LABOR LAW — EMPLOYEE DISLOYALTY — EIGHTH CIRCUIT HOLDS EMPLOYEE ORGANIZING ACTIVITY UNPROTECTED FOR DISLOYALTY DESPITE LACK OF "MALICIOUS MOTIVE." — *MikLin Enterprises, Inc. v. NLRB*, 861 F.3d 812 (8th Cir. 2017) (en banc).

The statutory framework governing labor disputes is the National Labor Relations Act[1] (NLRA), section 7 of which specifically protects employees who "engage in . . . concerted activities for the purpose of . . . mutual aid or protection."[2] Since the NLRA's passage, however, Congress and the courts have chipped away at the array of tactics available to employees and unions in labor disputes.[3] As a result of these judicial and legislative carve-outs, the NLRA has become increasingly ineffective.[4] In response, some unions and employees have shifted the focus of their organizing tactics, including strategically targeting the public in order to compel employers to meet their demands at the bargaining table or else face consumer backlash.[5] Recently, in *MikLin Enterprises, Inc. v. NLRB*,[6] the Eighth Circuit applied the longstanding rule for employee "disloyalty," holding that employees who publicly attack their employer "in a manner reasonably calculated to harm the company[]" are beyond the realm of NLRA protection.[7] In reaching this conclusion, the court misinterpreted "disloyalty" in a way that is inconsistent with the NLRA and cuts against one of the law's primary purposes: to equalize bargaining power between employees and employers.[8]

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[1] 29 U.S.C. §§ 151–169 (2012).

[2] *Id.* § 157. The provision contained in § 157 is generally known as "section 7."

[3] *See* Richard A. Bock, *Secondary Boycotts: Understanding NLRB Interpretation of Section 8(b)(4)(B) of the National Labor Relations Act*, 7 U. PA. J. LAB. & EMP. L. 905, 912–14 (2005) (stating that the Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.), which in 1947 amended the NLRA, served as the precursor to today's significant limitations on secondary boycotts); Julius G. Getman, *The NLRB: What Went Wrong and Should We Try to Fix It?*, 64 EMORY L.J. 1495, 1496–98 (2015) (describing examples of how the Supreme Court has crafted and enforced restrictions that inhibit union organization).

[4] *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1529–30 (2002).

[5] *See id.* at 1605–06; *see also* Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 FORDHAM L. REV. 2617, 2621–22 (2011) (noting that due to the falling rates of unionization in the United States, unions have turned to comprehensive campaigns, which often involve rallying a broad base of public support).

[6] 861 F.3d 812 (8th Cir. 2017) (en banc).

[7] *Id.* at 819 (quoting NLRB v. Local Union No. 1229, IBEW (*Jefferson Standard*), 346 U.S. 464, 471–472 (1953)). *But see* NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 506 (2d Cir. 1942) (noting that public appeals "may be highly prejudicial to [the] employer; his customers may refuse to deal with him . . . ; but the statute forbids him by a discharge to rid himself of those who lay such burdens upon him"), *superseded on other grounds by statute*, 61 Stat. 136.

[8] *See* 29 U.S.C. § 151 (2012) (identifying unequal bargaining power between employees and employers as one of the causes of falling purchasing power and instability); 78 CONG. REC. 3679 (1934) ("The primary requirement for cooperation is that employers and employees should possess equality of bargaining power."); *see also* Melinda J. Branscomb, *Labor, Loyalty, and the Corporate*

In early 2011, the Industrial Workers of the World (IWW) began a campaign demanding that MikLin Enterprises, a company operating ten Jimmy John's sandwich shops, provide all its employees with paid sick leave.[9] Under the MikLin employee handbook, any employee calling in sick was required to find a replacement. The company's rules for employment further stated: "We do not allow people to simply call in sick! We require our employees . . . to find their own replacement! NO EXCEPTIONS!"[10] In order to call attention to this policy and garner support for the IWW, a contingent of MikLin employees began a poster campaign.[11] The campaign sought to draw a connection between the company's sick day policy and the quality of Jimmy John's sandwiches, and implied that customers may be exposed to unsafe food due to the workers' inability to stay home when ill.[12] The posters concluded with a direct appeal to the public: "Help Jimmy John's workers win sick days."[13] After MikLin managers removed these posters from store bulletin boards, the IWW issued a press release calling attention to the issue and threatening to plaster the posters citywide unless management complied with their requests.[14] Management altered their sick leave policy in mid-March,[15] but the IWW supporters, unsatisfied with the change, carried out their plan on March 20.[16] Two days later, six employees who coordinated the campaign were fired.[17]

