

Hold the Mayo: Jimmy John's Workers' Disparaging Statements Not Protected by the NLRA Says 8th Circuit

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How far can employees go during a labor dispute to make their case to the public? For years the National Labor Relations Board (NLRB) has granted employees a surprising amount of leeway, so long as their statements were not made with malicious intent and pertained to an ongoing labor dispute. In other words, employees could go quite far. Fortunately for employers, the [8th Circuit Court of Appeals recently tamped down this enthusiasm](#) and redirected the NLRB to long-standing Supreme Court precedent.

Background

In 2007, employees of a Minnesota Jimmy John's franchise began an organizing campaign seeking representation by the Industrial Workers of the World (the "IWW"). While awaiting election, the IWW urged MikLin to provide employees paid leave. MikLin's policy at the time required employees to find their own replacements if they missed work, including when they were sick. Failure to do so would result in termination, and Miklin did not offer employees paid sick leave.

The IWW's sick leave campaign heavily featured a poster implying Jimmy John's was serving customers contaminated food (pictured right). Although the poster was quickly removed from store bulletin boards, IWW supporters continued their campaign by sending the poster and a letter to media outlets the day before the election. The press release highlighted unhealthy company behavior and stated that during flu season, employees are "sick and tired" of putting themselves and their customers' health at risk. The press release also included assertions that health code violations occur at MikLin locations every day. The release ended with a threat to "plaster" the poster all over Minneapolis-St. Paul if MikLin would not meet to talk with IWW supporters about their demands.

MikLin changed its sick leave policy six days later. Unsatisfied with the changes, IWW supporters carried out their threats to "plaster the city" with the above poster. The owner was "bombarded" by phone calls. Managers removed some public posters, six employees were fired, and three issued written warnings. After this, the IWW continued. It stated in another press release that the employees had a duty to speak out about this public health

issue, stated that the company jeopardized the health of thousands of customers and workers every day, and said “no one wants to eat a sandwich filled with cold and flu germs.”

The decision

In subsequent unfair labor practice charges alleging MikLin violated the National Labor Relations Act (NLRA) by firing employees for engaging in protected concerted activity, MikLin argued the employees’ statements were not protected.

The NLRB found that the conduct of the union and its supporters was protected under Section 7 of the NLRA, which protects employee communications to the public that are part of and related to an ongoing labor dispute, unless they are so disloyal, reckless, or maliciously untrue as to lose the Act’s protections. The Board held that its precedent required “malicious motivation” in order for such statements to not be protected. Notably, the Board made its finding despite a lack of critical health code violations that supported the union’s claims, because the Board found it “at least arguable” that the sick leave policy presented an increased risk of food borne disease.

The 8th Circuit disagreed, and held the NLRB’s standard violated the U.S. Supreme Court precedent, known as the “*Jefferson Standard*.” The *Jefferson Standard* permits an employer to fire employees who make “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 NLRB misinterpreted the *Jefferson Standard* by focusing on the employees’ intent and by excluding from the standard any disparaging remarks made in the course of an ongoing labor dispute said the Court. Instead, the “critical question” in *Jefferson Standard* disloyalty cases is whether the employees’ statements convince customers not to patronize the employer because its labor practices are unfair where subsequent resolution of that dispute will bring customers back, or whether the statement disparages the employer’s product as unsafe, unhealthy, or shoddy in such a way that it outlasts the labor dispute to the detriment of the employer and the workers. With this corrected standard in mind, it was clear that the IWW and its supporters disparaged MikLin’s product, especially because they were untrue.

Despite winning the protected activity argument, MikLin was still found to have committed unfair labor practices by removing other pro-union materials from the workplace and ridiculing pro-IWW employees on social media (including in a publicly-available page called “Jimmy John’s Anti-Union”).

Takeaway

Employer actions are closely-scrutinized during an organizing campaign. Employers should be especially cautious before disciplining or terminating employees who engage in this type of behavior or any other union organizing activity. Nevertheless, the case does give hope to employers facing similar situations, and it provides a clear guide about when employee communications cross the line. Should an employer encounter such a situation, it should not act on its own, but instead seek experienced legal advice from a labor attorney.

Please contact Evan Bonnett in Hinshaw's Rockford office or your regular Hinshaw attorney with any questions.

Topics

National Labor Relations Act (NLRA), National Labor Relations Board (NLRB), Unions, Section 7, Unfair Labor Practice, Union Organizing, Protected Concerted Activity, Jefferson Standard, Disparaging, Labor Dispute, Eighth Circuit Court Of Appeals