

Southwestern Bell Telephone Company and Communications Workers of America, Local 6333, affiliated with the Communications Workers of America, AFL-CIO. Case 17-CA-21366

November 20, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On April 26, 2002, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The General Counsel filed exceptions, a supporting brief, an answering brief, and a reply brief. The Respondent filed cross-exceptions, a supporting brief, an answering brief, and a reply brief.

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 and to adopt the recommended Order.

We adopt the judge's dismissal of the complaint's allegation of a *Weingarten* violation based on the conclusion that Paz could not have had a reasonable belief that the August 27, 2001 meeting would result in discipline. As the judge found, there is no basis for concluding that Paz could have reasonably believed that the August meeting would result in discipline because of his low production numbers. In so adopting, we note that, apart from references in the hearing transcript to a "positive discipline" program, no evidence was introduced as to disciplinary measures or policies related to an employee's low production performance. It would, therefore, be entirely speculative to conclude that any employee with low production performance would anticipate discipline. Thus, there was a failure of proof in support of the assertion that Paz could have reasonably believed that the August meeting would result in discipline.

As the judge also found, there is no basis for concluding that Paz could have reasonably believed that the August meeting would result in discipline because of his statement to Caskey concerning Paz' mental health. Even if Paz were to receive a management referral to the Respondent's Employee Assistance Program (EAP) due to his statement to Caskey, the judge found that the EAP program is not disciplinary. In adopting the judge's finding that the EAP

¹ The General Counsel has 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.

We note that no exceptions were filed to the judge's finding that Paz made a valid request under *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), for union representation.

is not disciplinary, we note that, in fact, the EAP is a benefit provided by the Respondent to the employees.

Our dissenting colleague maintains that the EAP is irrelevant, because it was the Workplace Violence Policy and not the EAP that was of concern to Paz. As our colleague notes, however, the *Weingarten* standard is an objective one. Thus, the standard is not what Paz subjectively believed. Furthermore, the standard is not what an employee with a history of mental instability would believe. Rather, under *Weingarten*, the standard is whether an employee would reasonably believe that the meeting would result in discipline. As discussed above, we agree with the judge that Paz could not have reasonably believed that discipline would result from the August 27 meeting.

Finally, in adopting the judge's decision, we do not pass on the judge's rejection of the Respondent's argument that Supervisor Petty's assurance to Paz that he did not need a union representative because the meeting would not affect Paz' job security or job status, precludes a finding that Paz could have reasonably believed that the August meeting would result in discipline.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

MEMBER LIEBMAN, dissenting.

Under the Supreme Court's *Weingarten* decision,¹ employee Roy Paz was entitled to a union representative at an August 27, 2001 investigatory meeting with management if Paz reasonably believed that the meeting might result in disciplinary action.² As I will explain, under the circumstances—Paz' history of mental instability, prior warnings to him involving a threat he had made, and his more recent poor productivity, his fresh statement to a supervisor that he was "about to snap," and the unusual intervention of a high-level manager—Paz would have been foolish *not* to think that discipline was possible. Accordingly, I cannot agree with the judge and my colleagues that there was no violation of Section 8(a)(1) here.

Factual Background

Paz had a history of mental instability. He had been referred to the Respondent's Employee Assistance Program (EAP) twice, in 1987 and 1998. The 1998 referral was accompanied by disciplinary action: Paz had made a threat determined to be in violation of the Respondent's Workplace Violence Policy (WVP), and he was warned

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

² See, e.g., *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676, 677 (2000), enfd. in relevant part 268 F.3d 1095 (D.C. Cir. 2001), cert. denied mem. 122 S. Ct. 2356 (2002).

that another threat in violation of the policy would cause his immediate discharge.

On August 1, 2001,³ Paz had a production meeting with his supervisor, Samuel Petty. Petty conducted production meetings of this kind with each member of his crew on a monthly basis. The meetings were not considered to be disciplinary. The judge found that Petty himself had never disciplined an employee for production problems. In fact, Petty testified that no one in his crew had ever failed to meet the Respondent's production standards. Nevertheless, at the August 1 meeting Petty told Paz that his productivity was poor and that he had 6 weeks to bring it up to compliance with the standards.