The IWW filed a charge against MikLin with the NLRB, alleging that the firing was an unfair labor practice.[18] The Administrative Law Judge (ALJ) ruled in favor of the employees, finding the posters to be protected activity under section 7.[19] The ALJ determined that communications may lose protection if they are deemed "disloyal, reckless, or

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Campaign, 73 B.U. L. REV. 291, 369–70 (1993) (explaining that a desire to arm employees with economic weapons and legal protection motivated passage of the NLRA).

[9] *MikLin Enters.*, 861 F.3d at 815.

[10] *Id.*

[11] *Id.* at 815–16.

[12] *See id.* at 816.

[13] *Id.* at 839.

[14] *Id.* at 816.

[15] The new policy included a disciplinary point system where employees would receive points for failing to find replacements. Four points in a year would result in termination. *Id.* at 816–17.

[16] *Id.* at 817.

[17] *Id.*

[18] *See* MikLin Enters., Inc., Nos. 18-CA-19707 et al., 2012 WL 1387939, slip op. at 1 (N.L.R.B. Div. Judges Apr. 20, 2012). The IWW also complained of several other unfair labor practices: interrogating an employee, removing union literature from a company bulletin board, urging employees to take down the posters, and encouraging the disparagement of a union supporter. *See id.* at 1–2. The Administrative Law Judge (ALJ) agreed with the IWW with respect to the removal of union literature and the harassment of a union supporter but dismissed the complaints of general disparagement of the union supporter on Facebook and the claim of interrogation. *Id.* at 14–15.

[19] *See id.* at 9–14.

maliciously untrue,"[20] but the mere fact that a tactic might harm an employer's finances or reputation is not enough to constitute disloyalty.[21] Instead, public criticism must "evidence a malicious motive" in order to be deemed disloyal.[22] The ALJ then applied the NLRB's two-part disloyalty test for retaining section 7 protection in the context of third-party appeals.[23] The first prong, that the communication must be related to the ongoing labor dispute, was "clearly me[t]" because the posters specifically referenced the employees' lack of sick days, a term of employment at issue in their ongoing dispute.[24] The ALJ then noted that the workers' insinuation that customers might get sick did not rise to the level of malicious motive required to satisfy disloyalty,[25] and pointed to prior health-related incidents at MikLin to suggest that perhaps the sick leave policy did increase the likelihood of customers getting sick.[26] A divided three-member panel of the NLRB largely adopted the ALJ rulings and recommended the order,[27] agreeing that the clear labor-dispute nexus and lack of malicious motive meant the posters were protected.[28]

A divided panel of the Eighth Circuit affirmed.[29] Writing for the majority, Judge Kelly[30] reviewed the NLRB's findings and held that the Board had not erred in concluding, first, that the posters indicated their connection to an ongoing labor dispute and, second, that the posters did not transcend the bounds of section 7 for being "disloyal or recklessly disparaging."[31] Judge Loken dissented in part and argued that the NLRB and panel majority had misapplied the Supreme Court's longstanding precedent established in *Jefferson Standard*,[32] a case where

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[20] *Id.* at 10 (quoting Valley Hosp. Med. Ctr., Inc., 351 N.L.R.B. 1250, 1252 (2007)).

[21] *Id.* ("[P]rotected activity will often adversely impact an employer's reputation and revenue.").

[22] *Id.* (internal quotation marks omitted) (quoting *Valley Hosp.*, 351 N.L.R.B. at 1252).

