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LABOR AND EMPLOYMENT - PARTICULAR GROUNDS FOR DISCHARGE: THE EIGHTH CIRCUIT DRAWS THE LINE FOR JUDICIAL DEFERENCE TO THE NLRB

MikLin Enter., Inc. v. NLRB, 861 F.3d 812 (8th Cir. 2017) (en banc)

ABSTRACT

In *MikLin Enterprises, Inc. v. National Labor Relations Board*, the United States Court of Appeals for the Eighth Circuit, sitting en banc, *held* that MikLin Enterprises, owner of ten Jimmy John's franchise restaurants, did not violate Section 7 of the National Labor Relations Act when it discharged several employees for protest activities related to an ongoing labor dispute. In March 2011, MikLin employees placed posters around the Twin Cities insinuating MikLin forced its employees to work while sick and that the company's sick leave policy endangered the health of its customers. As a result, MikLin terminated the employees who organized the poster campaign and reprimanded several others. The Eighth Circuit Court of Appeals explained that the employees' actions were disloyal and calculated to harm MikLin's reputation, and therefore Section 7 did not protect the poster campaign. In disagreeing with the decision of the NLRB, the court highlighted a critical tension point between administrative agencies and the judiciary as interpreters of law. Also of practical significance, the court adopted a narrow view of Section 7, imparting considerable latitude for North Dakota employers to terminate employees engaged in labor-related protest activities. Moreover, this decision exacerbates a previously brewing split among the federal circuit courts of appeals, meaning North Dakota practitioners should remain aware of conflicting Section 7 judicial interpretation.

I. FACTS

MikLin Enterprises, Inc. ("MikLin") owns and operates ten Jimmy John's sandwich restaurants in the Minneapolis and St. Paul, Minnesota ("Twin Cities") area.[1] Michael Mulligan serves as MikLin's president and his son, Robert, serves as the company's vice president.[2] The dispute that brought about this case began in 2007, when a group of MikLin employees attempted to unionize under the banner of the Industrial Workers of the World ("IWW") labor organization.[3]

Supporters of the IWW initially ventured to win seats on MikLin's Board of Directors, but failed.[4] Following its first unsuccessful attempt to influence the direction of the company, the IWW focused its attention on MikLin's sick leave policy, beginning in early 2011.[5] When the IWW campaign started, MikLin's policy required sick employees to find a replacement, with failure to follow the policy resulting in termination.[6] In response to the policy, a group of employees created posters with pictures of two identical Jimmy John's sandwiches side by side.[7] Above one picture, the first caption read in all capital letters, "your sandwich made by a healthy Jimmy John's worker," with the other caption reading, "your sandwich made by a sick Jimmy John's Worker."[8] The poster continued, "Can't tell the difference? That's too bad because Jimmy John's workers don't get paid sick days. Shoot, we can't even call in sick."[9] The flyer ominously concluded, "We hope your immune system is ready because you're about to take the sandwich test."[10]

Employees sympathetic to the union began their campaign in March 2011 by posting the flyers on bulletin boards in MikLin-owned Jimmy John's restaurants, which store managers promptly removed.[11] The employees believed March was an appropriate time to initiate the campaign because it was flu season.[12] On March 10, 2011, union supporters issued a press release to

1. MikLin Enter., Inc. v. NLRB, 861 F.3d 812, 815 (8th Cir. 2017) (en banc).
2. *Id*.
3. *Id*.
4. *Id*. The IWW filed an unfair labor practices complaint against MikLin because of the Board of Directors election. *Id*. The parties eventually settled their dispute, agreeing in January 2011 to conduct a new Board of Directors election if the IWW chose to file for a rerun election. *Id*.
5. *Id*.
6. *Id*. at 815.
7. *MikLin*, 861 F.3d at 815.
8. *Id*.
9. *Id*.
10. *Id*.
11. *Id*.
12. *Id*. at 815.

more than one hundred local and national news outlets, threatening to distribute thousands of posters around the Twin Cities if MikLin did not change its sick leave policy.[13] Management responded, meeting with organizers of the campaign later that day and posting a new sick leave policy the following week.[14]

The new policy established a points system, whereby MikLin would allow an employee to miss between two and four days of work without finding a replacement before facing termination.[15] The policy also reiterated that MikLin prohibited employees experiencing flu-like symptoms from working until twenty-four hours after they became symptom-free.[16]

Not satisfied with the new sick leave policy, union supporters acted on their previous threat, posting flyers around the Twin Cities near MikLin-owned stores.[17] The second wave of posters added one line that included Robert Mulligan's personal phone number, urging the public to "let him know you want healthy workers making your sandwich."[18] In response, management terminated six of the poster campaign organizers and sent written warnings to three other employees.[19] As a result, the IWW filed unfair labor practices complaints against MikLin with the National Labor Relations Board ("NLRB" or "Board").[20]

An Administrative Law Judge ("ALJ") heard arguments in the dispute and issued an order on April 20, 2012, finding that MikLin violated 29 U.S.C. § 158(a)(1).[21] The ALJ, adhering to NLRB administrative precedent, found that the posters were intricately related to an ongoing labor dispute, and therefore, fell within the protection of the National Labor Relations Act ("NLRA"

13. *MikLin*, 861 F.3d at 816. The press release also asserted MikLin restaurants violated state health codes daily. *Id*. While MikLin restaurants had twice been cited for health code violations likely resulting from ill employees over the course of 10 years, no evidence supported the contention that health code violations frequently occurred at MikLin restaurants. *Id*.