After the August 1 production meeting, but before August 27, Paz told another supervisor, Barbara Caskey, that "the job sucked and he was about to snap." Caskey reported this statement to her immediate supervisor, Melvin Wilson, the Respondent's area manager. Wilson was aware of Paz' mental health problems, and he decided to meet with Paz personally to evaluate the situation. In a document summarizing the matter, Wilson stated that he "wanted to personally hear from [Paz] was this a cry for help or was he about to put the safety of my work group in danger." In addition, Wilson testified that he was prepared to remove Paz from the workplace if he determined that Paz was a threat to other employees.

On August 27, Petty told Paz that Paz would be meeting with Wilson that day. It was highly unusual for Wilson, who was not stationed at Paz' facility, to meet personally with any employee, and Paz knew it. He asked if a union representative could accompany him to the meeting. Petty told him that it would not be necessary, although Petty also denied knowledge of what the meeting would be about.

The meeting in fact was about Paz' remark to Caskey. It also covered his productivity problem, which had not improved at all in the 4 weeks since the August 1 meeting with Petty. During the meeting, Paz made a separate remark that was perceived as a threat in violation of the Workplace Violence Policy. He was discharged for this August 27 threat. The discharge is not alleged as an unfair labor practice in this case.

The Respondent's WVP states that:

All statements, acts, or other expressions of violence or violent intent toward another person, or toward another person's family or property, made or committed on Company premises or during the conduct of Company business, are strictly prohibited regardless of their context. Every such statement, act, or other expression will be presumed to be serious and will be handled accord-

ingly. Any employee determined by the Company to have committed any act prohibited by this policy will be subject to disciplinary action up to and including dismissal, civil action, and/or criminal prosecution, as appropriate under the circumstances.

In addition, the policy is consistent with the warning Paz received in 1998: an employee's second violation requires automatic discharge. The procedure for enforcing the policy requires, among other things, that any supervisor who hears a statement that appears to be an expression of violence or violent intent must report it to his or her immediate supervisor; an evaluation of the situation is then made by management. It is readily apparent that both Caskey's and Wilson's responses to Paz' "about to snap" statement were consistent with the requirements of the WVP.

Procedural History

The General Counsel alleged that the Respondent's refusal to permit Paz to have a union representative at the August 27 meeting violated Section 8(a)(1). The General Counsel theorized that it was reasonable for Paz to anticipate that the meeting involved his statement to Caskey and/or his production problem, and that disciplinary action might result.

The judge agreed that it was reasonable for Paz to expect that the meeting would involve his statement or his productivity, or both. However, she further found that the "about to snap" statement was a "casual" remark, and thus no reasonable person could conclude that discipline might result from a meeting about this statement. She also found that "under no stretch of the imagination could Paz's remark to Caskey rise to the level of a 'statement, act, or other expression of violence or violent intent toward another person'" in violation of the WVP.

Concerning the productivity issue, the judge found that Petty had never disciplined an employee for poor production, that on August 27, exactly 2 weeks remained before the 6-week deadline expired, and that Petty never told Paz that he would be disciplined if his production did not improve. She concluded accordingly that Paz could not have reasonably anticipated that discipline due to poor productivity might result from the August 27 meeting.

The judge recommended dismissal of the complaint. Contrary to my colleagues, I cannot agree with the judge.

Analysis

In assessing an employee's entitlement to union representation in cases like this one, what is "reasonable" for an employee to believe about the possibility of discipline is measured by an objective standard accounting for all relevant circumstances. *Weingarten*, supra, 420 U.S. at 257 fn. 5. Pursuant to *Weingarten*, it is the employer's

³ All subsequent dates are in 2001 unless otherwise noted.

obligation to evaluate an investigatory interview situation from an objective standpoint, i.e., the employer must determine whether the employee at issue would reasonably believe that discipline might result from the interview. *Consolidated Edison Co. of New York*, 323 NLRB 910 (1997).

