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A Circuit Split Over Employee Disloyalty

Employee Disloyalty

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Douglas Darch and Shaun Cassin

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In two recent opinions, circuit courts have grappled with the interface between employee disloyalty as grounds for discharge and the protections Section 7 of the National Labor Relations Act grants employees when acting concertedly. *MikLin Enterprises, Inc. v. NLRB*, No. 14-3099 (8th Cir. 2017); *DirecTV, Inc. v. NLRB*, 837 F.3d 25 (D.C. Cir. 2016). The opinions yielded conflicting results, as acknowledged by the U.S. Court of Appeals for the Eighth Circuit itself. Based on the holding of *MikLin Enterprises*, employers in the Eighth Circuit may have greater freedom to discipline disloyal employees than employers in other circuits. Given this circuit split over the legal standard for disciplining disloyal employees, and considering the NLRB's policy of nonacquiescence, employers in all jurisdictions should carefully examine their approach to disloyalty.

Background of Employee Disloyalty Standard

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The legal standard for addressing employee disloyalty developed through a dispute between a television station and its employees. *Jefferson Standard Broad. Co.*, 94 N.L.R.B. 1507 (1951). While the employees were picketing in protest of the station's refusal to renew certain contract provisions, some employees released handbills that criticized the station's product and quality of its broadcasts. After the station terminated these employees, the NLRB found it was lawful for an employer to discharge employees for ''deliberately undertaking to alienate their employer's customers by impugning the technical quality of his product.'' The NLRB reasoned that product disparagement was not conduct protected by the Act because the ''gist of [the employees'] appeal to the public was that the employer ought to be boycotted because he offered a shoddy product . . . not because he was 'unfair' to the employees who worked on the product.'' The Supreme Court ultimately affirmed the NLRB's decision, albeit on slightly broader grounds. *NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464 (1953) (''*Jefferson Standard*'').

The Supreme Court emphatically and unequivocally stated that ''there is no more elemental cause for discharge of an employee than disloyalty to his employer.'' It then struck a balance between the employer's right to discharge an employee and Section 7's guarantees by granting greater weight to the employer's concerns. In holding that the station's decision to discharge the employees was lawful, the Court stated, ''Even if the attack were to be treated . . . as a concerted activity wholly or partly within the scope of Section 7, the means used by the [employees] in conducting the attack have deprived the [employees] of the protection of that section.''

Although the Supreme Court had appeared to tip the scale in favor of employers, in 1987, the NLRB signifi-

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cantly narrowed its view of disloyalty in *Emarco, Inc.*, 284 N.L.R.B. 832 (1987). Specifically, the NLRB added a higher level of proof to disloyalty claims, under which employers became obligated to prove the employee knew the communications were ''reckless or maliciously untrue.'' The NLRB reasserted this position in *American Golf Corp*., 330 N.L.R.B. 1238 (2000), where it adopted a two prong test to assess whether employees' third party appeals amounted to disloyalty. The first prong asks whether the target audience would understand the appeal arises out of a labor dispute. The second prong asks whether the employees' statements were so ''disloyal, reckless or maliciously untrue'' as to lose the Act's protections. Under the NLRB's developments following *Jefferson Standard*, it became much more challenging for employers to justify disciplining disloyal employees during labor disputes.

Circuit Split

In an en banc decision, the Eighth Circuit recently rejected the NLRB's narrowing of *Jefferson Standard*. In *MikLin Enterprises*, employees of a Jimmy John's franchisee organized a campaign to secure paid sick leave. The employees placed posters in the stores and in nearby public locations that suggested customers' sandwiches were being made by sick employees. Further, the employees strategically began their campaign during flu season, and encouraged the public to contact the restaurant owners to demand paid sick leave for the employees. The employer terminated the employees who organized the attack, and an unfair labor practice charge followed shortly thereafter. The NLRB determined that the employer violated the Act because the posters were not ''shown to be so disloyal, reckless, or maliciously untrue as to lose the Act's protection.''

