refusal to take a drug test." *Id.*, slip op. at 6. The report also stated that the employee's refusal to take the drug test constituted an "automatic 'positive' test result." *Id.* The Board found that the judge's make-whole remedy was appropriate because the reason for the employee's suspension and discharge was inextricably linked to his assertion of *Weingarten* rights. The Board observed that "[b]y relying on [the employee's] refusal to take the test as a basis for discipline, the [employer] penalized [the employee] for refusing to waive his right to representation, irrespective of whether it considered his refusal to be insubordination or an automatic positive test result." *Id.*, slip op. at 1.

The facts of *Ralphs Grocery* are strikingly similar to those presented here. As the judge found, the Respondent discharged Diaz based on his refusal to submit to a drug test. Small told Diaz that if Diaz refused to take the drug test, then the Respondent would consider it a positive test result, which could lead to Diaz' suspension and/or termination. After Diaz insisted upon exercising his *Weingarten* rights, this is exactly what occurred—the Respondent treated Diaz' refusal to take the drug test without the benefit of union representation as an automatic positive test result and terminated him.¹³ Because Diaz refused to take the test without having his union representative present, the reason for Diaz' discharge was inextricably linked to his assertion of *Weingarten* rights. As in *Ralphs Grocery*, there is "simply no way to divorce [Diaz's] refusal from his assertion of his *Weingarten* rights." 361 NLRB No. 9, slip op. at 1.¹⁴ Accordingly, Diaz' discharge was a direct result of his invocation of his *Weingarten* rights, and reinstatement and backpay are warranted.¹⁵

¹³ As in *Ralphs Grocery*, the Respondent did not terminate Diaz based on the information that it already had prior to Diaz' invocation of his *Weingarten* rights.

¹⁴ The Respondent argues that *Ralphs Grocery* is distinguishable from this case because there, unlike here, the termination report did not mention the employee's observed behavior or conduct before or during the meeting, and it made no finding, apart from the employee's refusal to take the sobriety test, that he was under the influence of intoxicants. We find that the facts of this case do not differ materially from those in *Ralphs Grocery*.

¹⁵ The Respondent and our dissenting colleague assert that Diaz' discharge was lawful, reasoning that the decision to terminate was based upon reasonable suspicion of drug use formed by Small and Wetherell. The Respondent in particular argues that the disciplinary documents prepared in connection with Diaz' termination indicate that it possessed a reasonable suspicion that Diaz was under the influence of drugs. We find no merit in this argument because the evidence supports the judge's finding that the Respondent terminated Diaz because he refused to submit to the drug test without union representation. Although it is true that the Respondent had a reasonable suspicion that Diaz came to

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 4 in the judge's decision.

"4. By discharging Diaz on June 8 because of his refusal to submit to a drug test without having a union representative physically present at the investigatory interview, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act."

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent violated Section 8(a)(1) by discharging Joe Garcia Diaz for his refusal to take a drug test without union representation, we shall order it to offer him full reinstatement to his former job or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at

work under the influence of drugs, and that several of the discharge documents describe the circumstances under which the supervisors developed those suspicions, not one of them states that a reasonable suspicion concerning Diaz' alleged drug use itself was the reason for his termination. As the judge found, "[a]ll the documents prepared by the Respondent at the time of [Diaz's] discharge recite that he was fired for refusing to take the [drug] test." Further, Director Reif, who made the final decision to discharge Diaz, testified that the reason he decided to discharge Diaz was "because of his refusal to submit to a reasonable suspicion drug test." For the same reasons, there is no merit to our dissenting colleague's argument that the Respondent discharged Diaz because he failed to overcome a presumed positive test result, an argument that is foreclosed by *Ralphs Grocery* in any event. See *Ralphs Grocery*, 361 NLRB No. 9, slip op. at 1 (observing that there is no way in these circumstances to divorce the employee's refusal to take a drug test from the assertion of his *Weingarten* rights).

Moreover, even if Small's and Wetherell's observations of Diaz' odor and appearance on June 8 formed part of the basis of the Respondent's decision to discharge Diaz, the Respondent has not shown that it would have terminated Diaz on that basis alone, even absent his refusal to submit to the drug test without union representation. See *Ralphs Grocery*, 361 NLRB No. 9, slip op. at 2 (the employer failed to show that it would have discharged the employee in the absence of its impermissible reliance on his purported insubordination, i.e., his refusal to take the drug and alcohol test).

Contrary to the judge and the Respondent, *Taracorp*, does not support finding that the termination of Diaz was lawful. In that case, the employer terminated the employee for a reason unrelated to his request for union representation: the employee's refusal to perform a job assignment. 273 NLRB at 223–224.

the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).¹⁶ We shall also order the Respondent to remove from its files any reference to Diaz' unlawful discharge and to notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Manhattan Beer Distributors LLC, Wyandanch, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Requiring employees to submit to a drug test as part of an investigation into their behavior or conduct notwithstanding their request to have a union representative at the investigatory interview.
 - (b) Discharging employees because of their refusal to submit to such a drug test without having a union representative at the investigatory interview.
 - (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Within 14 days from the date of this Order, offer Joe Garcia Diaz full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
 - (b) Make Diaz whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.
 - (c) Compensate Diaz for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to Diaz' unlawful discharge, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for

¹⁶ Consistent with our decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), we shall require the Respondent to reimburse discriminatee Joe Garcia Diaz for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file a report with the Social Security Administration allocating the backpay to the appropriate calendar quarters.

good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Wyandanch, New York facility, copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 8, 2013.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 29, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 27, 2015

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

¹⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER JOHNSON, dissenting.

My colleagues today have painted companies seeking to maintain safe, drug-free workplaces into a corner by unnecessarily foreclosing their ability to take reasonable steps to confirm whether an employee has reported to work under the influence of drugs or alcohol. Because, in my view, the record establishes that the Respondent acted reasonably here, I would dismiss the allegation that the Respondent violated Joe Garcia Diaz' *Weingarten*¹ rights by directing him to submit to a drug test based on a reasonable suspicion of his drug use. Further, because the Respondent reasonably discharged Diaz based on his refusal of the request to take a drug test—a request based on objective evidence suggesting that Diaz was under the influence of drugs or alcohol—I would adopt the judge's dismissal of the allegation that the Respondent unlawfully discharged Diaz.

