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Labor Law - Employer's Duty to Bargain - Authorization Cards [*NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)]

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treatment for illegitimates under the equal protection clause is at stake. As Mr. Justice Douglas stated for the majority in *Levy*: "[W]e have been extremely sensitive when it comes to basic civil rights . . . and have not hesitated to strike down an invidious classification even though it had history and tradition on its side."[51] Because discriminatory classifications based on illegitimacy are inherently suspect, regulation of succession is not subject to the unbridled discretion of the states. Concededly, the illegitimate child will not be completely equal to his legitimate counterpart since he will be required to prove his paternity or maternity before enjoying his right of inheritance; but he will be equal in the sense that any claimant able to prove a family relationship will enjoy these rights on an equal basis with legitimate descendants.

NORMAN A. LEVINE

LABOR LAW — EMPLOYER'S DUTY TO BARGAIN — AUTHORIZATION CARDS

NLRB v. Gissel Packing Co.,
395 U.S. 575 (1969).

A primary purpose of the National Labor Relations Act (NLRA) is to encourage collective bargaining and to protect "the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing."[1] A basic problem in achieving this objective has been the development of a fair and efficient means by which workers can choose their bargaining representatives. Traditionally, employees have selected their union by means of a secret ballot, but with the highly emotional atmosphere usually present at the typical election it may be more realistic to assume that such a "democratic" process is not completely secret nor free from untoward pressures from both sides. Frequently, the union and employer use any means — both legal and illegal — in an attempt to influence the results of the balloting. As a result, the NLRB and the courts have been hard pressed to insure the existence of "laboratory conditions" at the time of balloting. Nevertheless, since it is virtually impossible to police every aspect of the election, irregularities often do occur, thus rendering

[51] 391 U.S. 68, 71 (1968).

a fair election relatively improbable. In the face of this perplexing dilemma the courts and the Board have been forced to look to other methods of determining the workers' choice. In *NLRB v. Gissel Packing Co.*,[2] the Supreme Court seems to have firmly established the use of authorization cards[3] as an alternative indicator of employee preference when the employer's misconduct prevents the holding of a fair and representative election.

In *Gissel* the union notified the employer that it had obtained authorization cards from 31 of 47 employees. The employer refused to recognize the union and continued to wage an anti-union campaign. Instead of filing for an election, the union filed charges of unfair labor practices claiming that the company had violated the NLRA: Section 8(a)(1), by coercively interrogating and intimidating employees; section 8(a)(3), by discriminatorily discharging two union adherents; and section 8(a)(5), by refusing to bargain.[4] The NLRB agreed and issued a bargaining order. The

[1] National Labor Relations Act, 29 U.S.C. § 151 (1964) [hereinafter cited as NLRA].

[2] 395 U.S. 575 (1969). *Gissel* is actually a consolidation of three cases with similar factual situations. (NLRB v. Gissel Packing Co., 398 F.2d 336 (4th Cir. 1968); NLRB v. Heck's, Inc., 398 F.2d 337 (4th Cir. 1968); General Steel Prods., Inc. v. NLRB, 398 F.2d 339 (4th Cir. 1968)). In each case there were violations of the NLRA and a resultant request to bargain on the basis of a card majority. In each case the Fourth Circuit refused to enforce a bargaining order against the employer. The Supreme Court combined the cases on appeal and examined in greater detail the factual situation of *Gissel*.

[3] Authorization cards are used by union solicitors during an organization campaign. The current Board practice is not to conduct an election unless the union has obtained cards signed by at least 30 percent of the employees in the particular unit. This eliminates the need to conduct an election where the union has no chance of success. There are two types of cards: one indicates the signer desires an election; the other authorizes the union to represent the signer in collective bargaining. The latter (the type of card used in *Gissel*) may be used either to petition for an election or to determine if the signer wants union representation. The wording of the *Gissel* card was as follows:

APPLICATION
FOOD STORE EMPLOYEES UNION, LOCAL #347
(the union's address)

The undersigned hereby authorizes this Union to represent his or her interest in collective bargaining concerning wages, hours, and working conditions.