14. *Id*.

15. *Id*. at 816-17. Employees received zero points if they found a replacement. *Id*. However, if employees were unable to find a replacement, they received one point if they notified management more than an hour before their shift, two points if they notified management less than an hour before their shift, and three points if they failed to notify management. *Id*. Management would terminate employees who accumulated four points. *Id*.

16. *Id*. at 817.

17. *Id*.

18. *Id*. Robert Mulligan testified that because of the poster campaign, he became inundated with angry calls to his personal phone. *Id*.

19. *MikLin*, 861 F.3d at 817.

20. MikLin Enter., Inc. v. NLRB, 818 F.3d 397, 403 (8th Cir. 2016), *rev'd in part en banc*, 861 F.3d 812 (8th Cir. 2017).

21. MikLin Enter., Inc., 2012 WL 1387939 (2012), adopted as modified 361 N.L.R.B. No. 27 (2014).

or "Act").[22] Furthermore, the ALJ concluded that while the protestors' assertion they could not call in sick was "not literally true," it constituted "protected hyperbole."[23]

The NLRB affirmed the ALJ's order in a 2-1 decision on August 21, 2014.[24] A majority of Board members found the union supporters' statements were not maliciously untrue, and thus, were not so disloyal as to lose the Act's protection.[25] In dissent, however, one Board member argued the protestors' statements were materially false and calculated to harm MikLin's reputation, concluding MikLin therefore had cause to fire the six employees for disloyalty.[26]

A similar split occurred on appeal to a three-judge panel of the United States Court of Appeals for the Eighth Circuit. In relation to the poster campaign, MikLin argued the NLRA did not protect the protestors' activities because: (1) union supporters' statements were either false or showed a reckless disregard for the truth; or, alternatively, (2) the poster campaign constituted disloyal conduct.[27] A 2-1 majority of the panel rejected MikLin's arguments and enforced the order of the Board.[28] Judge Loken, in dissent, presented similar arguments to the dissenting NLRB member, and would have found that MikLin did not violate the Act when it fired the six employees.[29] Following the panel's decision, MikLin filed a motion for rehearing en banc, which the court granted on June 22, 2016.[30]

II. LEGAL BACKGROUND

A federal court of appeals can decline to enforce an NLRB order if the Board misapplies the law, or if substantial evidence does not support the Board's decision.[31] A critical tension point in the National Labor Relations Act is the dichotomy between Section 7,[32] which protects employees' rights

22. *Id*.

23. *Id*. The ALJ further reasoned that the employees' contention regarding frequent health code violations also stretched the truth, but remained protected because the statement pointed out the basic argument that MikLin's sick leave policy could result in customers becoming ill. *Id*.

24. MikLin Enter., Inc., 361 N.L.R.B. No. 27, slip op. at 10 (2014).

25. *Id*. at 6-8.

26. *Id*. at 12 (Johnson, M., dissenting in part).

27. MikLin Enter., Inc. v. NLRB, 818 F.3d 397, 406-07 (8th Cir. 2016), *rev'd in part en banc*, 861 F.3d 812 (8th Cir. 2017).

28. *Id*. at 408.

29. *Id*. at 414 (Loken, J., dissenting in part).

30. MikLin Enter., Inc. v. NLRB, No: 14-3099, 2016 WL 4651405 (8th Cir. Jun. 22, 2016).

31. MikLin Enter., Inc. v. NLRB, 861 F.3d 812, 815 (8th Cir. 2017) (en banc).

32. 29 U.S.C. § 157 (2012).

to collectively bargain, and Section 10(c),[33] which upholds the right of employers to terminate employees for cause. The United States Supreme Court addressed this apparent quandary in its 1953 *Jefferson Standard* decision, holding that employers may discharge employees engaged in labor-related protest activities for cause when the employees' actions constitute disloyalty.[34] Moreover, in addition to labor and employment law considerations, federal appellate courts reviewing decisions of the NLRB must remain aware of administrative law principles, namely deference to an administrative agency's interpretation of a statute under *Chevron* and its progeny.[35]

A. TENSION POINT: SECTIONS 7 AND 10(C) OF THE NATIONAL LABOR RELATIONS ACT

From the inception of the organized labor movement in the Nineteenth Century, unions have sought protection from employer retaliation for members participating in labor disputes. Congress codified labor's concerns into law in 1935 with the passage of the NLRA.[36] Specifically, Section 7 of the Act, designated as 29 U.S.C. § 157, protects the rights of employees to collectively bargain and organize.[37] Section 7 states, in relevant part, "Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining."[38] Significantly, Section 7 protects not only members of labor unions, but also those supporting a labor union's activities.[39] Section 8(a)(1) of the Act further directs the NLRB to hold employers engaged in restricting Section 7 rights accountable for maintaining unfair labor practices.[40] The protections of Section 7 are not absolute, however.[41]

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33. 29 U.S.C. § 160(c) (2012).

