

Union Representation and Drug Testing

On November 16, 2016, the Second Circuit upheld *Manhattan Beer Distributors, LLC v. NLRB*, a case in which the NLRB held that Manhattan Beer Distributors violated its employee's *Weingarten* rights. The Circuit Court found that the Board reasonably construed the National Labor Relations Act in determining that Manhattan Beer Distributors denied its employee the physical presence of a union representative before consenting to take a drug test in the context of an investigation that he reasonably believed would result in discipline.

Manhattan Beer Distributor alleged that its driver showed up to work “reek[ing] of the smell of marijuana” and had “glassy and bloodshot” eyes. The employee refused its employer's request that he submit to a drug test because no union representation was available at the time to advise him regarding the test. Manhattan Beer Distributors ultimately discharged its employee for his refusal to submit to a drug test, and refused to give a “reasonable period of time to obtain union representation.” The Supreme Court in *Weingarten* upheld the Board's decision that an employee has a right to active assistance from a union representative under Section 8(a)(1) of the Act. Therefore, where an employer insists 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 physical union representation before consenting to take the test.

Manhattan Beer Distributors possessed a reasonable suspicion that its driver was under the influence of drugs, however it must provide its union employees with a reasonable period to physically consult with a union representative in the course of a drug test.

The Second Circuit found that the Board reasonably determined that Manhattan Beer's discharge of its driver resulted from his assertion of his *Weingarten* rights. The Court also upheld the Board's decision to award the driver reinstatement and back pay, it reasoned that there was sufficient nexus between the unfair labor practice committed—the denial of representation at an investigatory interview—and the reason for discharge.

This ruling drives home the point that for employees to be entitled to union representation, they must request union representation during an investigation that may result in discipline, such as when asked to take a drug test.

ASHER, GITTLER & D'ALBA, LTD.
200 West Jackson Boulevard, Suite 1900
Chicago, IL 60606 – 312.263.1500

© 2016 Asher, Gittler & D'Alba, Ltd.

All rights reserved.
Dated: December 20, 2016

This release informs you of items of interest in the field of labor relations. It is not intended to be used as legal advice or opinion.