The key facts here are straightforward: Paz was an employee with a known history of mental instability. Earlier, he had violated the Respondent's Workplace Violence Policy by making a threat of violence. Under that policy, he was subject to automatic discharge if he violated the policy again. On August 27, that was as clear to Paz as it was to the Respondent. Paz had also recently been told to improve his work production and been given a deadline of 6 weeks. He had also recently made a statement to a supervisor that, while ambiguous with respect to violent content, could be perceived by the Respondent as a threat, especially coming from someone with his mental health and disciplinary history. The breadth of the WVP obviously allows for an investigation of a statement of this kind in these circumstances. On August 27, Paz was told that he must meet with an upper level manager who normally never meets with employees, and he was not told the purpose of the meeting. Paz asked for a union representative to accompany him and the request was denied. The meeting was in fact about the meaning of his statement under the WVP and about his poor production.

These facts clearly establish that it was reasonable for Paz to anticipate that he might be disciplined as a result of the meeting. Not one, but two factors—his remark and his productivity—could have created in Paz a reasonable apprehension concerning discipline. And, it was not unreasonable for him to anticipate that the Respondent might link the two matters together in its consideration of his status. At the time of the meeting, the Respondent was aware of all these circumstances. And, at the very least, it should have been aware of how Paz might reasonably interpret them. It is apparent that the Respondent did not satisfy its obligation to evaluate the interview situation objectively. Accordingly, its refusal to provide Paz with a union representative when he requested one violated Section 8(a)(1).

The judge found that "it is impossible" to conclude that Paz' "casual" statement to Caskey could reasonably cause Paz to believe that discipline might result from the meeting with Wilson. She further found that "under no stretch of the imagination" could Paz' statement be considered a violation of the WVP. The judge thus suggested that Paz' sense that discipline might be involved was irrational. However, her findings are refuted by what the Respondent actually did. Caskey and Wilson

responded to Paz' "about to snap" statement consistent with the WVP.⁴ Wilson, in particular, made clear that Paz' remark caused concern for the safety of other employees, and he testified that he was prepared to take disciplinary action if Paz confirmed at the meeting that his statement was an expression of violent intent. The WVP is clearly broad enough for the Respondent to determine that Paz' statement came within it, if other relevant circumstances confirmed a violent intent. Paz', Caskey's, and Wilson's reactions to the "about to snap" statement demonstrate what are "reasonable" reactions in the Respondent's workplace regarding the WVP. The judge and my colleagues give too little weight to this contextual evidence, in favor of their own detached judgment.

In addition, both the judge and the majority mistakenly focus on whether Paz surmised that the "about to snap" statement might trigger an *EAP* referral, observing that the Respondent's *EAP* is not considered a "disciplinary" program. Whether or not the *EAP* has a disciplinary element is immaterial, because it was the WVP, not the *EAP*, that was reasonably of concern to Paz. The WVP, in turn, clearly did have a disciplinary component with special application to him.

Paz' productivity was, of course, another issue of concern. On August 1, Petty told Paz that his productivity was poor and that he had 6 weeks to improve. Both the judge and the majority seem to think that it would have been unreasonable for Paz to believe that his poor production figures might be a cause for discipline at the meeting with Wilson. The judge suggests that Petty mentioned no disciplinary consequence, and my colleagues say that the General Counsel did not supply evidence of the disciplinary measures the Respondent takes in response to poor productivity.

But these points miss the mark. Surely, when an employee is notified that his production is unsatisfactory and is given a specific deadline for improvement, a disciplinary consequence is implicit. Otherwise, the warning (itself disciplinary) is a meaningless gesture. Paz was fully aware that his productivity had not improved over 4 weeks as of August 27. Given the prior warning, it was wholly reasonable for him to conclude that his failure to improve *might* lead to *some* sort of discipline. He was also fully aware of the possible consequences (automatic discharge) of his "about to snap" statement if that statement was evaluated by management to be a violation of the WVP. At the very least, it was reasonable

⁴ As described above, the WVP requires that any supervisor who hears a statement that appears to be an expression of violence or violent intent must report it to his or her immediate supervisor; management then makes an evaluation of the situation.

for Paz to anticipate that discipline might result if the Respondent considered the two matters in tandem, even though the 6-week deadline on the productivity issue had not expired. Indeed, it would have been foolhardy for him to have ignored that possibility.