[23] *Id.* at 11; *see* Am. Golf Corp., 330 N.L.R.B. 1238, 1240 (2000).

[24] *MikLin Enters.*, slip op. at 11.

[25] Prong two is satisfied if "the communication is not so disloyal, reckless or maliciously untrue as to lose the Act's protection." *Am. Golf Corp.*, 330 N.L.R.B. at 1240. To find disloyalty, the NLRB requires malicious motive. Richboro Cmty. Mental Health Council, Inc., 242 N.L.R.B. 1267, 1268 (1979). The ALJ rejected the argument that the posters were unprotected due to the workers' knowledge of or reckless disregard as to their falsity. *MikLin Enters.*, slip op. at 11–12.

[26] *MikLin Enters.*, slip op. at 12–13.

[27] Miklin Enters., Inc., 361 N.L.R.B. 283, 283 (2014). The NLRB disagreed with the ALJ and found that the online disparagement of a union supporter was also an unfair labor practice. *Id.* at 290–91.

[28] *Id.* at 284–88. Board Member Johnson dissented in part and would have denied the posters protection for, among other reasons, being motivated by a malicious intent "to injure MikLin's business reputation and income." *Id.* at 293 (Member Johnson, dissenting in part).

[29] MikLin Enters., Inc. v. NLRB, 818 F.3d 397, 401 (8th Cir. 2016).

[30] Judge Kelly was joined by Judge Bye.

[31] *MikLin Enters.*, 818 F.3d at 407. Judge Kelly agreed that the posters were not knowingly or recklessly untrue. *Id.* at 406–07. The majority also affirmed the NLRB's findings with respect to the Facebook postings and the removal of union literature from the workplace. *Id.* at 408–11.

[32] NLRB v. Local Union No. 1229, IBEW (*Jefferson Standard*), 346 U.S. 464 (1953); *MikLin Enters.*, 818 F.3d at 412–14 (Loken, J., dissenting in part).

several employees were discharged after distributing handbills that criticized their television station employer for poor-quality programming.[33] Because the handbills did not reference the ongoing dispute, the NLRB deemed them unprotected.[34] The Supreme Court in *Jefferson Standard* affirmed, highlighting several factors about the handbills that made them sufficient "cause" for discharge: they did not relate to any specific labor practices of the employer, "made no reference to wages, hours, or working conditions," and "asked for no public sympathy or support."[35]

After rehearing en banc, the Eighth Circuit reversed.[36] Judge Loken,[37] now writing for the majority, explained that although section 7 permits employees to make appeals to third parties to improve their working conditions, this does not derogate the right of an employer to fire an employee under section 10(c) of the Act.[38] Section 10(c) provides that no order of the NLRB shall require reinstatement or back pay when an employee is "discharged for cause."[39] According to Judge Loken, when the *Jefferson Standard* Court affirmed the NLRB, it rested its decision on more than just the lack of a labor-dispute connection.[40] The fact that the Court did not remand the case for further assessment of whether the handbills were a call for support in the ongoing labor dispute signaled that "the attack would be unprotected either way."[41] Judge Loken acknowledged the NLRB's longstanding disloyalty test, but rejected it as "fundamentally misconstru[ing] *Jefferson Standard*."[42] He emphasized that the disloyalty inquiry is largely an objective test that hinges not on the purpose of the communication but on whether the means used were objectively damaging.[43] The NLRB's test would have treated indiscriminately all public appeals made by employees in advancing their labor-related goals, regardless of how they might harm the employer,[44] thereby, according to Judge Loken, removing the key inquiry of *Jefferson Standard*: whether the "public communications . . . indefensibly disparaged the quality of the employer's product."[45]

The court then found that there was evidence to support the finding that the posters were related to an ongoing labor dispute but noted that