There was a space at the bottom for the worker's name, address, and other information. Brief for Petitioner at 4, NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

[4] Section 8(a) of the NLRA provides in part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees . . . .

(3) by discrimination in regard to hire or tenure or employment . . . to encourage or discourage membership in any labor organization . . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title. 29 U.S.C. § 158(a) (1964).

court of appeals affirmed the NLRB's additional order requiring the employer to remedy the section 8(a)(1) and 8(a)(3) violations, but refused to enforce the bargaining order,[5] holding that the employer had a "good faith doubt" as to the union's majority.[6] On appeal to the United States Supreme Court, the pivotal issue of whether authorization cards themselves could serve as grounds for a bargaining order was resolved on the basis of answers to three questions: (1) Does the NLRA require an election? (2) How valid are the authorization cards as indicators of employee's desires? (3) What factors should the court consider in determining whether to issue a bargaining order or to require an election?

The Court affirmed the NLRB's contention that the Act does not require a formal election for employees to select their representative. In so holding, the Court looked to the sections of the Act that relate either directly or indirectly to the selection process. While section 8(a)(5)[7] requires that the employer bargain with the "representatives of his employees," there is no requirement that such representatives must be elected. Section 9(a)[8] delineates the procedures for choosing these representatives by providing that they be "designated or selected" by a "majority of the employees." Once again, there is no suggestion that an actual election is necessary.[9]

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[5] However, in a factually similar case, Sinclair Co. v. NLRB, 397 F.2d 157 (1st Cir. 1968), the First Circuit sustained all of the NLRB's findings and ordered the employer to bargain with the Union. This conflict between the circuits prompted the Supreme Court to consider the instant cases.

[6] The finding of a "good faith doubt" was the basis of the test formerly used by the Board in deciding whether to issue a bargaining order. For a discussion of this test, see text accompanying notes 25-28 *infra.*

[7] 29 U.S.C. § 158(a) (1964). The pertinent provisions of section 8(a)(5) are set out in note 4 *supra.*

[8] Section 9(a) of the NLRA provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit. 29 U.S.C. § 159(a) (1964).

[9] The leading case in this area is Frank Bros. Co. v. NLRB, 321 U.S. 702 (1943). The union had obtained signed cards from 45 to 80 employees and had filed for an election when the employer began a vigorous anti-union campaign. The union withdrew its petition and instead filed charges of unfair labor practices. Meanwhile 7 months passed and 13 of the original union proponents had left the company. Even though the union no longer had a majority, the NLRB issued a bargaining order, ruling that the employer should have bargained when there *was* a majority. The Supreme Court affirmed the Board's position, reasoning that to do otherwise would encourage employers to refuse to bargain and to purposely delay in the hope that the union support would dissipate. In response to the argument that the employees were deprived of a free choice, the Court answered that the bargaining relationship was not permanent. Consequently, if after the initial arrangement had undergone a trial period the employees were dissatisfied, they could effectuate the selection of a new agent.

The Court also considered it significant that the House version of the Taft-Hartley Bill,[10] which would have amended section 8(a)(5) to require the employer to bargain only with a certified union, was rejected at the House-Senate conference.[11] Since the NLRA makes an election a prerequisite to certification,[12] the rejection of this proposed change suggests that the legislators recognized the existence of other means for designating representatives. Thus, it is clear from both the history of the NLRA and the express wording of the adopted version of the amendment itself that an election was not intended to be the sole means of selecting a bargaining agent.

Notwithstanding, the company argued that a 1947 amendment to section 9(c) gave the employer an absolute right to an election.[13] The Court, however, looked to the legislative history of the Taft-Hartley Act and noted that the purpose of the amendment was merely to permit employers to petition for an election when a union demanded recognition. Prior to 1947, only the union and the employees had the right to initiate the petition; the amendment did no more than extend this same right to the employer.[14] The company further contended that an additional change to section 9(c), requiring an election as a prerequisite to certification, made an election the exclusive means of selecting representatives.[15] However,

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[10] The Taft-Hartley Act of 1947 amended the NLRA generally to make the provisions of the Act "two-sided."

