

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 87-4

29 January 1987

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Joseph E. DeSio, Associate General Counsel

SUBJECT: Motions for Summary Judgment in Gissel Cases

In Handy Dan's Convenient Store, et al., 275 NLRB No. 61, a case in which a Gissel bargaining order had been sought by Summary Judgment because respondent failed to file an answer, the Board granted the motion insofar as it was based on the 8(a)(1) and (3) allegations of the complaint, but denied the bargaining order. The Board stated:

In evaluating the nature and pervasiveness of a company's unfair labor practices, [the Gissel] test requires us to consider many factors before making a determination as to whether a bargaining order is warranted The Complaint in the instant case merely alleges that the Company unlawfully discharged two employees, constructively discharged two employees, and changed the employees' working hours. The complaint further alleges in conclusionary terms that such unfair labor practices preclude the holding of a fair election and that therefore a bargaining order is warranted. In our view, the complaint does not allege sufficient facts to determine whether a bargaining order is warranted and whether the Company therefore violated Section 8(a)(5) and (1) of the Act as alleged. (Slip. Op. pp.3-4.)

Recently, in a similar situation, Abdul Samad, et al., d/b/a Michigan Expediting Service, 282 NLRB No. 30, the Board stated:

In evaluating the nature and pervasiveness of a company's unfair labor practices, that test requires us to consider many factors before making a determination as to whether a bargaining order is warranted. In weighing the pervasive effect of a violation, relevant considerations include the number of employees directly affected by the violation, the size of the unit, the extent of dissemination among the work force, and the identity of the perpetrator of the unfair labor practice. . . . Although the

unfair labor practices here are serious in nature, the complaint does not allege sufficient facts to enable the Board to evaluate the pervasiveness of the violations. For example, the complaint does not allege the size of the unit, the number of employees who witnessed the infliction of bodily injury on Greig, the number of employees who heard the Respondent's statement that Greig was being discharged for union activities, and the number of employees subjected to the Respondent's threat. The complaint also does not allege the extent of dissemination, if any, of these violations among the work force to those employees not directly affected by them. . . .

In order to provide the Board with facts sufficient to support a Motion for Summary Judgment in a Gissel case, the following procedures should be followed. Initially, the traditional Gissel complaint should be issued, including an allegation that the unfair labor practices were so serious and substantial that the possibility of erasing their effects by traditional remedies and conducting a fair election is slight. See, OM Memorandum 84-50. If respondent fails to answer, an amended complaint should issue containing supplementary allegations.

These supplementary allegations would be based upon the "many factors" relied upon by the Board in granting Gissel bargaining orders. These factors include the following: (1) the number of violations; (2) the extent to which unlawful conduct is repeated; (3) the character of the violations (discriminatory discharge, threats to close, etc.); (4) the level of authority of those individuals responsible for the misconduct; (5) whether any of the misconduct has been retracted; (6) the size of the unit; (7) the number of employees to whom the conduct was immediately directed; (8) the number of employees who learned or would likely learn of the misconduct; (9) whether the unlawful conduct followed immediately on the heels of the employer's knowledge of the union's campaign; (10) whether any of the discriminatees were leading organizers for the union.

In general, our current pleading practice provides the Board with sufficient factual information concerning items 1 through 3 above. As to item 4, the typical complaint adequately identifies the level of authority of those individuals responsible for 8(a)(1) conduct; however, for other misconduct, e.g., a discriminatory 8(a)(3) discharge, the typical complaint does not do so. However, the amended complaint should identify the responsible individuals and their positions. As to item 5, our current complaints generally indicate whether or not a discriminatee has been reinstated; however, the typical complaint does not indicate whether other unlawful conduct has been retracted. Hence, the amended complaint should indicate whether or not other alleged unfair labor practices have been retracted. The amended complaint should also contain facts relating to items 6 through 10.

As the list of ten factors is not exhaustive, the amended complaint should contain additional relevant allegations, as necessary, to serve as a basis for obtaining Summary Judgment. If respondent fails to file an answer to the amended complaint, a Motion for Summary Judgment should be filed contending that a Bargaining Order should be granted based upon the admitted allegations.

Any questions concerning implementation of this policy should be addressed to your Assistant General Counsel.

J. E. D.

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