34. NLRB v. Local Union No. 1229, Int'l Bhd. Of Elec. Workers, 364 U.S. 464 (1953).

35. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

36. 29 U.S.C. §§ 151-69 (2012).

37. 29 U.S.C. § 157 (2012).

38. *Id.*

39. Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activity under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 790 (1989).

40. 29 U.S.C. § 158(a)(1) (2012).

41. *See e.g.* NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 254 (1939) (holding employee seizure of factory during strike constituted unlawful activity and proper grounds for discharge); NLRB v. Knuth Bros., Inc., 537 F.2d 950, 956 (7th Cir. 1976) (holding employee disclosure of confidential company information during union organizing campaign provided grounds for discharge).

The NLRB and federal courts have established exceptions that curtail employee rights to collectively bargain and support union activity.[42] The most frequent exception to Section 7 derives from Section 10(c) of the NLRA, which retains the right of employers to terminate employees for cause.[43] The statute reads, "No order of the Board shall require the reinstatement of any individual as an employee . . . if such individual was suspended or discharged for cause."[44]

The apparent clash between Sections 7 and 10(c) of the NLRA has provided fertile ground for litigation.[45] This includes not only administrative bodies, but also the federal circuit courts of appeals, to which litigants may directly appeal orders of the Board.[46] Courts first must determine whether the activity falls within Section 7 protection, and then discern whether an administrative or judicial exception precludes application of Section 7.[47]

As Professor Branscomb explained, the Board and courts initially reserved exceptions under Section 10(c) for blatant insubordination, hijacking an employer's means of production, or other "indefensible" employee actions.[48] However, the United States Supreme Court significantly expanded the scope of Section 7 exceptions with its 1953 *Jefferson Standard* decision.[49]

B. JEFFERSON STANDARD AND THE EMPLOYEE DISLOYALTY TEST

The United States Supreme Court tackled the dichotomy between Sections 7 and 10(c) of the NLRA in its *National Labor Relations Board v. Local Union No. 1229, International Brotherhood of Electrical Workers* ("*Jefferson Standard*")[50] decision.[51] In *Jefferson Standard,* employees organized under a chapter of the International Brotherhood of Electrical Workers entered into negotiations to form a collective bargaining agreement with their employer, Jefferson Standard Broadcasting Company.[52] The company and the

42. Melinda J. Branscomb, *Labor, Loyalty, and the Corporate Campaign*, 73 B.U. L. REV. 291, 298 (1993).

43. 29 U.S.C. § 160(c) (2012).

44. *Id.*

45. Fischl, *supra* note 39, at 789-90.

46. 29 U.S.C. § 160(e)-(f) (2012).

47. Branscomb, *supra* note 42, at 310-11.

48. *Id.* at 299-300.

49. *Id.* at 300.

50. NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers, 346 U.S. 464 (1953). The International Brotherhood of Electrical Workers represented employees of Jefferson Standard Broadcasting Co. in the labor dispute that led to the NLRB action. *Id.* The case is referred to commonly as *Jefferson Standard.*

51. *Id.* at 475.

52. *Id.* at 467.

union disagreed as to whether an employee had an automatic right to arbitration upon termination, or if the company could first determine whether the termination necessitated arbitration.[53] As a result, several employees formed a picket line outside of regular work hours to protest the company's handling of the labor negotiations.[54] Several employees soon grew impatient with this strategy, however, and distributed more than 5000 handbills criticizing Jefferson Standard's broadcasting business.[55] The handbills did not mention the labor dispute between the union employees and the broadcasting company.[56] As a result, the company terminated ten employees responsible for distributing or sponsoring the handbills.[57]

Justice Burton, writing for a 6-3 majority, reasoned the handbills constituted "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."[58] The Court also noted the attack came at "a critical time in the initiation of the company's television service."[59] The Court further explained the employee's disloyal actions provided grounds for the company to discharge them under Section 10(c).[60] Accordingly, the Court held the NLRB could not reinstate the terminated employees because the broadcasting company properly discharged the employees for cause.[61]

The dissent countered that the majority's new disloyalty principle eviscerated Section 7 rights.[62] Justice Frankfurter, joined by Justices Black and Douglas, argued that interpreting Section 10(c) to include discharge for disloyalty was inconsistent with Congress' intent in passing the NLRA.[63] Justice Frankfurter asserted, "Many of the legally recognized tactics and weapons of labor would readily be condemned for 'disloyalty' were they employed between man and man in friendly personal relations."[64] The dissent also contended the *Jefferson Standard* disloyalty test would not be of use to future courts and should be confined to the facts of the case.[65]

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53. *Id*.
54. *Id*.
55. *Id*. at 468.
56. *Local Union No. 1229*, 346 U.S. at 468.
57. *Id*.
58. *Id*. at 471.
59. *Id*.
60. *Id*. at 472.
61. *Id*. at 477.
62. *Local Union No. 1229*, 346 U.S. at 479 (Frankfurter, J., dissenting).
63. *Id*. (Frankfurter, J., dissenting).
64. *Id*. at 479–80.
65. *Id*. at 481.

