

D.C. Circuit Says Firing Employee Who Secretly Records Meeting is an Unfair Labor Practice

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On April 20, the United States Court of Appeals for the District of Columbia Circuit upheld a National Labor Relations Board (“NLRB”) ruling that an employer committed an unfair labor practice by firing an employee who secretly recorded a conversation with his supervisor. The employee, a union steward, confronted the supervisor because he believed the supervisor was about to conduct a disciplinary investigation interview with a co-worker without allowing the co-worker to have a witness present. The co-worker had signaled to the steward that she wanted him to be present for the interview. The steward consulted with other employees, who encouraged him to record the confrontation with the supervisor with a concealed tape recorder. The employer investigated the incident, suspended the employee who provided the recorder and terminated the steward after he refused to turn over the recording and sign a letter admitting that the recording was an act of serious misconduct. The NLRB found that the employees were engaged in protected action under *N.L.R.B. v. Weingarten*, a Supreme Court case holding that the National Labor Relations Act guarantees an employee the right to have a union representative present during an investigatory interview in which there is a risk of discipline. The D.C. Circuit agreed and found that the steward had a reasonable basis for believing that the employer was going to violate the co-worker’s rights under *Weingarten*. The Board also held that the secret recording of the conversation was protected because it was intended to document a perceived violation of *Weingarten*. The D.C. Circuit, noting that the recording was not prohibited by company policy, state or local law, or NLRB precedent, held that the NLRB had substantial evidence to find that the secret recording was protected under the Act.

Tip: Employers with unionized workforces should be aware of employee rights to have union representation in certain meetings. All employers may want to examine their workplace policies to actively prohibit surreptitious recordings in the workplace.

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