The House version of section 8(a)(5) would have required the employer to bargain if the union is "currently recognized by the employer or certified as such under section 9." H.R. REP. NO. 245, 80th Cong., 1st Sess. 30 (1947); 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 51 (1948) [hereinafter cited as LEGISLATIVE HISTORY].

[11] In his report on the changes made in the bill at this conference, Mr. Hartley gave no reason why the House amendment was rejected. H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 41 (1947); LEGISLATIVE HISTORY, *supra* note 10, at 545.

[12] For a discussion of this provision of the NLRA, see notes 15-16 *infra* & accompanying text.

[13] Section 9(c) in its amended form provides:

> Whenever a petition shall have been filed . . . (A) by an employee . . . (B) by an employer . . . the Board shall investigate such petition and if it has reasonable cause to believe . . . that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. § 159(c)(1) (1964).

[14] Prior to the 1947 amendments, the NLRA did not specify who might petition the NLRB for an election, and the Board had interpreted it to mean that only the employees or the union could so petition. Such an interpretation effectively prevented the employer from testing a claim by the union that it represented a majority of the workers. Section 9(c)(1)(B) was added to the NLRA in 1947 to give the employer the right to petition when he was confronted with a union demand for recognition. H.R. REP. NO. 245, *supra* note 10, at 35; LEGISLATIVE HISTORY, *supra* note 10, at 326, 416-17; S. REP. NO. 105, 80th Cong., 1st Sess. 11 (1947).

[15] Prior to the 1947 amendments, section 9(c) of the NLRA provided that the

the Court viewed this amendment as only changing the requirement for *certification.* Sections 8(a)(5) and 9(a) still require the employer to bargain with the representative selected by the employees, whether or not that representative is certified.[16] Since an employer may be required to recognize and bargain with a union which has not been certified, there obviously must be another method of obtaining recognition.

In the past the NLRB has occasionally used authorization cards to determine the workers' preference when a union was demanding recognition. However, the use of the cards for this purpose has been widely criticized[17] because of the atmosphere surrounding a typical card drive. Signatures on such cards are normally obtained in person by union organizers as they talk to employees, either alone or in groups. Since there is no secrecy surrounding the solicitation, the worker may be subjected to group pressures, promises, and threats. Often he signs without fully understanding the consequences. The NLRB has made every effort to purify this solicitation process and thus enable the employee to make an unfettered decision. Its position was enunciated in *Cumberland Shoe Corp.*,[18] where cards unambiguously authorizing the union to act as the employee's bargaining agent were held valid because the employees were not told that the *sole* purpose of the cards was to request an election. The effect of such a ruling is to permit a union organizer

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Board may certify "representatives that have been designated or selected." It further provided that the NLRB "may take a secret ballot of employees, or utilize any other suitable method to ascertain such representative." Act of July 5, 1935, ch. 372, § 9(c), 49 Stat. 449.

[16] The recognition of a distinction between a certified and a recognized union is vital to the Court's reasoning. The Court noted that the following privileges are afforded only to a *certified* union: Protection for 12 months against the filing of new election petitions (section 9(c)(3)); protection for a reasonable period against claims that the union no longer represents a majority (Brooks v. NLRB, 348 U.S. 96 (1954)); protection against recognitional picketing by a rival union (section 8(b)(4)(C)); freedom from the restrictions of section 8(b)(4)(D) in work assignment disputes; and freedom from the restrictions of section 8(b)(7) on recognitional and organizational picketing. 395 U.S. at 599 n.14.

A case decided since 1947 which distinguishes between recognition and certification is United Mine Workers v. Arkansas Oak Flooring Co., 351 U.S. 62 (1956). There the union had not filed certain financial data and non-communist affidavits — a prerequisite to obtaining NLRB certification. Even so, the employer was required to recognize the union since it had authorization cards from a majority. The Supreme Court held that representation is not dependent on certification by the Board.