Failing to find a violation of Paz' *Weingarten* right is inconsistent with controlling law and with common sense. Accordingly, I dissent.⁵

Naomi L. Stuart, Esq., for the General Counsel.
Christian A. Bourgeacq, Esq., of Austin, Texas, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This case was tried in Overland Park, Kansas, on February 21, 2002. At issue is whether Respondent Southwestern Bell Telephone Company violated Section 8(a)(1) of the Act by denying the request of employee Roy Stephen Paz to be represented by Communications Workers of America, Local 6333, affiliated with the Communications Workers of America, AFL-CIO (the Union) during an interview which Paz allegedly reasonably believed would result in disciplinary action against him.¹

On the entire record, including my observation of the demeanor of the witnesses,² and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent, a corporation with an office and place of business located at 9000 Santa Fe, Overland Park, Kansas, is engaged in the business of providing telephone and related services. During the 12-month period ending August 1, 2001, Respondent derived gross revenues in excess of \$100,000 and purchased and received at its facility goods valued in excess of \$50,000 directly from points outside the State of Kansas. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

⁵ With respect to an appropriate remedy for the Respondent's violation, I acknowledge that *Taracorp, Inc.*, 273 NLRB 221 (1984), might preclude Paz' reinstatement, because his discharge was not in retaliation for the exercise of his *Weingarten* right. I have not passed on the *Taracorp* rule in previous cases. In this case, I would consider a reinstatement remedy for Paz, and I would consider overruling *Taracorp* if necessary.

¹ The Union filed the charge on September 21, 2001. The Union filed the amended charge on November 20, 2001. The complaint was issued on December 17, 2001. All dates are in 2001 unless otherwise specified.

² Credibility resolutions have been made based on a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

Background

Systems technician Paz worked as a special services installer. He was dispatched to Respondent's customers from Respondent's special services center at 9000 Santa Fe in Overland Park, Kansas, to install high-speed data circuits. Three crews worked out of that special services center: two installation crews and one repair crew. Samuel Lee Petty II, manager of special services, was Paz' direct supervisor. The other installation crew was managed by Barbara Lynn Caskey, also a manager of special services. Melvin Wilson, area manager special services, directly supervises Petty and Caskey. Respondent admits that Wilson, Petty, and Caskey are supervisors and agents of Respondent within the meaning of Section 2(11) and (13) of the Act.

Paz' normal work hours were from 8 a.m. to 4:45 p.m. Typically the first order of business each day is a crew meeting held by Petty. Usually, crew meetings last about 15–20 minutes and consist of disseminating information about traffic accidents and problems that other employees have encountered. One of the employees distributes a load sheet setting forth the day's assignments. At the end of the crew meetings, all of the employees get ready to depart the crew room for their assignments. All work is performed outside the facility.

Production

Paz and Petty routinely met once a month to discuss Paz' production statistics as measured by a "tech score database." Petty has identical meetings with each employee on his crew.³ Respondent viewed these meetings as counseling sessions. No discipline has ever been attached to these sessions. In fact, Petty has never disciplined any employee for productivity problems.

Paz testified he thought that Petty might have placed him on a Performance Improvement Plan (PIP). Petty told Paz he needed to be more productive and he needed to eliminate overtime when they met on about August 1. According to Paz, Petty gave him, "like I guess it was a month-and-a-half or so" to increase his production. No formal documents or program was put into place. Paz acknowledged that Petty did not use the term "PIP" and that Petty did not say what would happen if Paz failed to improve. Petty denied that Paz had ever been placed on a PIP.