It has been settled Board law that an employee has the right to consult with a union representative before responding to the employer's request that the employee submit to a drug and/or alcohol test. *Safeway Stores*, 303 NLRB 989 (1991); *System 99*, 289 NLRB 723, 725 (1988). I do not quarrel with my colleagues there. Applying this precedent, in *Ralphs Grocery Company*, 361 NLRB No. 9 (2014), I agreed with the majority that the employer unlawfully interfered with the employee's *Weingarten* rights when it insisted that the employee take a drug and alcohol test notwithstanding his request for representation. But this case is different. Unlike in *Ralphs Grocery*, the Respondent here not only afforded Diaz the opportunity to consult with his union representative before deciding whether to take the drug test, but Diaz in fact did consult with, and obtain advice from, his union representative Gonzalez before deciding not to take the drug test.

The right to representation in a traditional investigatory interview contemplates a "knowledgeable" union representative who can provide "advice and active assistance" to the employee. *Washoe Medical Center*, 348 NLRB 361 (2006), quoting *Barnard College*, 340 NLRB 934 (2003). As a matter of logic, however, the role of a union representative is more limited in a drug- or alcohol-testing situation. The presence of another party in the midst of the physical administration of a drug- or alcohol-test, whether or not that person is a union representative, poses substantially increased risks of inaccuracy and adulteration.² Moreover, the benefit of any kind of legitimate "advice and active assistance" that would happen in that context is likely to be minimal. Thus, in

my view, the legitimate need for a test free of such inaccuracy and adulteration outweighs whatever minimal benefit might be provided. Here, once an employee has *the opportunity to confer with a union representative prior to deciding whether to submit to the drug or alcohol test*, the union representative no longer has a role to play under our statute that would overcome the legitimate business interest in an accurate and unadulterated drug test. There is simply no basis to extrapolate from *Weingarten* a rule that employees have the right to have a union representative present for the physical administration of drug or alcohol testing.³

Here, the Respondent permitted Diaz to contact his union representative, and Diaz was able to have a phone conversation with Gonzalez. Indeed, Gonzalez offered Diaz advice on whether he should take the drug test. After conferring with Gonzalez, his chosen representative, Diaz exercised his right to refuse to take the drug test. Unlike my colleagues, I do not believe that Gonzalez's physical presence would have affected Diaz' decision as to whether to submit to the drug test. In my view, in these circumstances, *Weingarten* requires nothing more. Accordingly, I find that Diaz' phone conversation with Gonzalez satisfied his right to union representation under *Weingarten*.⁴

My colleagues claim to recognize an employer's need to drug test employees without unreasonable delay. Yet, in the same breath, they find that the Respondent was required to wait some undetermined amount of time so that Diaz could find a representative to accompany him to the drug testing site. Moreover, the majority appears to agree with the judge's finding that there would have been no harm to the Respondent in postponing the investigatory interview until Diaz' representative could attend.

³ And, of course, the Board has never before held that an employee's *Weingarten* rights with regard to drug or alcohol testing extend to the right to have a union representative physically present for the testing itself.

⁴ I disagree with my colleagues that the fact that Facility Manager Wetherell purportedly told Diaz that they could finish talking at the drug testing site shows that the investigatory interview would continue. As the judge found, the Respondent directed Diaz to participate in an "investigatory interview" within the meaning of *Weingarten* when Wetherell and Small asked Diaz questions about his suspected drug use and ordered him to take a drug test. And, as the judge further noted, "[t]he purpose of the interview was to direct Diaz to take a drug test." Diaz had the right to consult with a union representative before responding to Wetherell and Small's request, a right that I have found was satisfied based on Diaz' phone conversation with Gonzalez. I do not agree with my colleagues that Wetherell's comment made Diaz' phone call with Gonzalez any less sufficient; Diaz had already received advice from Gonzalez on whether he should take the drug test when Wetherell allegedly made this remark to Diaz.

¹ *NLRB v. Weingarten*, 420 U.S. 251 (1975).

² See note 4, *infra*.

I find my colleagues' rationale deeply concerning. As I explained in *Ralphs Grocery*, I do not believe that an employer should have to delay a drug or alcohol test in the event that no union representative is available. Alcohol and drug abuse creates significant safety and health hazards in the workplace and also can result in decreased productivity and poor employee morale. Consequently, reasonable suspicion drug testing plays an important role in maintaining a safe workplace. "[D]rug testing in the workplace connects to occupational safety as a key component in protecting the safety, health, and welfare of employees, as well as the general public."⁵ Moreover, testing for drug and, especially alcohol use is time-sensitive; in order for the testing to provide accurate results, the testing must occur before the suspected drug or alcohol dissipates in the employee's system. Accordingly, employers have a legitimate and substantial interest in immediately testing employees suspected of using drugs or alcohol, particularly employees who hold safety-sensitive positions. My colleagues' decision here, as in *Ralphs Grocery*, permits an employee and union to delay a drug or alcohol test while waiting for a union representative to become available, despite the fact that any substantial delay has a real probability of altering the results of the test. Furthermore, one cannot ignore the reality that there are various methods and products available to individuals seeking to alter the results of a drug test. One need only "type the words 'beat a drug test' into any Internet search engine and it's quickly apparent that there's an entire industry built around cheating."⁶ Accordingly, the real potential for delay, inaccuracy, and adulteration resulting from my colleagues' decision here substantially interferes with employers' important interest in maintaining a safe, drug-free workplace. See *Coca-Cola Bottling Co. of Los Angeles*, 227 NLRB 1276 (1977) (emphasizing the admonition in *Weingarten* that the right to choose representation should not interfere

⁵ Reilly, Joe, "Drug Testing & Safety: What's the Connection?," OH&S Occupational Health & Safety, (September 1, 2014), available at <https://ohsonline.com/articles/2014/09/01/drug-testing-and-safety.aspx>.