[17] The dissenting opinion in NLRB v. Gotham Shoe Mfg. Co., 359 F.2d 684, 693 (2d Cir. 1966), refers to the cards as a "notoriously unreliable method of determining majority status of a union." *See generally* Comment, *Union Authorization Cards*, 75 YALE L.J. 805 (1966).

[18] 144 N.L.R.B. 1268 (1964).

to operate without restriction as long as he refrains from using "only" in his representations;[19] yet the worker may still be left with a misunderstanding as to the purpose of the cards. For this reason many courts have refused to enforce bargaining orders in cases where signatures were obtained through misrepresentations.[20] The NLRB responded to this judicial criticism and cautioned against future mechanical applications of this rule by relying entirely on magic words such as "sole" or "only."[21] In spite of the recent trend toward a more liberal application of this doctrine and the NLRB's caveat against mechanical application of the doctrine, the Supreme Court in *Gissel*, not only affirmed the *Cumberland Shoe* doctrine,

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[19] For example, in NLRB v. Gotham Shoe Mfg. Co., 359 F.2d 684 (2d Cir. 1966), the union organizer told employees: "The cards are for a vote," and "Sign the cards so we can have a vote;" yet, the court refused to invalidate the cards since the employees were not told the cards were *only* for an election. *Id.* at 686. The dissent noted the danger of relying on the word "only" in determining fraud and said the rule came "close to the little bit pregnant notion." *Id.* at 698.

[20] The Sixth Circuit (which on appeal had enforced *Cumberland Shoe*) later refused to enforce a bargaining order after invalidating some of the cards because of misrepresentation. In NLRB v. Swan Super Cleaners, Inc., 384 F.2d 609 (6th Cir. 1967), the court stated:

> [W]e do not consider that we have announced a rule that only where the solicitor of a card actually employs the specified words "this card is for the *sole* and *only* purpose of having an election" will a card be invalidated. We did not intend such a narrow and mechanical rule. We believe that whatever the style or actual words of the solicitation, if it is clearly calculated to create in the mind of the one solicited a belief that the *only purpose of the card is to obtain an election*, an invalidation of such card does not offend our *Cumberland* rule.
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> . . . .
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> The undenied statement of Makowski here that the cards "did not mean a thing" other than for election and that the signing of the cards "wasn't joining the union" were clear misrepresentations . . . . *Id.* at 618-19.

Accord, NLRB v. S.B. Nichols Co., 380 F.2d 438 (2d Cir. 1967). *See generally* Browne, *Obligation to Bargain on Basis of Card Majority*, 3 GA. L. REV. 334 (1969). Browne states that all of the courts which have recently considered the *Cumberland* rule have rejected it. *Id.* at 339. Union organizers do not always attempt to misrepresent the purpose of the cards; of the three cases consolidated in *Gissel* the validity of the cards was challenged only in *General Steel.*

In defense of the Board's policy, it should be noted that when the cards are challenged the hearing is usually held months after the signing. The employee may not remember exactly what he was told at the time, and what he does remember may be influenced by what he thinks his employer would like to hear. Sheinkman, *Recognition of Unions Through Authorization Cards*, 3 GA. L. REV. 319, 332-33 (1969).

[21] *See, e.g.*, Levi Strauss & Co., 172 N.L.R.B. No. 57, 68 L.R.R.M. 1338, 1341-42 n.7 (1968). In *Levi*, the Board attempted to answer some of the recent criticism by reasoning that misrepresentation is not confined to situations where "sole" and "only" are used; it is not the use of "magic words," but the "totality of circumstances" which will be considered when judging the validity of the cards. It is submitted, however, that the Board failed to heed its own warning. One member dissenting from the Board's findings as to the validity of the cards in *Levi*, cited statements, such as "signing a card didn't mean that we were joining the union," to show that there had been misrepresentation. *Id.* at 1340-41 n.3.