I find Paz' testimony regarding the existence of a PIP on about August 1, to be a bit speculative and self-serving. On a different occasion, Paz had been placed on a formal PIP. He admitted he

³ Paz disputed Petty's assertion that Petty met regularly with all crew members regarding their production. I credit Petty's testimony that he does hold regular meetings with all crew members. Paz was asked on cross-examination whether he had any knowledge about other crew members having regular meetings with Petty and he responded, "Just from what they have told me." This was followed up with, "and they told you that there have been such meetings?" to which Paz responded, "I was told that they were very surprised that Sam [Petty] was having these meetings with me because a couple of them had had numbers that were roughly equivalent to mine and hadn't been put on a PIP." Although Paz responded somewhat evasively, his answer appears to concede that other crew members had been made aware of their numbers. This is consistent with Petty's testimony regarding regular meetings.

knew there were documents involved in the PIP procedure. None of those documents were utilized by Petty on August 1. Moreover, Paz knew that a PIP lasted 3 months—not the 6 weeks Petty had given him for improvement. In any event, it is undisputed that Petty never told Paz that he was “warning” him about his production or that he needed to improve or he would receive a warning. Accordingly, I find that Paz was not placed on a PIP. Rather, he was told to improve his productivity and decrease his overtime in a regularly held, nondisciplinary coaching and counseling meeting. There was no discipline attached.

Employee Assistance Plan and Workplace Violence

Paz had been placed in mandatory Employee Assistance Programs (EAP) on two occasions during his tenure. One of these occasions took place from 1987 to 1989 and the other was in 1998. Respondent’s EAP envisions three categories of use. First, it allows employees to voluntarily avail themselves of the program. Second, management may refer an employee to EAP on a nonmandatory basis. Neither of these first two options is disciplinary. However, a third category involves management referral for violation of the workplace violence policy, the substance abuse policy, or the driving record review policy. Failure of the employee to participate in EAP or follow recommendations will result in disciplinary action or job jeopardy in this third category. Both of Paz’ prior referral’s to EAP were in the third category.

The 1998 referral to mandatory EAP was based on a violation of Respondent’s Workplace Violence and Threats of Violence policy. Paz received a written warning and was informed that if he violated this policy a second time, he would be discharged.

Request that Paz Meet with Wilson

As Paz was getting ready to leave the crew room to go on his assignments on August 27, Petty told him to “stick around” because Melvin Wilson wanted to meet with Paz. Petty and Paz went into Petty’s office and closed the door. It was about 8:25 a.m. No one else was present in the office.⁴

Employee’s One-On-One Meetings with Wilson, Generally

Wilson had never been present at any of Petty’s meetings with Paz. When asked whether Paz was aware of occasions when Wilson came to the service center other than for recognition ceremonies, Paz responded, “From my own observation, I hadn’t seem him come to the work center unless there was a specific problem with a particular employee or a particular group of employees. And in that case, he would come and address the problem.” Paz was further questioned, “In your experience when Mr. Wilson came to talk to an employee and the employee’s direct supervisor, was there a problem for the employee?” Paz responded, “Normally it wasn’t—wasn’t anything that was going to be good.” I reject this testimony as nonspecific, vague, and self-serving. In fact, there is no specific evidence that Wilson had ever met individually with any unit employee. Indeed, when Paz

⁴ According to Petty and Wilson, Wilson was at the facility to conduct a recognition ceremony which lasted until about 10 a.m. Petty and Wilson believe they met with Paz at around 10:30 a.m. It is not important to this analysis whether the parties met at 8:25 or 10:30 a.m. Accordingly, Paz’ subjective speculations regarding being placed on a PIP will be disregarded.

was asked, “any other occasions (than recognition day) that you know of that would bring Mr. Wilson to the facility” he responded, “Not under normal circumstances.”

As it turned out, Wilson was concerned about Paz’ mental and emotional state. Caskey reported to Wilson that Paz had told her during a casual conversation that “the job sucked and he was about to snap.” Wilson knew that Paz had a history of mental health problems related to Vietnam combat experiences. Petty was not privy to this information so Wilson decided he would meet with Paz personally to assess the situation.