Despite Justice Frankfurter's reservations about the future applicability of *Jefferson Standard*, the disloyalty principle remains a core exception to Section 7 protection. Since the 1953 decision, the NLRB has developed the disloyalty principle "considerably."[66] The Board clearly laid out the modern disloyalty standard in its own MikLin decision when it stated, "To lose the Act's protection as an act of disloyalty, an employee's public criticism of an employer must evidence a malicious motive."[67] The Board further articulated, "[E]ven communications that raise highly sensitive issues such as public safety [are] protected where they are sufficiently linked to a legitimate labor dispute and are not maliciously motivated to harm the employer."[68] Thus, today's circuit courts of appeals are faced with determining whether the Board's malicious motive test can be reconciled with *Jefferson Standard*.[69]

C. CHEVRON AND BRAND X: JUDICIAL DEFERENCE TO THE NATIONAL LABOR RELATIONS BOARD

Federal appellate courts also must remain vigilant for bedrock principles of administrative law when reviewing NLRB orders. In its landmark *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[70] decision, the Supreme Court articulated the modern standard for judicial deference to the statutory interpretation of an administrative agency.[71] In *Chevron*, the Natural Resources Defense Council challenged an Environmental Protection Agency ("EPA") rule that interpreted the term "stationary source" in the context of the Clean Air Act.[72] Significantly, the United States Court of Appeals for the District of Columbia Circuit found no Congressional intent existed as to the meaning of a "stationary source."[73] The appeals court nonetheless held the EPA stationary source rule was "inappropriate" in the context of the Clean Air Act based on the court's own construction of the statute.[74]

On appeal from the D.C. Circuit, the Supreme Court handed down a two-part test for the judiciary to apply when confronted with a rulemaking

66. MikLin Enter., Inc., 361 N.L.R.B. No. 27, slip op. at 6 n. 18 (2014).

67. *Id.* at 5 (quoting Valley Hosp. Med. Ctr., Inc., 351 N.L.R.B. 1250, 1252 (2007).

68. *Id.* at 6.

69. *Compare* MikLin Enter., Inc. v. NLRB, 861 F.3d 812, 821–22 (holding the NLRB's reliance on the malicious motive test impermissibly overruled *Jefferson Standard*) (8th Cir. 2017) (en banc), *with* DIRECTV, Inc. v. NLRB, 837 F.3d 25, 41–42 (D.C. Cir. 2016) (affirming the NLRB's malicious motive standard).

70. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 834, 837 (1984).

71. *Id.* at 842-43.

72. *Id.* at 840.

73. *Id.* at 841.

74. *Id.*

agency's interpretation of a statute.[75] First, if Congress has directly addressed an issue, both the judiciary and the bureaucracy must give effect to the express will of the legislative branch.[76] Second, if Congress has not spoken directly on an issue and an administrative agency has promulgated a rule on that issue, the judiciary is not permitted to impose its own construction of the statute that the administrative agency relied upon.[77] Rather, the court's task is to determine if the administrative agency's rule is "based on a permissible construction of the statute."[78] Relying on the two-part test, the Court explained that the D.C. Circuit erred when it struck down the EPA regulation as "inappropriate" absent specific congressional intent on the issue.[79] The Supreme Court reasoned that the appeals court should not have imposed its own construction of the Clean Air Act, but rather determined whether the EPA's interpretation of the Act was "reasonable."[80] Therefore, the high Court reversed the D.C. Circuit Court of Appeals and upheld the EPA rule.[81]

Two decades later, the judiciary and bureaucracy again squared off in the Supreme Court, this time over whether an administrative agency is bound to follow a judicial interpretation of a statute.[82] In *National Cable & Telecommunications Association v. Brand X Internet Service*,[83] the Court addressed a Federal Communications Commission ("FCC") ruling determining whether broadband cable internet service constituted an "information service," a "telecommunications service," or both, under the Telecommunications Act of 1966.[84] The FCC initially classified broadband providers as an "information service," but not a "telecommunications service."[85] A flurry of litigation resulted as broadband providers sought classification as a "telecommunications service," and the United States Court of Appeals for the Ninth Circuit took up consolidated appeals in the dispute.[86] Rather than address the FCC ruling on *Chevron* grounds, the Ninth Circuit relied on its own precedent to resolve the case, which held that cable modem providers were a "telecommunications service."[87]

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75. *Id.* at 842.
76. *Chevron*, 467 U.S. at 842-43.
77. *Id.* at 843.
78. *Id.*
79. *Id.* at 845.
80. *Id.*
81. *Id.* at 866.
82. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).
83. *Id.*
84. *Id.* at 977.
85. *Id.* at 977-78.
86. *Id.* at 979.
87. *Id.* at 979 (citing AT & T Corp. v. Portland, 216 F.3d 871, 877-880 (9th Cir. 2000)).