but, indeed, seems to have relied on such magic words itself.[22] The Court held that when the card states clearly, in plain language that the employee authorizes the union to represent him, the employee should be bound. Justification for the use of the rule was found in the increasing degree of sophistication possessed by the average worker.[23]

Because the cards are subject to abuse, both the NLRB and the Supreme Court agree that an election is the favored method of selection in most circumstances;[24] the cards should only be used if there is no other satisfactory means to gauge employee desires. In determining whether to use the cards or to hold an election, the NLRB traditionally had used the "good faith doubt" test set forth in *Joy Silk Mills, Inc. v. NLRB*.[25] There the court stated that the employer may insist on an election if he clearly shows that his refusal to recognize the union stems from a bona fide doubt as to the union's majority status.[26] The existence of a "good faith doubt" was determined by the facts of the particular case, and employer unfair labor practices were usually interpreted as evidence of "bad faith." The NLRB modified the *Joy Silk* doctrine in 1966 by shifting the burden of proof, thus requiring the General Counsel

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[22] In *Gissel*, the Supreme Court affirmed the findings of the NLRB concerning alleged misrepresentations by the union organizer in *General Steel*. The NLRB had found the following statements to be insufficient to invalidate the cards: "(1) that the card would be used to get an election, (2) that [the employee] had the right to vote either way, even though he signed the card, and (3) that the card would be kept secret and not shown to anybody except to the Board in order to get an election." General Steel Prods., Inc., 157 N.L.R.B. 636, 645 (1966). The trial examiner found that this was not the "absolute equivalent of telling the employee it will be used 'only' for the purposes of obtaining an election." *Id.* This certainly seems to be a mechanical application of the *Cumberland* rule, yet the Court affirmed this conclusion, stating that it represented the "limits" of the rule.

[23] Yet, in finding a violation of section 8(a)(1), the trial examiner in *General Steel* placed great weight on the illiteracy of the employees which made it possible for the employer to create in the employees a false impression of their right to strike. It is submitted that illiteracy could affect to a comparable degree the employees' understanding of the purpose of the cards in *Gissel*.

[24] This is reflected in the statistics for 1967 which show that there were 8,116 elections, while only 157 bargaining orders were issued on the basis of a card majority. Levi Strauss & Co., 172 N.L.R.B. No. 57, 68 L.R.R.M. 1338, 1342 n.9 (1968). However, one author notes that there is a "steadily increasing use of cards" for this purpose — 12 cases in 1964; twice as many in 1965; and about 117 in 1966. Browne, *supra* note 20, at 347.

[25] 185 F.2d 732 (D.C. Cir.), *cert. denied*, 341 U.S. 914 (1951).

[26] The Board stressed the importance of the employer's motive. If there was doubt as to the union's majority the employer might insist on the election; not so, however, if he was motivated by a rejection of the bargaining principle or by a desire to gain time in which to undermine the union. Joy Silk Mills, Inc., 85 N.L.R.B. 1263, 1264 (1949).

to present evidence establishing the employer's "bad faith."[27] The Board further declared that the employer no longer needed to give a reason for refusing to bargain, and that not every unfair labor practice would automatically lead to a bargaining order.

In arguing *Gissel*, the NLRB announced that its current practice was to issue a bargaining order based on a card majority when an employer's unfair labor practices had disrupted the election process. The Board admitted that it had used the term "bad faith" in some of its recent decisions; however, it urged that "bad faith" was only found when the possibility of a fair election was unlikely. Notwithstanding the allegedly favorable effect of the Board's current mode of administering the test, the *Gissel* Court adopted a new standard which completely discards any vestiges of the "good faith doubt" test. An employer may now refuse to bargain with a union on the basis of cards alone, and, instead, may either petition for an election or require the union to do so. Before initiating the election procedures, the Board will examine the employer's pre-election conduct. If, in its opinion, any unfair labor practices preclude the holding of a fair election, the Board will look to the cards as the basis for a potential bargaining order.[28]