⁶ "Cheating On A Drug Test," The National Center for Drug Free Sport, Inc., (Third Quarter, 2005), available at <http://www.drugfreesport.com/newsroom/insight.asp?VolID=31&TopicID=7>. See also Zwillich, Todd, "Experts Say Internet and Household Products Bring New Challenges to Drug Testing," WebMD Health News, (July 28, 2008), available at <http://www.webmd.com/mental-health/addiction/news/20080728/drug-test-cheats-try-new-tricks-on-labs>; Cooper, Barry, "Passing a drug test by Ex Narc," NeverGetBusted, (2015) available at <http://nevergetbusted.com/nevergetbusted-tips/passing-a-drug-test/>.

with "legitimate employer prerogatives" such as conducting investigatory interviews without delay).⁷

For these reasons, I would dismiss the complaint allegation asserting that the Respondent's actions here violated Diaz' *Weingarten* rights.

Next, contrary to my colleagues, I would adopt the judge's dismissal of the allegation that the Respondent's discharge of Diaz was based on his assertion of his *Weingarten* rights and, therefore, violated the Act. Like the judge, I would find that Diaz was discharged based on the Respondent's reasonable suspicion that he had reported to work under the influence of drugs as well as on Diaz' failure to overcome that reasonable suspicion by submitting to, and passing, a drug test.

I agree with the judge that there is no record evidence that the Respondent exhibited any hostility toward Diaz' request for union representation. Indeed, they gave him the opportunity to pursue that request through his conversation with Gonzalez. Rather, the evidence shows that Diaz' managers had a reasonable suspicion that he was under the influence of drugs based on his appearance and smell and that, absent a test to confirm or deny their suspicions, they acted in accordance with their observations with regard to his physical condition in deciding to discharge him.

Under the parties' collective-bargaining agreement, the Respondent has the right to terminate or otherwise discipline an employee if it reasonably believes that the employee has used drugs. However, it has been the Respondent's policy not to discipline employees without first affording them with the opportunity to overcome such reasonable suspicions by taking a drug test. Con-

⁷ My colleagues find that there was no need to immediately test Diaz for drugs based on Small's testimony that marijuana stays in an employee's system for 3 months. I am troubled that my colleagues believe that it is sufficient to rely on a layperson's non-scientific opinion. Even more shocking is the majority's rationale that the Respondent did not have an interest in Diaz immediately submitting to a drug test because it never informed him that taking the drug test was time-sensitive. It is reasonable that an employer would not tell an employee that drug or alcohol testing is time sensitive because it is common knowledge that these substances quickly dissipate in one's body.

I note that the judge's analysis in *System 99*, which the Board adopted without comment, supports my position that an employer must be able to immediately test employees suspected of using drugs or alcohol. There, the judge, in finding a *Weingarten* violation, found it doubtful that the employee "had a *Weingarten* right to delay the interview until [the chief steward] returned, . . . considering that [he] was not expected back for perhaps an hour . . . and the passage of that much time has made the results of any sobriety test to which [the employee] might ultimately agree to submit largely useless . . ." *System 99*, 289 NLRB at 727 (emphasis added). Although I recognize that testing for alcohol may be more time-sensitive than testing for drugs, I believe the judge's rationale in *System 99* is instructive because, in my view, an employer should not have to delay testing in either context.

sistent with its collective-bargaining agreement and drug-testing policy, the Respondent requested that Diaz submit to a reasonable suspicion drug test. Diaz, however, refused the opportunity to take the test, fully aware that a refusal would be treated the same as a positive result for which he could be terminated. The Respondent thereafter, consistent with its contract and drug-testing policy, treated Diaz' refusal of the drug test as a positive result and terminated him.

Here, I take issue with my colleagues' assessment of the evidence in arguing that Diaz was terminated for his refusal *qua* refusal. In any situation where a refusal is treated by the employer's preexisting policy or practice as either a failure to overcome reasonable suspicion, like here, or an automatic positive test result, like *Ralph's Grocery*, then terminating an employee "for the refusal" is really terminating the employee because of the preordained result under the policy, not because of the employee's protected assertion that he or she would refuse the test. In other words, under the *Weingarten* doctrine, the employee has chosen to "forgo the interview" and what should happen is that the employer is now free to make its decision without the benefit of information that could have been provided by the interview:

[The employee who asserts the right not to participate in the interview] would then also forego whatever benefit might come from the interview. And, in that event, the employer would, of course, be free to act on the basis of whatever information he had and without such additional facts as might have been gleaned through the interview.

NLRB v. Weingarten, 420 U.S. at 259 (quoting *Quality Mfg.*, 195 NLRB 197, 198–199 (1972)).

As the Supreme Court held in affirming the *Weingarten* right as a permissible construction of the Act, the employer should be "free to act" on the basis of the information it has. And, if the employer has a preexisting policy or practice that a termination will occur if potentially exculpatory information is *not* provided by the drug test, then the termination "for the refusal to take the drug test" is merely the employer acting as the Supreme Court said it should be "free to act" under *Weingarten*. Simply put, the employer is merely carrying out a policy or practice that it already stated would apply where exculpatory evidence is not provided.⁸

⁸ Indeed, the existence of a pre-existing policy in relation to drug tests furthers the mechanism set up by *Weingarten* because the employee is now fully informed concerning the ramifications of his or her decision not to take the test. By essentially transforming such policies into violations of law merely because their triggering event is an employee refusal to take the test, my colleagues undermine *Weingarten* in this additional way.