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[33] *Jefferson Standard*, 346 U.S. at 466–68.
[34] *Id.* at 476–77.
[35] *Id.* at 476.
[36] *MikLin Enters.*, 861 F.3d at 815.
[37] Judge Loken was joined by Chief Judge Smith and Judges Wollman, Riley, Gruender, and Shepherd.
[38] *MikLin Enters.*, 861 F.3d at 818–19.
[39] 29 U.S.C. § 160(c) (2012).
[40] *MikLin Enters.*, 861 F.3d at 819.
[41] *Id.*
[42] *Id.* at 821.
[43] *Id.*
[44] *Id.*
[45] *Id.* at 822.

this connection would provide no protection if the posters constituted a "sharp, public, disparaging attack upon the quality of the company's product and its business policies."[46] The court reasoned that this test was met because the "attack" effectively persuaded customers they would become sick if they patronized a MikLin Jimmy John's.[47] Moreover, the employees timed their attack with flu season with the understanding that MikLin's business required a "'clean' public image."[48] The court also emphasized that this disparagement would likely "outlive . . . the labor dispute" and was unnecessary to further the employees' objectives.[49] Ultimately, to Judge Loken, the employees had selected a tactic that was guaranteed to economically and reputationally harm MikLin, and the NLRA "does not protect such calculated, devastating attacks."[50]

Judge Colloton[51] concurred in the judgment. Judge Colloton would have applied the NLRB test but would have reached the same result as the majority because the employees "obviously intended to harm MikLin's business."[52] Judge Kelly[53] dissented with respect to the poster campaign. She emphasized that in *Jefferson Standard*, lack of connection to a labor dispute "was crucial to [the Court's] conclusion" and that the NLRB's motive requirement did not betray *Jefferson Standard*.[54]

The *MikLin* court's reformulation of the disloyalty test is symptomatic of a fundamental challenge with articulating a test for employee disloyalty that is reconcilable with the NLRA. *MikLin* constructs a test that would further frustrate the NLRA's purpose of equalizing bargaining power between employees and employers. First, the *MikLin* majority erred when it concluded that under *Jefferson Standard* the disloyalty rule *must* extend to concerted employee appeals that maintain a nexus to an ongoing labor dispute. Second, it wrongly deemed this interpretation to be harmonious with the NLRA. To best serve the purpose of

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[46] *Id.* at 824–25 (quoting NLRB v. Local Union No. 1229, IBEW (*Jefferson Standard*), 346 U.S. 464, 471 (1953)).

[47] *Id.* at 825.

[48] *Id.*

[49] *Id.* Finally, the court noted that the posters were also "materially false and misleading" given that the employees did have the ability to call in sick. *Id.* (quoting St. Luke's Episcopal-Presbyterian Hosps., Inc. v. NLRB, 268 F.3d 575, 581 (8th Cir. 2001)).

[50] *Id.* at 826. Because the posters themselves were unprotected, Judge Loken also determined that MikLin's directing employees to take them down was not an unfair labor practice. *Id.* Judge Loken agreed with the panel as to the other unfair labor practices. *Id.* at 826–29.

[51] Judge Colloton was joined by Judge Benton.

[52] *MikLin Enters.*, 861 F.3d at 829 (Colloton, J., concurring in the judgment). To Judge Colloton, the posters were also materially false. *Id.*

[53] Judge Kelly was joined by Judge Murphy.

[54] *MikLin Enters.*, 861 F.3d at 832 (Kelly, J., dissenting in part). Furthermore, the majority gave the NLRB no deference, *id.* at 824 (majority opinion), and the dissent asserted that traditional *Chevron* deference applied, *id.* at 835 (Kelly, J., dissenting in part).

the statute, the *MikLin* court should have taken this opportunity to limit the applicability of disloyalty to the specific situation presented in *Jefferson Standard* and defined the rule as applying only when concerted third-party appeals lack a nexus to an ongoing labor dispute.[55]