After granting certiorari, the Supreme Court expanded on its *Chevron* decision to reverse the Ninth Circuit Court of Appeals.[88] The Court determined, "Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."[89] The Court explained the principle originated from *Chevron* because Congress explicitly delegated authority to promulgate rules emanating from federal statutes to administrative agencies.[90] Therefore, the Court held the Ninth Circuit erred in overruling the FCC based on its own precedent, and instead should have deferred to the reasonable construction of the statute the FCC relied upon.[91]

Finally, while courts typically defer to an agency's construction of a statute, the judiciary has remained hesitant to enforce orders of the NLRB when doing so would result in the erosion of judicial precedent.[92] Two Supreme Court cases illustrate this trend. In *Lechmere, Inc. v. National Labor Relations Board*,[93] the Court refused to enforce an order of the Board that attempted to morph a long-held judicial rule into a multi-factor balancing test.[94] The crux of the Court's reasoning was that adoption of the NLRB's test would have "significantly erod[ed]" prior caselaw.[95] Likewise, in *National Labor Relations Board v. International Longshoreman's Association*,[96] the high Court remanded a labor dispute for further fact finding because the Board "misconstrued" the Supreme Court's caselaw regarding whether a type of labor could be the subject of a work preservation agreement.[97] Thus, when reviewing decisions of the NLRB, federal appellate courts must consider not only labor and employment law, but also administrative law and the role of the judiciary in the federal system.

III. ANALYSIS

In *MikLin Enterprises, Inc. v. National Labor Relations Board*,[98] Judge Loken, writing for the majority, reasoned that the Industrial Workers of the

88. *Brand X*, 545 U.S. at 982.
89. *Id.* at 982-83.
90. *Id.* at 983.
91. *Id.* at 984.
92. *See* Lechmere Inc. v. NLRB, 502 U.S. 527 (1992); NLRB v. Int'l Longshoreman's Ass'n, 473 U.S. 61 (1985).
93. *Id.*
94. *Id.* at 538.
95. *Id.*
96. *Int'l Longshoreman's Ass'n*, 473 U.S. at 61.
97. *Id.* at 80.
98. MikLin Enter., Inc. v. NLRB, 861 F.3d 812 (8th Cir. 2017) (en banc).

World supporters' activities were disloyal and calculated to harm MikLin's reputation.[99] Furthermore, the majority found that *Chevron* did not apply because *Jefferson Standard* unambiguously interpreted Section 7 to require the reasonably calculated to harm test, which the Board improperly discarded when it focused instead on its own malicious motive test.[100] In dissent, Judge Kelly argued that the court should have afforded the NLRB deference under *Chevron*, and that *Jefferson Standard* did not apply.[101]

A. THE MAJORITY OPINION

Judge Loken, writing for the majority after dissenting from the Eighth Circuit's first *MikLin* decision, began the court's analysis by refuting the dissent's contention that *Jefferson Standard* did not apply because the posters referenced a labor dispute.[102] Next, the court explained the NLRB implicitly and improperly overruled *Jefferson Standard* when it employed its own subjective malicious motive test, rather than the Supreme Court's objective "reasonably calculated to harm" test.[103] The court proceeded to reject the dissent's second argument, that *Chevron* and *Brand X* required the court to defer to the decision of the NLRB, on the grounds that *Jefferson Standard* required the Board to apply an objective disloyalty test.[104] Finally, relying on the court's interpretation of *Jefferson Standard*, the court reasoned the IWW supporters' actions constituted unprotected disloyalty that fell outside of the protections of Section 7.[105]

1. The NLRB misconstrued Jefferson Standard when it ignored the "reasonably calculated to harm" test in favor of its own precedent

The majority first focused its attention on whether *Jefferson Standard* applied to the case. The dissent argued that *Jefferson Standard* only applies when employees disparage an employer without reference to a labor dispute, and because the MikLin employees referenced sick leave in their posters, the decision did not apply.[106] The majority refuted this position, however, reasoning that the Supreme Court upheld the Section 10(c) right of employers

99. *Id.* at 825.
100. *Id.* at 823.
101. *Id.* at 832, 835 (Kelly, J., dissenting).
102. *Id.* at 820.
103. *Id.* at 821.
104. *MikLin*, 861 F.3d at 823.
105. *Id.* at 824-25.
106. *Id.* at 832 (Kelly, J., dissenting in part).

to terminate employees for disloyalty, even if that disloyalty presents itself in the context of a labor dispute.[107] Specifically, the court referenced a passage from *Jefferson Standard* that stated the employees in that case would have lost Section 7 protection regardless of whether the actions constituted "concerted activity" within the meaning of the NLRA.[108] Therefore, the majority concluded the disloyalty principle articulated in *Jefferson Standard* applied.[109]

Next, the court addressed the NLRB's interpretation of the *Jefferson Standard* disloyalty principle. The court took issue with the NLRB's decision to employ its own subjective test, which protected disloyal conduct under Section 7 unless the employees' actions evidenced a malicious motive.[110] The court explained that the Board misapplied *Jefferson Standard* in two ways. First, the court found the Board essentially ignored the objective analysis required in *Jefferson Standard*, that being whether or not an employee's actions were "reasonably calculated to harm" the employer.[111] Second, the court reasoned that the Board's malicious motive test impermissibly overruled *Jefferson Standard*'s disloyalty test.[112] The court pointed to the Board's flawed reasoning that the MikLin employees' actions may have harmed the reputation of the company, but that the actions were still protected because of the lack of malicious motive.[113] The court explained the NLRB's reasoning directly conflicted with *Jefferson Standard* because it disregarded the Supreme Court's directive that conduct undertaken to advance a Section 7 right could still constitute disloyalty.[114] Accordingly, the court held the NLRB impermissibly overruled *Jefferson Standard* by relying on its own precedent and ignoring the "reasonably calculated to harm" test.[115]