Request for Union Representative

Paz asked Petty what the meeting with Wilson was about. Petty said he “wasn’t sure.”⁵ Petty said Wilson would be there in a few minutes. Paz asked, “if it would be okay to have a Union steward present in the meeting.” Petty said it would not be necessary. Paz said, “In other words, this meeting won’t affect my job status or my job security, is that right?” Petty said, “that’s right.”⁶ Wilson arrived 5 or 10 minutes later and the interview proceeded with no further discussion of union representation for Paz.

B. Framework for Analysis

In *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), the Court held that employee insistence on the presence of a union representative at an investigatory interview which the employee reasonably believes might result in disciplinary action, is protected concerted activity. Once an employee makes a request for union representation, the employer may grant the request, discontinue the interview, or offer the employee the choice between continuing the interview without a representative or having no interview at all. *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982); *General Motors Co.*, 251 NLRB 850, 857 (1980), end. in relevant part 674 F.2d 576 (6th Cir. 1982).

In order to determine whether Respondent violated Section 8(a)(1) when it told Paz that a union representative would not be necessary, three issues must be determined:

- Whether Paz made a valid request for a Union representative.
- Whether Paz had a reasonable belief that the interview might result in disciplinary action.
- Whether Respondent improperly denied the request.

C. Analysis

Did Paz Make a Valid Request for a Union Representative

The *Weingarten* “right arises only in situations where the employee requests representation. In other words, the employee

⁵ Indeed, it appears that Petty knew that he was going to go over Paz’ production statistics with him. No discipline had ever occurred pursuant to production counseling sessions. Petty also knew that Wilson wanted to speak to Paz about Paz’ “well being.”

⁶ Petty agreed that Paz asked whether he needed a union representative and whether the meeting would be job affecting. Petty did not mention and was not asked whether Paz asked him why Wilson wanted to talk with Paz. I find that Paz credibly testified that Petty stated he did not know why Wilson wanted to talk with Paz. This is consistent with Petty’s testimony. Petty was aware of only a nebulous topic of “well being” but did not know the specifics.

may forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative.” *Weingarten*, 240 U.S. at 257.

Paz’ question to Petty, “Would it be okay to have a Union steward present?” sufficiently invoked *Weingarten*. Clearly, Paz asked if he could have a union steward present at the interview. See, e.g., *Consolidated Edison Co. of New York*, 323 NLRB 910, 916 (1997) (“I need a Union Steward;” “Do I need anybody here with me?” “Do I need a shop steward?” found sufficient to trigger *Weingarten*); *Southwestern Bell Telephone Co.*, 227 NLRB 1223, 1223, and 1227 (1977) (relied on by counsel for the General Counsel) (employee who asked if they should obtain union representation and employee who stated, “I would like to have someone there that could explain to me what was happening” sufficiently notified the employer that the employees desired *Weingarten* representation); *Bodolay Packaging Machinery*, 263 NLRB 320, 325–326 (1982) (*Weingarten* rights are triggered by the employee asking whether he needed a witness).

As noted by counsel for the General Counsel, it was not necessary for Paz to repeat to Wilson his question regarding presence of a union steward. Petty, to whom the question was propounded, was present throughout the meeting. *Amoco Oil Co.*, 278 NLRB 1, 8 (1986) (request need not be repeated where supervisor to whom the original request was made was present at later meeting) (relied on by counsel for the General Counsel); *Lennox Industries*, 244 NLRB 607, 608 (1979), *enfd.* 637 F.2d 340 (5th Cir. 1981), *cert. denied* 452 U.S. 963 (1981) (employee who has made request for representation on plant floor need not repeat the request at the interview).

Did Paz have a Reasonable Belief that the Interview Might Result in Disciplinary Action

At the time of the meeting, Paz was not informed about the purpose of the meeting. Although Paz’ supervisor told Paz that the meeting would not affect Paz’ job status or job security, this assurance must be discounted because Petty also told Paz that he did not know why Wilson wanted to meet with Paz.