Additionally, just as in *Ralph's Grocery*, my colleagues' ruling suffers from the flaw that it puts an employer in an untenable situation. The employer can wait an undetermined amount of time until a representative becomes available while the drugs or alcohol dissipate in the employee's system, or the employer can discipline the employee based on the information it has from other sources. By choosing the latter option, however, the employer will likely open itself up to other legal challenges and questions concerning the basis for its termination decision. If an employer disciplines the employee based only on the observed appearance or conduct of the employee, the employer may well lose in a subsequent arbitration, where the employer will only be able to rely on the personal observations of a supervisor and not objective evidence. Further, under many drug policies, employers are unable to take disciplinary action without first confirming the employee had, in fact, violated the company's drug and alcohol policy. Also, employers may be sued under state law for terminating an employee based on their perception alone.⁹ Finally, I note that the majority has now created an incentive for union representatives to make themselves unavailable in the circumstances presented here because an employer will not be able to lawfully terminate an employee without the drug or alcohol test, but cannot administer the test until the representative is present.

In sum, I find that the Respondent's discharge of Diaz, for cause, did not violate the Act. See *System 99*, 289 NLRB at 723 fn. 3 (1988). I would adopt the judge's dismissal of this complaint allegation and, accordingly, would dismiss the complaint in its entirety. Accordingly, I further find that a make-whole remedy is not appropriate. *Taracorp Inc.*, 273 NLRB 221, 223 fn. 12 (1984) ("A make-whole remedy can be appropriate in a *Weingarten* setting if, but only if, an employee is discharged or disciplined for asserting the right to representation."), citing *Garment Workers ILGWU v. Quality Mfg. Co.*, 420 U.S. 276 (1975).

⁹ See *Reeves v. Singleton*, 994 S.W.2d 586, 590 (Mo.App. W.D. 1999) (reversing employee's dismissal for refusal to take a drug test where the employer failed to establish reasonable suspicion); *Kraslawsky v. Upper Deck Co.*, 56 Cal.App.4th 179 (Cal.App. 4 Dist., 1997) (employee who was terminated because she refused to take a urinalysis drug/alcohol test under employer's reasonable cause drug-testing program prevailed on summary judgment where evidence raised factual question as to whether employer had reasonable cause to believe employee was under the influence of intoxicants).

Dated, Washington, D.C. August 27, 2015

Harry I. Johnson, III, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT require you to submit to a drug test as part of an investigation into your behavior or conduct notwithstanding your request to have a union representative at the investigatory interview.

WE WILL NOT discharge or otherwise discriminate against you because of your refusal to submit to such a drug test without having a union representative at the investigatory interview.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Joe Garcia Diaz full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Diaz whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL compensate Diaz for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Diaz, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

MANHATTAN BEER LLC

The Board's decision can be found at www.nlrb.gov/case/29-CA-115694 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, D.C. 20570, or by calling (202) 273-1940.



Matthew A. Jackson, Esq., for the General Counsel.

Allen B. Roberts and Dustin E. Stark, Esqs. (Epstein, Becker & Green, P.C.), of New York, New York, and *Philip S. Rantzer, Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge filed by Joe Garcia Diaz (Diaz) on October 23, 2013, a complaint was issued on December 19, 2013, against Manhattan Beer Distributors LLC (Respondent or Employer).

The complaint alleges essentially that (a) the Respondent denied Diaz' request to be represented by the Union during an investigatory interview (b) Diaz had reasonable cause to believe that the interview would result in disciplinary action being taken against him (c) Diaz refused to attend the interview without his union representative present and (d) the Respondent discharged Diaz because he refused to attend the investigatory interview without union representation.

The Respondent's answer denied the material allegations of the complaint and on February 19, 2014, a hearing was held before me in Brooklyn, New York. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent, a domestic corporation having its principal office at 955 East 149th Street, Bronx, New York, and a place of business at 401 Acorn Street, Wyandanch, New York, has been engaged in the nonretail sale and distribution of beverage-

es. During the past year, the Respondent has purchased and received at its Wyandanch, New York facility, goods and materials valued in excess of \$50,000 directly from points located outside New York State. The Respondent admits and I find that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits and I find that Laundry Distribution and Food Service Joint Board, affiliated with Service Employees International Union (Union) has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

The Respondent, which delivers beer to retail establishments, operates a delivery operation in Wyandanch, Long Island, where it employs about 90 workers. The unit includes truck drivers and helpers.

The employees are represented by the Union which has had successive collective-bargaining agreements with the Employer. Diaz began his employment in August 2010, and was laid off for 3 months in November 2012, returning in December 2012, or early 2013, as a driver's helper. In that capacity he helped the driver maintain the inventory of products on the truck, helped deliver the product and remained in the truck when the driver collected money from the customers.

Diaz served as a union shop steward from 2011 to Spring, 2012. He helped employees with grievances and disciplinary actions against them by speaking to their managers, and ensured that their rights were not being violated.

Diaz did not represent any employees who were asked to take a drug test. However, he was aware that the Respondent had a drug testing policy. He signed a statement upon his hire which acknowledged that "no employee shall report to work while under the influence of such drugs. Employees who engage [I]n such conduct will be subject to discipline up to and including discharge." In addition, he took a preemployment drug test and a test upon his return from layoff. Prior to the latter test, he was told by his union agent that if he failed the test he would be fired.

The parties' collective-bargaining agreement provides, in relevant part, that "any employee who . . . is impaired by . . . narcotics, illegal drugs, prescription drugs absent a prescription, controlled substances . . . when reporting for work . . . is subject to immediate disciplinary action, up to and including termination of employment."

The contract further states, in relevant part, that "employees other than drivers may be tested only when there is reasonable suspicion that the employee is working or has reported to work while impaired by drugs or alcohol. . . ."

The Respondent's director or operations, Ron Reif, testified that notwithstanding the contract's provision that the Employer has the right to immediately fire an employee who is impaired, the Respondent has no right to discipline the worker without first giving him an opportunity to be tested for substance abuse. He stated that "the employee has the right to be drug tested. We never take that away from an employee . . .

"which is intended for the benefit of the employee."

2. The events of June 8

On June 7, 2013, Diaz injured his knee and shoulder at work and that day submitted an incident report. He reported to work the following day, June 8, at 6:33 a.m. and went to the office to learn which route he would be assigned that day. The route assignments were posted on the outside of the office window.