In its decision the Court attempted to strike a balance, taking into account the rights of the union, the employer, and the employee. It rejected the union's contention that cards should be used more freely and recognized that an election is the preferred means of attaining recognition.[29] Yet, it also acknowledged that an employer's unfair labor practices may prejudice the results of the balloting.[30] Where an unfair labor practice has the potential for invalidating election results the Board may utilize this alternative

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[27] Aaron Bros. Co., 158 N.L.R.B. 1077 (1966). Here the employer committed no unfair labor practices, but insisted on an election when presented with a request to bargain. The Board refused to issue a bargaining order since the employer's "bad faith" had not been proved.

[28] 395 U.S. at 591-92.

[29] The union in *Gissel* had asked the Court to either reaffirm *Joy Silk* or to at least require the employer to file for the election rather than allowing him to insist that the union file. *See* 395 U.S. at 594-95.

[30] Remedies such as cease and desist orders or posting of notices have proven inadequate to allay the effects of such serious employer misconduct. Indeed, in the years 1960-62, 70 percent of the rerun elections were won by the party who interfered with the first election. A notable example is the employer who threatens to close the plant. *See* Pollitt, *NLRB Re-Run Elections: A Study*, 41 N.C.L. REV. 209, 212-13, 223 (1963).

Thus, it is submitted, the card-based bargaining order looms as the only alternative and, in fact, may prove to be the most effective deterrent to future employer misconduct.

means by issuing a bargaining order based on the union's card majority and thus prevent the employer's profiting from his illegal acts.

Unfortunately, it seems that here the balancing was terminated. Indeed, the serious flaw in the decision appears to be the Court's failure to fully protect the employees' rights by declining to impose a restriction on the solicitation process which would invalidate cards obtained through misrepresentation. In relying on *Cumberland Shoe*, the Court has done nothing to curb union abuse of this rule. In light of the professed concern with the protection of employee rights, it would seem that more stringent requirements should be imposed in the validation process to insure that signatures on authorization cards truly reflect employee desires.[31]

In spite of the Court's failure to censure union abuse of the cards, the decision is basically sound. In establishing a new standard to replace the "good faith doubt" test, the Court has recognized that it is the employer's conduct rather than his intent which should determine how the cards will be used. The new test should be much easier to administer. Since the employer's intent is irrelevant, the NLRB need only look for illegal acts that could have prejudiced the election. Both the NLRB and the Court agree, however, that not every unfair labor practice will automatically interfere with an election; only when the employer's conduct is viewed in light of the totality of the circumstances surrounding each particular election will the true vitiating effect be realized.[32] Since the Court considers the secret ballot to be the most reliable method for ascertaining employee desires, it probably would not approve the use of a bargaining order if the employer committed no unfair labor practices. Thus, it seems clear that an employer who is guilty of no misconduct and who is confronted with a union request to bargain on

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[31] Ironically, it has been argued that the use of authorization cards in this manner interferes with the employee's right to a free choice of representation. It is submitted, however, that the use of the secret ballot presents the same problem. Use of the ballot is premised on the assumption that the employee is able to make an independent, unfettered decision. Such a decision becomes quite difficult when the employer has used coercion and threats in an attempt to influence his choice. *See* Bok, *The Regulation of Campaign Tactics in Representative Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 135 (1964). *See also* Lesnick, *Establishment of Bargaining Rights Without an Election*, 65 MICH. L. REV. 857, 862 (1967), wherein the author suggests: "When the preferred method of determining employee wishes has been tampered with, it totally begs the question to say that employee rights are sacrificed by a bargaining order." The employee rights are affected in any event.

[32] For an example of a violation which was not considered severe enough to support a bargaining order, see Hammon & Irving, Inc., 154 N.L.R.B. 1071 (1965). The employer interrogated 6 of 110 employees. The NLRB found a section 8(a)(1) violation, but said that not every act of misconduct vitiates the employer's good faith.