First, the *Jefferson Standard* decision did not compel this far-reaching articulation of the disloyalty test that considers only the acceptability of the means used by employees when appealing to the public. The Eighth Circuit premised this interpretation on one of the final sentences in *Jefferson Standard*: "Even if the attack were to be treated . . . as a concerted activity . . . within the scope of . . . § 7, the means used . . . in conducting the attack have deprived the attackers of the protection of that section . . . ."[56] The *MikLin* court read "the means used" to signify that the Court was specifically condemning the employees' decision to publicly critique their employer's television programming, but this phrase could also have referred to the employees' failure to connect the appeal to their ongoing dispute. The *Jefferson Standard* Court itself cited numerous cases after this statement, and none addressed the situation of peaceful third-party appeals, let alone the notion that "the means" used by employees in appealing to the public could deprive them of section 7 protection despite a connection to a labor dispute.[57] In *DirecTV, Inc. v. NLRB*,[58] the D.C. Circuit explained that the reason *Jefferson Standard* emphasized the employees' failure to draw an explicit connection to their ongoing labor dispute was that this failure itself was the impermissible "means" to which *Jefferson Standard* was referring in its penultimate sentence, not the fact that the employees' actions were "reasonably calculated" to harm the employer.[59] Other circuits have used the same reasoning as *DirecTV*,[60] and the *MikLin* court should have followed suit.

In addition to wrongly rejecting this alternative analysis, the *MikLin* court also misinterpreted the structure of the NLRA and inappropriately relied on section 10(c) as a reason to except the posters from section 7 protection.[61] *MikLin* framed *Jefferson Standard* as a case about the

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[55] *See* Ken Matheny & Marion Crain, *Disloyal Workers and the "Un-American" Labor Law*, 82 N.C. L. REV. 1705, 1727 n.147 (2004) (stating that *Jefferson Standard* could be limited to its facts).

[56] NLRB v. Local Union No. 1229, IBEW (*Jefferson Standard*) 346 U.S. 464, 477–78 (1953).

[57] *Id.* at 478 n.13 (collecting cases).

[58] 837 F.3d 25 (D.C. Cir. 2016).

[59] *Id.* at 34–36.

[60] *See* Sierra Publ'g Co. v. NLRB, 889 F.2d 210, 219 (9th Cir. 1989) (rejecting the notion that interference with the employer can independently make communications disloyal); *see also* Cmty. Hosp. of Roanoke Valley, Inc. v. NLRB, 538 F.2d 607, 610 (4th Cir. 1976) (finding statements protected because they were "related to protected concerted activities then in progress").

[61] Branscomb, *supra* note 8, at 315 (arguing that a focus on section 10(c) "incorrectly eliminates any investigation into the section 7 protection that the employee conduct, considered as providing 'cause' for discharge, might deserve"); *see also* 29 U.S.C. § 158(a)(1) (2012) (defining as unlawful any interference with employees' rights under § 157).

"interplay between Section 7 and Section 10(c)" and concluded that 10(c) was the statutory basis for the disloyalty test.[62] Although the court conceded that the posters were concerted and seemingly maintained a nexus to a labor dispute,[63] *MikLin* nevertheless deemed the posters unprotected. By arguing that 10(c)'s language permits an employer to fire an employee purely based upon the "indefensible" means she used in appealing to the public, the *MikLin* majority privileged section 10(c) analysis over section 7. The court allowed 10(c) to *defeat* section 7, rather than giving it effect only when employees were fired for activities falling outside the realm of section 7 in the first place. *MikLin* thus got the order of operations backward because "under the Act, an activity protected by section 7 *cannot* lawfully constitute 'cause' for discipline."[64]

Furthermore, this construction of 10(c) is at odds with the NLRA's aim to equalize bargaining power between employers and employees. Employers, unfettered by the NLRA's protections, possess near-unilateral authority over their employees to hire, fire, and alter basic working conditions. In order to impose equality on the employer-employee relationship, the NLRA specifically preserved the power of employees to resort to economic weapons, like the strike, as a means of combating the employer's exclusive control over the workplace.[65] The NLRA thus implicitly accepts the premise that labor disputes are, at least to a certain extent, adversarial economic contests. Yet the *MikLin* majority flouts this premise by characterizing the campaign as "disloyal" instead of as a valid exercise of adversarial tactics in the pursuit of equal bargaining power. *MikLin* thus works against the equalization of bargaining power by disarming section 7: it removes from protection those economic weapons that effectively garner public support and threaten to harm the employer's reputation and income.[66] In contrast, if the posters had made their point more softly and were comparatively ineffective, MikLin might not have resorted to dismissal and protection would have been

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[62] *See MikLin Enters.*, 861 F.3d at 819.

