

Employee conduct not protected by Section 7 when disloyal to employer.

Recently, the Eighth Circuit Court of Appeals reversed a NLRB ruling and a prior decision entered by a three-judge panel of that Circuit Court that MikLin Enterprises (who own and operate several Jimmy John's franchises) violated sections 8(a)(1) and 8(a)(3) of the NLRA for disciplining its employees who publicly distributed posters that suggested the MikLin Jimmy John's sandwiches posed a health risk to consumers, solicited employees to remove the posters, encouraged employees to disparage a union supporter, and removed union literature from in-store bulletin boards.

In 2007, several MikLin workers began an organizing campaign with Industrial Workers of the World ("IWW") union. The IWW lost a Board-conducted election, but continued its organizing campaign to give workers holiday pay. In early 2011, IWW organizers began a campaign for paid sick leave. Employees were responsible for finding their own replacements if sick, and could not just call in. This campaign included public posters that prominently featured two identical images of a Jimmy John's sandwich. Above the first image were the words, "YOUR SANDWICH MADE BY A HEALTHY JIMMY JOHN'S WORKER." The text above the second image said, "YOUR SANDWICH MADE BY A SICK JIMMY JOHN'S WORKER." "HEALTHY" and "SICK" were in red letters, larger than the surrounding text in white. Below the pictures, white text asked: "CAN'T TELL THE DIFFERENCE?" The response, in red and slightly smaller: "THAT'S TOO BAD BECAUSE JIMMY JOHN'S WORKERS DON'T GET PAID SICK DAYS. SHOOT, WE CAN'T EVEN CALL IN SICK." Below, in slightly smaller white text, was the warning, "WE HOPE YOUR IMMUNE SYSTEM IS READY BECAUSE YOU'RE ABOUT TO TAKE THE SANDWICH TEST." Text at the bottom of the poster asked readers to help the workers win paid sick days by going to their website. Store managers quickly removed the posters, but IWW distributed a press release including the language from the posters. The press release also indicated that Jimmy John's was putting their customers at risk by letting the sandwich-makers continue to work.

An employer commits an unfair labor practice if it discharges employees for engaging in concerted activities that are protected by Section 7 of the NLRA. This includes communications to third parties or to the public. However, the United States Supreme Court has developed a standard of measuring employee disloyalty, and when such disloyalty goes outside the bounds of protected Section 7 activity. This is known as the *Jefferson Standard*. Essentially, employees are not protected by Section 7 when their indefensible conduct is found to show a disloyalty to the employer and the conduct is not necessary to carry the workers' legitimate concerted activities.

The Board has expanded *Jefferson* analysis in its numerous decisions. In this case, the Eighth Circuit has found that the Board has misconstrued the *Jefferson Standard* in its analysis. The Board requires that an act of employee disparagement is protected unless "maliciously motivated to harm the employer." The Eighth Circuit found that this language has essentially overruled the Supreme Court's *Jefferson Standard*. This Court explained the *Jefferson standard* principle applies even if the employees had explicitly related their public disparagement to their ongoing labor dispute.

The Board (and dissenting judges) argued that its decision is entitled to judicial deference under the *Chevron* case. The Eighth Circuit rejected this claim stating this position would leave the Board free to disregard any prior Supreme Court interpretation of the NLRA, and runs contrary to the 80 years of Supreme Court decisions reviewing the heavily litigated NLRA.

Applying the facts of this case, the Eighth Circuit found that the IWW attack was sharp and proceeded in manner “calculated to harm the company’s reputation and reduce its income.” As such, the Eighth Circuit found that this conduct was not protected Section 7 activity and the company had cause to discipline these employees. Further, the Company soliciting employees to remove the communications was also not a violation of Section 7.

However, there were a few issues in which the Eighth Circuit upheld the Board’s decision. First, a MikLin manager posted on Facebook an employee/union-supporter’s personal information, along with disparaging personal attacks against the employee. Some other managers further disseminated the information and piled on the comments. The Board found that this violated section 8(a)(1) because it encouraged employees to harass the union-supporter employee simply for supporting the union. The Court upheld this decision. Second, the Company removed an IWW flyer that gave the employees an interpretation of the previous settlement regarding the contested election. Under the law, where by policy or practice, the company permits employee access to the bulletin boards, section 7 permits employees to post union materials. The Company had no response to this. The Board found this violated Section 8(a)(1) of the Act. The Eighth Circuit upheld this decision.

All in all, the first part of this decision is not a good result for unions. The NLRB’s expanded interpretation of *Jefferson* gave employees more protections when communicating negatively about an employer stemming from a labor dispute. Here, the IWW was pushing for paid sick leave, and the measures taken to inform about its situation to the public were deemed unprotected. This scales back employee protections. The Eighth Circuit also limited the NLRB’s authority to interpret and implement the NLRA under *Chevron*. The Court here rejected the NLRB’s interpretation of the *Jefferson Standard*, and held that the NLRB does not have authority to overrule Supreme Court law. The issue of agency deference will likely be litigated in front of the Supreme Court for years to come.

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