

OFFICE OF THE GENERAL COUNSEL
Division of Operations Management

MEMORANDUM OM 85-9

February 11, 1985

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

FROM: Joseph E. DeSio, Associate General Counsel

SUBJECT: Cases Arising under Section 11(c) of the
Occupational Safety and Health Act

By memorandum 75-29 dated June 24, 1975, copies of the Memorandum of Understanding between the Occupational Safety and Health Administration, U.S. Department of Labor, and the General Counsel, National Labor Relations Board, were distributed to all Regions. Set forth in that Memorandum of Understanding are the procedures for handling unfair labor practice charges where the allegations are also cognizable under Section 11(c) of the OSH Act.

As you know, the Board has now held in Meyers Industries, Inc., 268 NLRB No. 73, that an individually filed OSHA complaint is not protected concerted activity within the meaning of Section 7 of the Act unless the employee filed the complaint on the authority of other employees. That decision has prompted a review of the Memorandum of Understanding and, based upon our review, it is clear that a modification of the Memorandum of Understanding is unnecessary. That is, the memorandum recognizes that not all safety and health activities are concerted and protected under the Act, and that "where a charge involving issues covered by Section 11(c) of the OSH Act has been filed with the General Counsel and a complaint has also been filed with OSHA as to the same factual matters, the General Counsel will, absent withdrawal of the matter, defer or dismiss the charge." (emphasis supplied) The memorandum goes on to provide: "The General Counsel will process under the NLRA those charges covered by Section 11(c) of the OSH Act where, . . . the charging party has not filed or, having filed, has withdrawn a complaint with OSHA." (emphasis supplied). Thus, the memorandum allows for the dismissal of nonmeritorious unfair labor practice charges which involve issues covered by Section 11(c) of the OSH Act whether or not a complaint is pending with OSHA.

In cases where a charge is dismissed based upon the Board's decision in Meyers, the procedures in the Memorandum of Understanding (i.e., notice to the employee of his or her rights under 11(c) of the OSH Act; notice to OSHA, etc.) should be carried out. Further, any pending charges which have been deferred to OSHA but which, based on Meyers, fail to establish a violation of the Act, should be dismissed, absent withdrawal.

Any questions concerning this matter should be directed to your Assistant General Counsel.

J. E. D.

A handwritten signature, possibly "J. E. D.", is written over the typed name. The signature is a vertical line with a small loop at the top and a horizontal stroke at the bottom.