Counsel for the General Counsel argues that “a reasonable person standing in Paz’ place at the outset of the meeting would believe that there was a possibility that an investigation could result in discipline or adverse job action.” Counsel notes that about 4 weeks prior to August 27, Petty gave Paz a deadline of 6 weeks to improve his production levels. Counsel also notes that on two prior occasions, Paz had been required to submit to mandatory EAP counseling. Paz received discipline for one of the incidents which led to EAP.

Weingarten requires the employer to evaluate the employee’s request for representation on an objective basis under all the circumstances. *Weingarten*, *supra*, 420 U.S. at 257 fn. 5. It is irrelevant that there might have been no intent to discipline Paz on Respondent’s part when it began the interview. Nor is it a defense that the Respondent’s only purpose in conducting the interview was to engage in fact finding. *Consolidated Edison of New York*, 323 NLRB 910 (1997). Quite important to his case is the Court’s admonition in *Weingarten* that an employee’s “reasonable belief” will be measured by objective standards under all the circumstances of the case. The Court specifically rejected any

rule that required probing an employee’s subjective motivations. *Weingarten*, 420 U.S. at 257 fn. 5.

Based on the objective facts under all the circumstances of the case, I find that Paz could not reasonably have concluded that the interview might result in disciplinary action. Initially, I have discounted Petty’s assurance to Paz that the meeting would not affect Paz’ job status or job security because, in the same breath, Petty admitted to Paz that he did not know why Wilson wanted to speak to Paz. Accordingly, I do not find Petty’s assurance to Paz a factor in determining whether a reasonable belief could have been founded on the evidence before Paz.⁷

On an objective basis, as an employee with a well-known need for professional mental health assistance, Paz might reasonably have concluded that Wilson had been advised of his remarks to Caskey 1 week prior to the interview that “the job sucked and he was about to snap.” From this conclusion, Paz might have formed a reasonable belief that Wilson wished to speak to him regarding his statement to Caskey. However, because his statement to Caskey was no more than a casual remark, it would not be reasonable to conclude that discipline might result from a meeting concerning this statement. Moreover, if Paz formed a belief that Respondent’s EAP might be discussed during the interview because of his remark to Caskey, it should be noted that the EAP program is not a disciplinary program according to Respondent’s policies.⁸ Accordingly, it is impossible to base a reasonable belief that discipline might result from meeting with Wilson based on Paz’ remark to Caskey.

Paz also knew that Wilson was aware of his request to transfer to Topeka, Kansas, so that he could receive counseling from the VA Hospital located there. Certainly, a reasonable belief that discipline might result could not be based on a discussion about Paz’ request for a transfer.

As an employee who had been counseled about poor production, Paz might reasonably have concluded that Wilson wished to talk about his poor production. However, it is not possible to reasonably conclude that such a discussion would lead to discipline. First, Petty has never disciplined any employee for production problems. Second, even if Petty were inclined to consider discipline for production problems, there was still a 2-week period remaining in the time given Paz by Petty to show improvement. Third, Petty did not tell Paz that failure to improve would lead to disciplinary action. It would not be reasonable, ~~therefore, to believe that the interview might result in disciplinary~~

⁷ Cf., *Amoco Chemicals Corp.*, 237 NLRB 394, 397 (1978) (supervisor’s advice that no disciplinary action would occur as result of meeting effectively dissipated any reasonable grounds to fear disciplinary action); *Spartan Stores, Inc. v. NLRB*, 628 F.2d 953, 958 (6th Cir. 1980) (supervisor’s assurance of no discipline meant the employee could not have reasonably believed the meeting might result in discipline).