2. Jefferson Standard unambiguously interpreted Sections 7 and 10(c), precluding Chevron deference to the NLRB

The court next addressed whether *Chevron* and *Brand X* required deference to the Board's interpretation of the NLRA. First, the majority asserted

107. *Id.* at 820 (citing NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers, 346 U.S. 464, 478 (1953)).
108. *Id.* (citing *Local Union No. 1229*, 346 U.S. at 477-78).
109. *Id.* at 821.
110. *MikLin*, 861 F.3d at 821.
111. *Id.* at 821.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 821-22.

it was doubtful that *Brand X* applied to the case.[116] The court reasoned the NLRB interpreted *Jefferson Standard* itself and did not create its own interpretation of employee disloyalty under Section 10(c).[117] The majority then explained *Brand X* did not require a court to defer to an agency's interpretation of a judicial decision, but rather only to an agency's reasonable interpretation of a statute.[118] Consequentially, the court determined it had the authority to impose its own interpretation of the Supreme Court's decision in *Jefferson Standard*.[119]

Second, and of primary importance, the court asserted the power of statutory interpretation rests primarily with the judiciary.[120] The court relied on *Lechmere*[121] and *International Longshoreman's Association*,[122] explaining the Supreme Court previously refused to enforce NLRB orders that would have eroded judicial precedent.[123] The court reasoned *Jefferson Standard* clearly established that disloyalty provided employers cause to fire employees under Section 10(c).[124] This unambiguous interpretation of the Act precluded *Chevron* deference to the Board because the NLRB's interpretation of Section 7 eroded the disloyalty principle articulated in *Jefferson Standard*.[125] Therefore, the court determined the Board's interpretation of Section 7 was not entitled to *Chevron* deference.[126]

3. The employee protest activities were so disloyal as to provide cause for MikLin to discharge them

Finally, after ruling on the questions of law, the court addressed the merits of the case. Applying the court's interpretation of *Jefferson Standard*, the majority reasoned the posters insinuated eating at a MikLin-owned restaurant would cause illness, which disparaged MikLin's reputation.[127] The court further explained that allegations of serious health violations against a restaurant company constituted the "equivalent of a nuclear bomb," and that MikLin's employees intentionally played on this fear by choosing March as the time to

116. *MikLin*, 861 F.3d at 823.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. Lechmere, Inc. v. NLRB, 502 U.S. 527, 538 (1992).
122. NLRB v. Int'l Longshoreman's Ass'n, 473 U.S. 61, 80 (1985).
123. *MikLin*, 861 F.3d at 824.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 825.

attack the company because of flu season.[128] Critically, the court found the devastating nature of the employees' attack against MikLin would outlive the labor dispute and damage the company's reputation for maintaining clean establishments.[129]

Furthermore, the court explained that the employees' attacks against MikLin were "materially false and misleading."[130] The statement "we can't even call in sick" presented on the posters was not based on fact, the court reasoned, and the protestors' assertion that MikLin violated health codes every day was also misleading.[131] Based on the falsehoods contained on the posters, the court contended the posters in *MikLin* made an even stronger case for disloyalty than the handbills in *Jefferson Standard* because the IBEW handbills asserted only facts about the company's broadcasting business.[132] Therefore, the court found the employees' disloyal actions fell outside of the protections of Section 7 and accordingly declined to enforce the NLRB's order in relevant part.[133]

B. THE DISSENTING OPINION

In dissent, Judge Kelly, joined by Judge Murphy, offered two primary arguments against the majority's decision to partially decline to enforce the Board's order. First, she argued that *Jefferson Standard* did not apply because the attacks in *MikLin* referenced an ongoing labor dispute.[134] Second, she contended the Board's malicious motive test did not originate from *Jefferson Standard*, and the court should have thus deferred to the NLRB's interpretation of Section 10(c) under *Chevron*.[135]

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128. *Id.* (quoting Diamond Walnut Growers v. NLRB, 113 F.3d 1259, 1267 (D.C. Cir. 1990)).

129. *MikLin*, 861 F.3d at 825.

130. *Id.* (quoting St. Luke's Presbyterian-Episcopal Hosp., Inc. v. NLRB, 268 F.3d 575, 581 (8th Cir. 2001)).

131. *Id.*

132. *Id.*

133. *Id.* at 826. The court enforced the remainder of the NLRB order, which found MikLin responsible for three other Section 7 violations. *Id.* The court held that posts on an anti-union Facebook page by Robert Mulligan urging employees to remove posters around the Twin Cities violated the Act. *Id.* Second, posts by MikLin supervisors on the same page disparaging union supporters also violated the Act. *Id.* at 827. Finally, removal of union literature from MikLin stores at the request of management regarding a settlement reached on the initial Board of Directors election also violated Section 7. *Id.* at 828.

134. *Id.* at 831 (Kelly, J., dissenting in part).

135. *MikLin*, 861 F.3d at 835 (Kelly, J., dissenting in part).