Diaz observed that there was no assignment listed next to his name. Rather, the notation "workers compensation" appeared next to his name. He saw Roy Small, the delivery manager, inside the office, and Tony Wetherell, the facility manager, standing near Small. Diaz opened the window and asked Small why he was placed on "workers compensation," adding that he was ready to work.

Small replied that since Diaz submitted an incident report the previous night he assumed that Diaz would not be at work due to a workers compensation claim. Small added that if he intended to report to work he should have called in. According to Diaz, Small said that he would see if work was available for him.¹ During their 5 or 6 minute conversation through the open window, Diaz was about 3 feet away from Small.

Small is responsible for administering the Respondent's drug testing policy. He noted that safety is a top priority with the Employer since the employees work with heavy equipment, trucks and forklifts, stating that it is "crucial" that employees appear at work in an unimpaired state.

Small attended a training class on the topic of "reasonable suspicion" in December, 2011 given by the JW Rufolo Institute for Occupational Safety and Health. Small stated that the training consisted of what behaviors an employee might demonstrate if he is under the influence of drugs or alcohol. Inasmuch as he received this training, he was authorized to determine whether reasonable suspicion exists that an employee is under the influence of drugs. He stated that in making such a determination, the manager observes the employee's behavior, and if the supervisor has such reasonable suspicion, the employee is asked to submit to a drug test which is administered by a drug testing facility off site. The employee is driven to the site by a manager who waits in the waiting room.²

Small testified that when Diaz appeared at the driver's delivery window he "reeked of the smell of marijuana," and his eyes were glassy and bloodshot. He asked Diaz to take a drug test and Diaz refused, saying that his "rights are being violated." Small conceded that Diaz asked to speak with shop steward Joseph Gonzalez and left the office to call Gonzalez.

According to Diaz, Wetherell asked Small if he "smelled that?" Small said "yes." Wetherell asked Diaz to enter his office and Diaz did so. Wetherell asked him questions about the incident report and asked if he was feeling well, and what caused his injuries. Diaz answered, and then Wetherell asked "how are you feeling?" Diaz responded that he felt "great. I'm here to work."

¹ Small denied offering to see if he could find work for Diaz.

² Diaz first testified that during the return from layoff drug test, no union representative was present with him at the testing facility or in the toilet area when he produced his urine specimen. However, he later testified that a union representative was "just outside the door."

Wetherell then said “have you been doing anything stupid?” Diaz asked why he was asking, and Wetherell replied “you smell a little funny.” Diaz answered that he did not know what he was talking about. Diaz testified that he believed that Wetherell suspected that he smelled of marijuana. Wetherell then asked him to wait outside the office.

Diaz stated that he waited for over 1 hour and, seeing that other employees received their routes and left the facility, he repeatedly asked Small if he would be receiving an assignment. According to Diaz, Small told him to wait or said that he was trying to find an assignment. Finally, Diaz asked Small whether he should go home. Small replied that he had a route for him but first he had to take a drug test. Small replied that the test was necessary because “you smell like marijuana.” Wetherell entered the office and said that he was looking for the drug screening paperwork.

Diaz testified that he asked Wetherell why he needed to take a drug test and Wetherell replied “you smell like marijuana.” Diaz testified that he told Small “I don’t have a problem taking the drug test. At that point I just wanted my shop steward.” Small answered that “it’s a company issue now. The shop stewards have nothing to do with it.” Diaz replied “I don’t believe that’s correct, because when I was a shop steward I had to be there for everything that was going on between workers and management.” Small said “you just have to take the test.”

Diaz testified that he left the office and called shop steward Joe Henry who did not answer the call. Diaz then called Steward Gonzalez. Wetherell then drove up and told Diaz to enter the car to be driven to the drug testing laboratory. Diaz replied “no, without a shop steward I’m not taking the drug test.” Wetherell then suggested that Diaz drive himself to the test, and that they would “finish talking there,” but Diaz refused saying “not without a shop steward,” adding that he had Gonzalez on the phone. Wetherell asked Diaz to have Gonzalez called him (Wetherell).

Diaz testified that in their phone conversation he told Gonzalez that he was asked to take a drug test and he told the managers that “that’s fine but I need my shop steward first. I would like you to come with me or at least be present to show me the new collective-bargaining agreement.” Gonzalez replied that it was his day off and he could not accompany him, and in any event, he did not have the new contract with him. According to Diaz, Gonzalez told him that if he felt “strongly enough” that his rights were being violated and he needed his representative, he should not take the test. Diaz told Gonzalez to call Wetherell.

Small testified that when Diaz returned to the office, Small asked him what Gonzalez said and Diaz answered that was “between me and my shop steward.” Small then called Gonzalez at about 7:30 a.m. and told him that Diaz smelled of marijuana and his eyes were glassy and bloodshot, adding that he would take him for a drug test since he had a reasonable suspicion that he was under the influence of marijuana. Gonzalez replied “I understand. Do what you have to do.”

Small further stated that he again asked Diaz to take a drug test because he reasonably suspected him of using marijuana, warning him that if he refused, such a refusal would be consid-

ered a positive result and he could be terminated.³ Diaz refused to take the test.

Diaz stated that he waited at the facility and a short time later, Small and Wetherell asked him what he was going to do. Diaz replied “I feel like my rights are being violated and I don’t have a problem taking the test, but I want my shop steward present. Since he’s not able to be present, I’m not taking the test.” Small suggested that Diaz take the test and after he passed the test he could “come back, stick your nose up at us and tell us that we messed up.” Diaz replied that he was “not that type of person.” Small answered “do you understand by refusing to take the drug test you’re going to be suspended?” Diaz said “now that you explained that, yes I understand.” Diaz repeated that he did not “have a problem taking the drug test. I just don’t believe you guys have grounds to do this.” Small told him to clock out and go home. Diaz left at 8:24 a.m.

Small testified that during the nearly 2-hour period that Diaz was at the facility he observed Diaz’ “reasonable suspicion” behavior. The rest of the time was consumed by the phone calls between Gonzalez, Diaz, and Small.