The Eighth Circuit, however, overturned the Board's decision, observing that by adding the requirement that the employee disparagement must be ''maliciously motivated to harm the employer,'' the NLRB had impermissibly overruled *Jefferson Standard*. In its view, an employer was permitted by *Jefferson Standard* to discharge an employee for ''making a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income.'' The Eighth Circuit further observed that the NLRB erroneously used the ''malicious motive'' requirement to protect any employee communication as long as it related to a labor dispute. The court again found this passed beyond merely interpreting *Jefferson Standard* to effectively overruling it. Likewise, the court dismissed the argument that the NLRB's decision was entitled to *Chevron* deference, reasoning that doing so would ''leave the Board free to disregard any prior Supreme Court or court of appeals interpretation of the NLRA.'' Accordingly, the Eighth Circuit restored *Jefferson Standard*'s more employer-friendly holding regarding disloyalty.

Turning to its prior decisions, the Eighth Circuit noted that disloyal statements can lose Section 7 protection without a showing of actual malice. It held that the franchisee's employees had gone beyond merely seeking paid sick leave into a sharp disparaging attack on the franchisee's product—its sandwiches. According to the court, ''[b]y targeting the food product itself, employees disparaged [the employer] in a manner likely to outlive, and also unnecessary to aid, the labor dispute. Even if [the employer] granted paid sick leave, the image of contaminated sandwiches made by employees who chose to work while sick was not one that would easily dissipate.''

The en banc decision in *MikLin Enterprises* stands in sharp contrast to the D.C. Circuit's decision in *DirectTV v. NLRB*, which was issued several months earlier. In *DirectTV*, a number of employees became dissatisfied with their employer's new pay policy, which permitted the employer to lower their pay when certain services were not sold to customers. Unable to resolve the issue with their employer directly, the employees appeared on a local news segment, making damaging statements and claiming that they were told to lie to customers to sell unnecessary services. The employer terminated the employees after the news segment aired, and, just as it did in *MikLin Enterprises*, the Board held the employer violated the Act by doing so.

On appeal, a divided panel of the D.C. Circuit upheld the NLRB's view that merely mentioning there was a labor dispute shielded an otherwise disparaging and disloyal statement from discipline. Judge Srinivasan joined by Judge Rogers adopted the standard that an employee's public communications had to be ''maliciously untrue'' or rise to the level of ''flagrant disloyalty, wholly incommensurate with any employment-related grievance.'' In doing so, the panel majority adopted a subjective test for the employees' intent, rather than an objective one as used by the Eighth Circuit.

In a scathing dissent, Judge Brown argued, similar to the Eighth Circuit opinion, that the requirement of subjective intent effectively overturned *Jefferson Standard*. She stated that under the NLRB's and D.C. Circuit's test, it would be ''impossible for disloyal and disparaging employee behavior to be the basis for termination, so long as it is connected to an ongoing labor dispute.'' She further noted that ''in endorsing the Board's examination of the [employees'] subjective intent, the majority goes so far as to accept the 'relation' itself as valid evidence undermining any finding of disloyalty. Going forward it is difficult to see how employee behavior could satisfy the test's first prong and nonetheless still fail the second.''

What's Next?

It remains to be seen if the NLRB will simply ignore the decision in *MikLin Enterprises* or whether it will seek certiorari to resolve the circuit split. There is some impetus for a petition, given the D.C. Circuit's recent decision in *Heartland Plymouth Court*. Similarly, assuming President Trump's nominees to the NLRB are confirmed, it is unclear if a Republican controlled NLRB will use a more employer-friendly standard for disloyalty. In the meantime, employers should carefully review employee discipline for public comments or protests, even if the protest disparages the employer or its products or services. Employers should anticipate that well-coached employees will always link such comments to a labor dispute in some fashion. Until the NLRB indicates otherwise, employers should expect the NLRB to require a showing of subjective, malicious intent from employees to lose the protection of the NLRA.

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