1. Jefferson Standard should not apply when employee protest activities specifically reference an ongoing labor dispute

Judge Kelly's first argument centered around the Board's decision to apply the employee disloyalty principle in *Jefferson Standard*. She disagreed with the majority's analysis, arguing *Jefferson Standard* left open the possibility that Section 7 protected protest activities specifically related to ongoing labor disputes even when the employees' actions were disloyal.[136] The judge asserted that because the IWW posters clearly referenced the company's sick leave policies, they were entitled to more protection than the handbills in *Jefferson Standard*, which did not explicitly reference a labor dispute.[137] Judge Kelly concluded *Jefferson Standard* did not foreclose the Board from finding explicit communications referencing an ongoing labor dispute as protected under Section 7, and thus argued the Board's interpretation of the statute did not overrule *Jefferson Standard*.[138]

2. The malicious motive test did not originate from Jefferson Standard, so the court should have given the Board's interpretation of Section 7 deference

Judge Kelly contended second that the court should have afforded *Chevron* deference to the Board's malicious motive test. The majority discarded this argument because *Jefferson Standard* unambiguously foreclosed the NLRB's ability to formulate a test that did not include the "reasonably calculated to harm" standard.[139] However, the dissent asserted the *Jefferson Standard* decision did not unambiguously interpret Section 7, and the Board was therefore free to formulate its own reasonable interpretation of the statute.[140] Accordingly, the dissent pointed to *Brand X* and reasoned the administrative agency's interpretation of the statute trumped the court's interpretation.[141] Judge Kelly believed the Board's precedent was a reasonable interpretation of an ambiguous issue regarding Section 7, and the court should have therefore deferred to the NLRB malicious motive test.[142]

136. *Id.* at 831.
137. *Id.* at 832.
138. *Id.* at 834.
139. *Id.* at 824.
140. *Id.* at 835.
141. *MikLin*, 861 F.3d at 825.
142. *Id.* at 836.

IV. IMPACT

MikLin Enterprises, Inc. v. National Labor Relations Board will have significant implications for labor and employment law as well as administrative law in North Dakota. The Eighth Circuit Court of Appeals' decision here creates precedent for the court to rely on in future disputes between employees engaged in labor-related protest activities and employers. Additionally, the decision binds North Dakota federal district courts. *MikLin* also deepens a split between the federal circuit courts of appeals regarding the validity of the NLRB's malicious motive test.[143] Most importantly, *MikLin* establishes firm guidelines in the Eighth Circuit for clashes between the judiciary and administrative agencies in their often-blurred roles as interpreters of law.

A. EMPLOYERS GAINED MORE LATITUDE TO DISCHARGE EMPLOYEES FOR LABOR-RELATED PROTEST ACTIVITIES

The Eighth Circuit's *MikLin* decision constrains Section 7 employee protest rights and gives employers more latitude to discharge employees for cause under Section 10(c). The decision allows employers to discharge employees whenever an employee attacks a company "in a manner reasonably calculated to harm the company's reputation and reduce its income," regardless of whether that employee is engaged in labor-related protest activities.[144] This could potentially result in a chilling effect for workers interested in joining already struggling labor unions, which have notably dwindled in size and influence in the past three decades.[145] Employees often face increased retaliation from their employers during labor disputes, and with the additional power of employers to terminate employees for disloyalty, potential members may be more hesitant to participate in or support unions.

Furthermore, *MikLin* widens a split among the federal circuit courts of appeals, most recently between the Eighth Circuit and the D.C. Circuit.[146] Particularly, the two appellate courts disagree as to whether the NLRB's malicious motive test is consistent with *Jefferson Standard*. While the *MikLin*

143. *Compare* DIRECTV, Inc. v. NLRB, 837 F.3d 25, 41-42 (D.C. Cir. 2016), *with* Sierra Pub. Co. v. NLRB, 889 F.2d 210, 220 (9th Cir. 1989); NLRB v. Parr Lance Ambulance Serv., 723 F.2d 575, 578 (7th Cir. 1983); Misericordia Hosp. Med. Ctr. v. NLRB, 623 F.2d 808, 814 (2d Cir. 1980); *and* Texaco, Inc. v. NLRB, 462 F.2d 812, 814 (3d Cir. 1972).

144. *MikLin*, 861 F.3d at 824-25.

145. Megan Dunn & James Walker, *Union Membership in the United States*, Article in *Spotlight on Statistics*, BUREAU OF LABOR STATISTICS (Sept. 2016), https://www.bls.gov/spotlight/2016/union-membership-in-the-united-states/pdf/union-membership-in-the-united-states.pdf. The Bureau of Labor Statistics reports the number of employed union members decreased by 2.9 million from 1983 to 2015.

146. *Compare MikLin*, 861 F.3d at 821-22, *with DIRECTV*, 837 F.3d at 41-42.

court found the Board's reliance on the malicious motive test improper, the court in *DIRECTV* did not question the Board's use of the malicious motive test.[147] Following the D.C. Circuit's decision, MasTec Advanced Technologies, co-petitioner in the *DIRECTV* case, filed a Petition for a Writ of Certiorari to the United States Supreme Court.[148] Almost immediately following the Eighth Circuit's decision in *MikLin*, MasTec filed a supplemental brief in support of its petition.[149]

In its supplemental brief, MasTec relied heavily on *MikLin* to urge the high Court to grant certiorari to resolve whether the NLRB's malicious motive test comports with *Jefferson Standard*.[150] The Board filed a brief in response to MasTec's arguments, distinguishing the Eighth Circuit's reasoning from the D.C. Circuit's.[151] Most notably, the Board believed the Eighth Circuit overturned its *MikLin* ruling only because the Board failed to take the "reasonably calculated to harm" test into account, and not because of the malicious motive standard itself.[152] The Supreme Court ultimately denied MasTec's petition on October 2, 2017.[153] Accordingly, the question of whether the Board's malicious motive test satisfies *Jefferson Standard* will remain open for the foreseeable future.