Small could not recall Diaz saying that he would take the test but that he wanted his shop steward present. Wetherell did not testify. Ron Reif, the Respondent’s director of operations who was not at the facility on June 8, testified that he was not aware that Diaz wanted Gonzalez present at the facility at that time, but Reif stated that he was aware that Diaz “requested his union representative that morning.”

Three documents were completed on June 8 by Small and Wetherell:

1. An “Observed Behavior Reasonable Suspicion Record” concerning Diaz.⁴ The document stated that reasonable suspicion was determined for drugs, and that the following was observed: glassy and bloodshot eyes, his appearance and clothing had an odor, and “clothing reeked of the smell of marijuana.”
2. A Progressive Disciplinary Report which was also signed by steward Gonzalez. The report stated that Diaz was discharged because he “refused to go for a drug screening under the reasonable suspicion of substance abuse.” It stated that Diaz reported to work under the influence of a controlled substance. Diaz’s eyes were bloodshot and glassy and his uniform reeked of the smell of marijuana. Diaz was told that he must go for a drug screening because it’s against Manhattan Beer’s policy to have an employee working impaired in the trade delivering beer to customers or operating equipment impaired and under the influence of narcotics.
3. A memo signed by Wetherell, Small and steward Gonza-

³ Ron Reif, the Employer’s director of operations, testified that it is the Employer’s policy that an employee’s refusal to submit to a drug test is considered a positive test which results in the employee’s discharge.

⁴ The form stated that “according to 49 CFR Sec. 382.307, Reasonable Suspicion Testing, the employer shall require the driver to submit to a controlled substance . . . test if a supervisor or company official who is trained in accordance with Sec. 382.603 determines that reasonable suspicion exists.”

lez, which stated the following, under the heading “Termination of employment”:

- Refused to go for drug testing under the reasonable suspicion of substance abuse.
- On Saturday, June 8, 2013, driver’s helper Joe Garcia Diaz reported to work at 6:33 a.m. under the influence of a controlled substance. Facility Manager Tony Wetherell and I, Delivery Manager Roy Small were both present in the delivery office when Joe Garcia Diaz had his upper torso peering through the delivery window asking what route he was assigned to. I walked over to the delivery window to speak with Joe Garcia Diaz and I noticed that his eyes were bloodshot and glassy and his uniform reeked of the smell of marijuana.
- I reached out to shop steward Joseph Gonzalez via telephone to explain to him that Joe Garcia Diaz reported to work under the influence of a controlled substance and that he will be taken for a drug screening under the reasonable suspicion of substance abuse.
- As stated in the Collective Bargaining Agreement: Article 39: Substance Abuse and Testing 39.1: An Employer and the Union recognize that employee drug and alcohol abuse may have an adverse impact on, among other things, the general health, welfare and safety of employees and the employer’s operation.
- Joe Garcia Diaz was then brought into the delivery office and told he had to go for a drug screening under the reasonable suspicion of substance abuse. Joe Garcia Diaz refused, therefore he has been terminated.

On June 12, Reif sent an email to certain union officials which stated that Diaz was discharged for “his refusal to submit to substance abuse testing based on reasonable suspicion.”

On June 11, Diaz took a drug test administered by his physician. The test was negative. On June 20, a grievance meeting was held. Diaz stated that at that meeting union representatives presented a copy of that test to representatives of the Employer. Director of Operations Reif, who was at that meeting, testified that he did not recall the June 11 drug test being discussed, nor was it mentioned in the minutes of the meeting. Small testified here that marijuana remains within the body for 3 months.

The grievance was denied

Diaz applied for unemployment insurance and a hearing was held. In a decision issued in September 2013, the administrative law judge found that after being asked to take a drug test Diaz “conferred with his union representative and was not told to refuse the test.” The judge further found that Diaz “contends that he refused to submit to the drug screening because he believed it was intrusive.” She held that Diaz was discharged for misconduct—refusing to submit to a drug screening.

Discharges of Other Employees

The Respondent presented evidence of three employees who were discharged for refusing to submit to substance abuse or alcohol testing.

In August 2010, employee John Reyes refused to submit to a

postvehicle accident substance abuse testing and was discharged. In November 2010, employee Greg Irving was discharged for refusing to submit to a reasonable suspicion substance abuse testing. In August 2013, employee Felix Marin failed to submit to reasonable suspicion alcohol testing and was fired.⁵ There was no evidence that any of the three employees asked for union representation before they were asked to submit to substance abuse testing. However, two of the workers, Marin and Irving, had union representatives with them during the interview with supervisors in which they were asked to take a substance abuse test.

Analysis and Discussion

The complaint alleges that Diaz was discharged because he refused to attend an investigatory interview, which he reasonably believed would result in disciplinary action, without union representation.

In *NLRB v. Weingarten*, 420 U.S. 251 (1975), the Supreme Court approved the Board’s conclusion that Section 8(a)(1) of the Act provides employees with the right to be accompanied and assisted by their union representative at meetings that the employee reasonably believes may result in disciplinary action. The employee has the right to advice and active assistance from the union representative. 420 U.S. at 260, 263.

The first question to be answered is whether *Weingarten* rights attached to the interview surrounding the Respondent’s determination that a “reasonable suspicion” drug test was warranted.⁶ In *Safeway Stores*, 303 NLRB 989, 989 (1991), the Board noted that “we do not pass on the administrative law judge’s apparent conclusion that a drug test, standing alone, would constitute an investigatory interview under *Weingarten*,” noting that the test was part of a wider inquiry into the dischargee’s absence record—a first step in determining whether his excessive absences were due to drug use.

The Respondent argues that *Weingarten* rights did not attach because here, unlike *Safeway*, there was no wider inquiry into Diaz’ work record. The only matter under consideration was whether he was under the influence of drugs, and a drug test was ordered to resolve that issue. The Employer further argues, citing *U.S. Postal Service*, 252 NLRB 61 (1980), that since there were no “questions of an investigatory nature” and no “confrontation” between Diaz and his managers there was no investigatory interview. The Respondent asserts that the only investigation which would have taken place was a test of Diaz’ urine specimen obtained in the privacy of the off-site independent laboratory.