[63] *Id.* at 824. One might argue the posters should be deemed unprotected for the simple reason that they were not for "mutual aid or protection." 29 U.S.C. § 157. However, third-party appeals have been found protected under section 7. Eastex v. NLRB, 437 U.S. 556, 566–67 (1978).

[64] Branscomb, *supra* note 8, at 319.

[65] 29 U.S.C. § 163 (preserving the right to strike); *see also* Matheny & Crain, *supra* note 55, at 1719 (citing the preservation of the right to deploy economic weapons in the NLRA as evidence that the NLRA "codifies the antagonistic nature of the [employee-employer] relationship").

[66] Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 133 (1995) (explaining that speech is protected by the NLRA *because* it "brings information to the public . . . that may threaten the employer's chosen way of doing business"); George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 187, 247 (1994) (suggesting that secondary boycotts were outlawed because of how effective they were).

unnecessary.[67] The *MikLin* test is thus unworkable if equal bargaining power is to be achieved: under the present test, the acts that generate leverage for employees would be categorically excluded from protection.

The *MikLin* decision should not be accepted as the correct articulation of the disloyalty rule. *Jefferson Standard* denied protection to employees who, despite acting in concert, failed to connect their public appeal to an ongoing labor dispute.[68] But the Court articulated no clear test for disloyalty[69] and did not state that harmful "means," or even a malicious motive, were sufficient to deny a communication section 7 protection. To genuinely serve the policies of the NLRA, the *MikLin* court should have taken this opportunity to confine the disloyalty rule to the facts of *Jefferson Standard*,[70] which would have entailed defining disloyalty as applying only in situations where concerted third-party appeals lack a nexus to an ongoing labor dispute. This formulation of the test would mean "disloyalty" could not be used to negate the protection of employees engaging in concerted third-party appeals connected to an ongoing labor dispute. This test would be a stronger version of the NLRB test and would essentially eliminate disloyalty's applicability beyond the situation presented in *Jefferson Standard*. But an ultraprotective test for disloyalty is the most effective way to serve the NLRA's policies.[71] Anything short of total protection allows courts to deem "disloyal" actions that *do* harm employers but do so necessarily in order to maintain the equality constructed by the NLRA. Requiring only a labor-dispute nexus to render inapplicable the disloyalty test thus best promotes equal bargaining power because it homes in on the situations where section 7 is most critical: when employees act in concert to seek public support and bring the power associated with such support to the bargaining table.

Ultimately, the *MikLin* decision risks enfeebling section 7's ability to provide employees with the economic power necessary to match that of their employers. Protecting employees who make public appeals empowers workers and promotes their capacity to act collectively to improve their working conditions. But the looming possibility of termination for a capacious notion like "disloyalty" will deter employees from seeking public support[72] and thus solidify another limitation on the NLRA's ability to promote equal bargaining power.

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[67] *See* Matthew W. Finkin, *Disloyalty! Does* Jefferson Standard *Stalk* Still*?*, 28 BERKELEY J. EMP. & LAB. L. 541, 562 (2007) (noting that *Jefferson Standard* forbids credible criticism but would permit hyperbole that is unlikely to be believed).

[68] NLRB v. Local Union No. 1229, IBEW (*Jefferson Standard*), 346 U.S. 464, 477 (1953).

[69] Branscomb, *supra* note 8, at 306.

[70] *MikLin Enters.*, 861 F.3d at 831 (Kelly, J., dissenting) (arguing that *Jefferson Standard* did not articulate a specific test for disloyalty and thus did not mandate this outcome).

[71] This test proscribes discharge for disloyalty. All other NLRA prohibitions remain applicable.

[72] Estlund, *supra* note 66, at 102 ("[W]e should expect reasonable employees to be 'chilled' from speaking freely when it may put their jobs at risk.").