⁸ See, e.g., *Postal Service*, 252 NLRB 61 (1980), relied on by Respondent, in which the Board stated that a fitness for duty examination which was not part of a disciplinary procedure did not fall within the purview of *Weingarten*. The fact that Paz had received a warning for a statement he made which also led to referral to mandatory EAP is not relevant to the instant situation. Respondent’s Workplace Violence and Threats of Violence policy covered the statement for which Paz was warned. Under no stretch of the imagination could Paz’ remark to Caskey rise to the level of a “statement, act, or other expression of violence or violent intent toward another person” in violation of the policy.

to believe that the interview might result in disciplinary action regarding production levels.⁹

Counsel for the General Counsel argues that a conversation about improving employee production standards may trigger *Weingarten*, “if the meeting is sufficiently linked to a real prospect of discipline . . . for poor production,” citing *Quazite Corp.*, 315 NLRB 1068 (1994). In *Quazite*, employee Sartin had received a written warning for low production prior to being called into a meeting with his supervisor. Supervisor Robbins told Sartin to come with him to his office and explained that the purpose of the meeting was to discuss Sartin’s production. Under these circumstances, employee Sartin had a reasonable expectation that discipline might result. *Id.* at 1069. Contrary to the situation in *Quazite*, Paz had no prior discipline for his production, no threat of discipline loomed, and no employee had ever been disciplined for poor production by Petty. Accordingly, I find *Quazite* distinguishable.

Counsel also relies on *Alfred M. Lewis v. NLRB*, 587 F.2d 403 (9th Cir. 1978), *enfg.* in part 299 NLRB 757 (1977). In that case, employees were counseled pursuant to the employer’s production quota and disciplinary system. The counseling was an integral and preliminary step to imposition of discipline. Clearly, employees had an objective basis for a reasonable belief that discipline might result. Such objective facts are not present in the instant case.

Because Wilson was a superior rarely seen at Paz’ facility except for monthly gatherings, Paz might reasonably assume that a private meeting with Wilson was out of the ordinary. However, there is no evidence that Wilson’s presence has led to discipline because there is no specific evidence that Wilson has ever had a meeting with an employee. Hence, there is no evidence that a meeting with Wilson might lead to discipline. Accordingly, it would not have been reasonable for Paz to view the mere presence of Wilson as indicative that the interview might result in disciplinary action.

⁹ See, e.g., *Northwest Engineering Co.*, 265 NLRB 190, 191 (1982), in which the Board noted that *Weingarten* rights do not apply to meetings held to advise employees of the employer’s valid work performance expectations. Cf., *Lennox Industries*, *supra* at 608 (employee Nestle could reasonably conclude that discipline would result when he was asked to go to supervisor Ary’s desk, in light of Ary’s prior admonitions to Nestle that Nestle needed to acquire greater speed or action would be taken against him and his work was “not going to make it.”)

Thus, based on the objective facts available at the commencement of the meeting, I am unable to conclude under all the circumstances of this case that Paz could reasonably have believed that the meeting might result in disciplinary action. This conclusion is consistent with the policy underlying *Weingarten*.¹⁰ In any event, Paz was indeed terminated on September 3, for a statement he allegedly made during the interview on August 27. Paz’ discharge is not at issue in this proceeding. Rather, it is the subject of a grievance proceeding. The fact of Paz’ discharge is not relevant to consideration of whether he had a reasonable belief that the interview might result in disciplinary action.

CONCLUSION OF LAW

By denying the request of its employee Roy Stephen Paz to be represented by the Union during an interview, Respondent did not violate Section 8(a)(1) of the Act because the employee did not have a reasonable belief that the interview might result in disciplinary action. Accordingly, Respondent did not interfere with, restrain, and coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended¹¹

ORDER

The complaint is dismissed.

¹⁰ The presence of a union representative at an interview is based on the Sec. 7 employee right to act in concert for “mutual aid and protection.” Denial of this right reasonably tends to interfere with, restrain, and coerce employees in violation of Sec. 8(a)(1). Thus it is a serious dilution of the employee’s right to act in concert when an employer compels an employee to appear unassisted at an interview which may put his job security in jeopardy. *Weingarten*, *supra*, 420 U.S. at 256–257, quoting *Mobil Oil Corp.*, 196 NLRB 1052 (1972). By the same token, if there is no reasonable basis for concluding that the meeting will place job security in jeopardy, the Sec. 7 right does not come into play. The Court specifically noted that it would not normally extend the rule to giving instructions or training or correcting work techniques. *Id.* at 257–258.

¹¹ 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.