I do not agree. The core issue is whether management’s reasonable suspicion that Diaz was under the influence of drugs constituted an investigatory interview. The drug test the Respondent asked Diaz to take was an extension of, and a required

⁵ Pursuant to my request, complete documentation regarding the unemployment insurance decision and these discharges were filed by the Respondent following the hearing. They have been received in evidence, over the General Counsel’s objections, as R. Exhs. 1(a), 8(a), and 9(a).

⁶ I do not express an opinion on whether *Weingarten* rights attach to a preemployment substance abuse test or such test administered after an employee’s return from layoff. Those tests are not at issue here.

part of its investigatory process to determine if he was under the influence of drugs. As credibly testified by manager Reif, the Respondent has no power to discipline an employee unless it offers him a drug test and he fails it, or if he refuses to take the test.

Where, as here, an employer insists on administering a medical test as part of an investigation into an employee's alleged misconduct, the employee has a right to consult with his union representative before consenting to take the test. *Safeway Stores*, above; *Systems 99*, 289 NLRB 723 (1988). Once the employee makes a valid request for representation, the burden is upon the employer to either (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview unaccompanied by a representative or having no interview at all. *Washoe Medical Center*, 348 NLRB 361, 361, fn. 5 (2006), quoting *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982).

In making the determination that Diaz was required to take a drug test, Small and Wetherell observed his physical condition and behavior, noting in their reports that he had glassy and bloodshot eyes, his appearance and clothing had an odor, and that his clothing reeked of the smell of marijuana.

They then questioned him, Wetherell asking whether he had been doing anything "stupid," an obvious inquiry as to whether he had been using drugs. This was, effectively, an interview within the meaning of *Weingarten*, as to which Diaz reasonably could believe that he would be subject to discipline. Diaz asked Wetherell why he was asking, and Wetherell replied that he smelled "a little funny." Diaz replied that he did not know what Wetherell was talking about although he believed that Wetherell may have suspected him of using marijuana.

In *Arlington Hospital*, 246 NLRB 992, 997 (1979), the Board held that *Weingarten* rights do not attach when the meeting between the employee and employer is solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision. However, if the employer informs the employee of a disciplinary action and then seeks facts or evidence in support of that action or to attempt to have the employee admit his alleged wrongdoing or to sign a statement to that effect . . . the employee's right to union representation would attach."

Here, after Wetherell told Diaz that he smelled "a little funny," which Diaz believed was a reference to a possible odor of marijuana, Wetherell asked Diaz "'have you been doing anything stupid?'" This question went beyond a simple order that Diaz take the drug test and was attempting to have Diaz admit to using drugs. Accordingly, if the order that Diaz take a drug test is considered disciplinary action, Wetherell's question whether he was doing anything stupid sought to elicit an admission from Diaz that he was under the influence of drugs. The right to union representation at that point clearly attached.

At that point in the interview, and also when the determination was made that there was reasonable suspicion that Diaz had used drugs, the interview became inextricably intertwined with the direction that Diaz submit to a drug test. Diaz' union agent could have been of aid to him in the interview in challenging the basis upon which that determination was made. The agent could have expressed his opinion that Diaz exhibited

none of the manifestations of drug use observed by the managers.⁷

That is the type of assistance that the Supreme Court held was required in an investigatory interview which may result in discipline. Inasmuch as a positive drug test following the interview would result in discipline, I hold that Diaz was entitled to such representation when a determination was made that reasonable suspicion existed to require him to take a drug test.

Systems 99, above, was a case involving an employee who arrived at work in a condition in which the manager "formed the impression" that he was intoxicated. In the interview which followed, the employee was told that management believed that he was intoxicated and that he was being asked to take a sobriety test, and would be fired if he refused since the employer would presume that he was intoxicated. The employer did not believe that it could sustain a discharge simply on the testimony of management that the worker appeared to be intoxicated. In *Systems 99*, the judge described the meeting at which the employee was asked whether he would take the test as "confrontative in character," in which his refusal would be an admission of intoxication.

Based on those facts, the judge, affirmed by the Board, found that the employee's *Weingarten* rights attached. "Where an employee is advised by his employer—and therefore he 'reasonably believes'—that he may be disciplined if he refuses to submit to a proposed set of tests, there appears to be no reason for concluding that he should not be entitled to the services of a representative before deciding what he will do." 289 NLRB at 727

Similarly, in the instant case, Small possessed a reasonable suspicion, based on Diaz' appearance when he arrived at work, that he was under the influence of drugs. As noted above, Operations Manager Ron Reif, testified that, notwithstanding the contract's provision that the Employer has the right to immediately fire an employee who is impaired, the Respondent has no right to discipline the worker without first giving him an opportunity to be tested—"the employee has the right to be drug tested." Similarly, here, the Respondent regarded a refusal to take the test as an admission of drug use. I accordingly find that Diaz' *Weingarten* rights attached when he was ordered to take a drug test.

Diaz had the right to request union representation if he reasonably believed that he would be disciplined as a result of the interview. Here, the purpose of the interview was to direct Diaz to take a drug test. Diaz reasonably believed that he would be disciplined if he failed the test—he signed a statement upon his hire which acknowledged that employees who report to work while under the influence of drugs would be disciplined, and had been told by his union agent that if he failed a drug test upon his return from layoff he would be fired.

The Respondent disputes that Diaz requested the presence of his union representative. Diaz credibly testified that he repeatedly told Small and Wetherell that he would take the drug test

⁷ I am aware that *Weingarten* cautioned against the transformation of an investigatory interview into an adversarial contest. 251 U.S. 263. That question need not be reached here since a union agent was not present.

but wanted his union agent present. Small could not recall Diaz saying that he would take the test but that he wanted his shop steward present. Wetherell, who was present during Diaz' requests, did not testify. The fact that Small could not recall but did not deny the repeated entreaties by Diaz to have his agent present, and that Wetherell did not testify, leads me to conclude that Diaz requested the presence of Union Agent Gonzalez.