Interestingly, the split among Eighth Circuit judges in the *MikLin* decisions at both the panel and en banc level aligned with whether a Republican or Democrat president appointed the judge.[154] The Republican appointees uniformly sided with MikLin, while the Democrat appointees dissented in favor of the employees.[155] This split may become particularly relevant if the United States Supreme Court eventually grants a writ of certiorari to decide whether the malicious motive test comports with *Jefferson Standard*.[156] With the recent confirmation of Neil Gorsuch as the Court's fifth Republican-appointed justice, the Supreme Court may resolve the malicious motive issue along similar ideological lines. In the meantime, North Dakota practitioners should remain acutely aware of the conflicting interpretations the courts of

147. *DIRECTV*, 837 F.3d at 41-42.

148. Petition for Writ of Certiorari, MasTec Advanced Tech. v. NLRB, 2017 WL 2179347 (U.S. May 11, 2017) (No. 16-1370).

149. Supplemental Brief for Petitioner, *MasTec*, (No. 16-1370), 2017 WL 3405613.

150. *Id*. at *10.

151. Supplemental Brief for Respondent, *MasTec*, (No. 16-1370), 2017 WL 3601392 at *22.

152. *Id*.

153. MasTec Advanced Tech. v. NLRB, (No. 16-1370), 2017 WL 2119340 at *1.

154. *Active and Senior Judges*, UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, http://www.ca8.uscourts.gov/active-and-senior-judges (last visited Sept. 17, 2017).

155. MikLin Enter., Inc. v. NLRB, 861 F.3d 812 (8th Cir. 2017) (en banc).

156. *See* Petition for Certiorari, *supra* note 148, at *i.

appeals have proffered on the malicious motive test and its clash with *Jefferson Standard*.

B. THE COURT'S NARROW VIEW OF CHEVRON AND BRAND X RESTRICTS ADMINISTRATIVE AGENCIES' ABILITY TO INTERPRET JUDICIAL DECISIONS

Finally, the *MikLin* decision represents the judiciary firmly staking its position as the final interpreter of the laws of the United States. With the rising power of the federal bureaucracy, restraints on the authority of administrative agencies are more important than ever.[157] As the federal government continues to grow, critical resolutions of disputes affecting millions of Americans are increasingly made not in the courtroom, but in quasi-judicial administrative proceedings.[158] While statutory law and judicial precedent superficially bind these administrative agencies, courts must afford agency decisions wide latitude in the wake of Supreme Court decisions such as *Chevron* and *Brand X*.[159]

MikLin meaningfully restricts the power of administrative agencies to interpret judicial decisions. Importantly, the decision reinforces the principle that the bureaucracy may not impose its own interpretation of statutes when that interpretation erodes judicial precedent.[160] More significantly, the Eighth Circuit boldly asserted the *Jefferson Standard* decision unambiguously foreclosed the ability of the NLRB to discard the "reasonably calculated to harm" test.[161] The holding in *MikLin* therefore constrains the ability of an administrative agency to skirt around judicial precedent by relying solely on the agency's own administrative precedent.

The conflict between the judiciary and bureaucracy as interpreters of law on full display in *MikLin* has long been a source of tension in American government. The ballooning of American bureaucracy directly threatens the constitutional balance of government, as evidenced by Chief Justice Roberts' statement that "the danger posed by the growing power of the administrative state cannot be dismissed."[162] The Eighth Circuit's decision in *MikLin* momentarily checks the bureaucracy, but the judiciary must continue to assert

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157. *See* Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013), https://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faaad0-c2ed-11e2-9fe2-6ee52d0eb7c1_story.html?utm_term=.90b41accdd5c.

158. *Id*.

159. *See MikLin*, 861 F.3d at 832 (citations omitted) (Kelly, J., dissenting) (arguing Board interpretations of the NLRA are entitled to "considerable deference").

160. *Id*. at 824.

161. *Id*. at 823.

162. City of Arlington v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

itself as the proper branch for interpreting the laws of the United States before it is swallowed whole.

V. CONCLUSION

In *MikLin Enterprises, Inc. v. National Labor Relations Board*, the Eighth Circuit Court of Appeals handed down two holdings that will undoubtedly impact North Dakota practitioners. First, the court found the *Jefferson Standard* employee disloyalty test precluded the National Labor Relations Board from relying solely on its own precedent requiring employees to evidence a malicious motive.[163] Second, the court found *Chevron* deference did not apply to the NLRB's malicious motive test because *Jefferson Standard* unambiguously interpreted the Act to require an objective test for employee disloyalty.[164] Employers, labor unions, and attorneys alike should be aware of the sweeping implications of *MikLin*, including the distinct possibility that the United States Supreme Court will definitively resolve these critical issues in the future.

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163. *MikLin*, 861 F.3d at 821-22.

164. *Id.* at 835.

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