As noted above, Diaz attempted to locate a union agent to represent him but none were available. He spoke with Gonzalez by phone. The Supreme Court noted the importance of the physical presence of the union agent who "is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them." *Weingarten*, 251 U.S. at 260. To hold that a phone call with a union agent satisfies an employee's right to union representation would make that right meaningless. "If the employer grants the request [for representation], the union representative is entitled not only to attend the investigatory interview, but to provide active advice and assistance to the employee." *Washoe Medical Center*, 348 NLRB 361, 361 (2006).

When Diaz refused to take the drug test, the Employer may have advised Diaz that it would not proceed with the interview unless he was willing to speak to the managers unaccompanied by his agent. Diaz could then have refused to participate in the interview, thereby protecting his right to representation, but at the same time relinquishing any benefit which might be derived from the interview. The employer would then be free to act on the basis of information obtained from other sources. *Weingarten*, at 259.

There would have been no harm to the Employer in delaying the interview until Diaz' representative could have attended since, according to Small, marijuana remains within the body for 3 months.

The Request for Reinstatement

As part of the requested remedy, the General Counsel requests that Diaz be reinstated. In *Taracorp, Inc.*, 273 NLRB 221, 222-223 (1984), the Board held that where the only violation is the denial of an employee's request for union representation pursuant to *Weingarten*, a make-whole remedy is inappropriate. The Board noted that Section 10(c) of the Act prohibits such a remedy where the employee was discharged for cause. In order to issue a make-whole remedy there must be a nexus between the *Weingarten* violation and the reason for the discharge.

When an employer takes disciplinary action against an employee for conduct that was the subject of the investigation, and not for invoking his *Weingarten* rights, the disciplinary action does not itself violate Section 8(a)(1), even when the employee's *Weingarten* rights were violated. *Taracorp*, above at 222 ("we are unable to justify the imposition of a make-whole remedy where an employer's only violation is the denial of an employee's request for representation at an investigatory interview."); *L.A. Water Treatment*, 263 NLRB 244, 246 (1982). An employer, however, may violate the Act by disciplining the employee if that punishment resulted from the employee invoking his *Weingarten* rights. If it is found that the discipline resulted from the assertion of *Weingarten* rights, the burden is

placed on the employer to prove that it would have taken the disciplinary action in the absence of the employee invoking his *Weingarten* rights. *Safeway Stores, Inc.*, above; *T. N. T. Red Star Express, Inc.*, 299 NLRB 894, 895 fn. 6 (1990).

Although I have found that Diaz requested union representation at his interview on June 8, and that the Respondent unlawfully denied that request, I find that the sole reason for his discharge was his refusal to submit to a drug test. I cannot find that he was discharged for refusing to submit to a drug test without his union representative being present.

The General Counsel argues that his refusal to take the test was premised upon the Respondent's denial of his *Weingarten* right to have union representation. That may be, but the question is the reason for the discharge as set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980). Applying the *Wright Line* test, I find that Diaz' discharge did not violate the Act. First, the General Counsel must establish that Diaz has engaged in protected concerted activity and that animus against that conduct was a motivating factor in the decision to discharge him. If that showing is made, the violation is proven unless the Respondent proves that it would have disciplined him even in the absence of his protected conduct. Here, the General Counsel has not met his initial burden.

I first find that Diaz engaged in protected concerted activity by requesting union representation when he reasonably believed that discipline would result. However, it has not been proven that the Respondent bore animus against such protected activity in discharging him. *Barnard College*, 340 NLRB 934, 935-936 (2003).

All the documents prepared by the Respondent at the time of his discharge recite that he was fired for refusing to take the test. There is no evidence that he was discharged because he refused to submit to the test without his union representative being present. As credibly testified by Manager Reif, the Respondent's policy is that a refusal to take a drug test is considered a positive result in such a test. The purpose of the test is to confirm or rebut the reasonable suspicion entertained by the managers. If the employee refuses to take the test, the Respondent reasonably concludes that the test would be positive. Indeed, Diaz conceded that Small told him that he would be suspended if he refused to take the test.

I find that Diaz' refusal to take the test and the belief of the Respondent's managers, based on their observations that they possessed reasonable suspicion that Diaz was under the influence of drugs, were the events which resulted in his termination, not his insistence on his *Weingarten* rights. I conclude that the General Counsel has failed to establish a sufficient nexus between the denial of Diaz' *Weingarten* rights and his discharge. I conclude that the Respondent did not violate Section 8(a)(1) of the Act by terminating Diaz. *Systems 99; Taracorp*, above.

CONCLUSIONS OF LAW

1. The Respondent, Manhattan Beer Distributors LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Laundry Distribution and Food Service Joint Board, affiliated with Service Employees International Union has been a

labor organization within the meaning of Section 2(5) of the Act.

3. By denying Joe Garcia Diaz his right to union representation at an investigatory interview in which he reasonably believed that discipline may result, and by directing him to immediately submit to a drug test as part of its investigation into his behavior, notwithstanding his request to obtain union representation prior to the test, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

4. The Respondent did not violate the Act by discharging Diaz on June 8, because of his refusal to submit to a drug test without first consulting with his union representative.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, Manhattan Beer Distributors LLC, Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying Joe Garcia Diaz or any employee his or her right to union representation at an investigatory interview in which he reasonably believed that discipline may result, and by directing him to immediately submit to a drug test as part of its investigation into his behavior, notwithstanding his request to obtain union representation prior to the test.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in the Bronx, New York, and its place of business in Wyandanch, New York, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Re-

spondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 8, 2013.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 15, 2014

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT deny your right to union representation at an investigatory interview in which you reasonably believe that discipline may result.

WE WILL NOT direct you to immediately submit to a substance abuse test as part of our investigation into your behavior, notwithstanding your request to obtain union representation prior to the test.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed by Section 7 of the Act.

MANHATTAN BEER LLC

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."