EMPLOYEE (DIS)LOYALTY: THE FURTHERANCE OF A COMMON ENTERPRISE

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I. INTRODUCTION

This Note will attempt to analyze what test courts should apply when determining whether employees' disloyal activities rise to the level of cause for termination, and therefore are unprotected under section 7 of the National Labor Relations Act (NLRA).[1] Section 7 of the NLRA states that employees have the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[2] In contrast, section 10 of the NLRA states that the National Labor Relations Board shall not order the reinstatement of "any individual . . .

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1. *See infra* Part III.

2. 29 U.S.C. § 157 (2019).

if such individual was suspended or discharged for cause."[3] Accordingly, due to the potential conflict between these two provisions, courts must formulate a test to determine whether an employee's disloyal activity constitutes protected concerted activity or cause for termination.[4] This Note takes the position that the appropriate test is an objective test because it is consistent with the congressional goals of the NLRA and Supreme Court precedent.[5]

This Note will first examine the historical background of unions and the development of the law with regard to employees' right to organize.[6] Second, this Note will discuss the enactment of the NLRA and the various provisions under the Act that are at the foundation of the legal problem.[7] Third, this Note will discuss *Jefferson Standard*, a Supreme Court case known as the controlling precedent in this area of law.[8] Fourth, the Note will discuss the circuit split between the D.C. and Eighth Circuits with regard to the test for determining employee disloyalty.[9]

The analysis section of this Note will begin by establishing the pertinent sections of the Act and the congressional purpose for enacting them.[10] This Note then attempts to decipher *Jefferson Standard* to clarify the rules the Supreme Court created.[11] Finally, the analysis section will analyze the differing tests offered by the circuit courts and the reasoning that each court used to establish the test.[12] This leads to the conclusion that courts should adopt the objective test and reject the subjective test.[13]

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3. 29 U.S.C. § 160(c) (2019).
4. *See infra* Section II.E.
5. *See infra* Section III.E.
6. *See* discussion *infra* Section II.A.
7. *See* discussion *infra* Sections II.B., II.C.
8. NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers (*Jefferson Standard*), 346 U.S. 464 (1953); *see* discussion *infra* Section II.D.
9. *See* discussion *infra* Section II.E.
10. *See* discussion *infra* Section III.A.
11. *See* discussion *infra* Section III.B.
12. *See* discussion *infra* Section III.D.
13. *See* discussion *infra* Section III.D.

II. BACKGROUND

A. The History of Unionization Prior to the National Labor Relations Act

Attempts to organize employee unions date as far back as the 1800s.[14] During these early attempts, courts generally acted with hostility towards employees' continuing efforts to unionize.[15] A relatively small number of courts took an extreme position and rejected unions on the ground that they were "nothing less than a form of criminal conspiracy."[16] These courts held that unions were a form of criminal conspiracy because they restricted the freedom of contract between individuals and employers and encouraged "monopoly power" that was "*disruptive to both market competition and to the political system.*"[17] However, in all of these early criminal conspiracy cases, the defendants "used means to effect their ends which are generally regarded as unlawful even now."[18] Contrary to the handful of criminal conspiracy cases, courts more commonly used injunctions to curb union activities.[19] In general, these courts evaluated union activities by determining if the "objectives and/or activities of a union" were themselves lawful.[20] Overall, an overwhelming majority of courts agreed that "[i]t was never the law in the United States that labor unions are illegal per se, or that all strikes are unlawful."[21] Nevertheless, this disparity between courts using criminal charges and courts using injunctions to control union activities shows that during these early attempts to form unions, courts did not know exactly how to handle unions.[22]

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14. William N. Cooke, *Evolution of the National Labor Relations Act*, W.E. UPJOHN INST. FOR EMP. RES. 2 (Nov. 1, 2018), http://research.upjohn.org/cgi/viewcontent.cgi?article=1131&context=up_bookchapters.

15. *Id.* at 2–4.

16. *Id.* at 3.

17. *Id.*

18. WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 60 n.2 (Harvard University Press 1991) (citing Edwin E. Witte, *Early American Labor Cases*, 35 YALE L.J. 825, 825–28 (1926) (discussing that in these criminal conspiracy cases, the defendants were also charged with acts of violence and closed shop rules and practices, which would constitute illegal acts even today)).

19. *Id.* at 59–62 (discussing that criminal conspiracy charges against union leaders received most of the attention but when examining all of the cases criminal charges were rare compared to injunctions).

20. Cooke, *supra* note 14, at 3; *see, e.g.,* Commonwealth v. Hunt, 45 Mass. 111 (1842).

21. Witte, *supra* note 18, at 825–26.

22. *Compare* Cooke, *supra* note 14, *with* Forbath, *supra* note 18.

Eventually, Congress enacted the Clayton Act, formally adopting the idea that unions were lawful organizations.[23] The Act states that the antitrust laws do not prevent the formation of labor organizations or hold the members participating in labor organizations to be involved in criminal conspiracies.[24] However, despite the clear language of the statute, courts continued to prevent the formation of unions by granting employers injunctions to prevent employee strikes.[25] These unionizing efforts consequently led to litigation, which prompted Congress to enact numerous additional statutes.[26]

Employees based their efforts to unionize primarily on the desire "to improve . . . working conditions."[27] As the labor movement and its members continued to grow during World War I, President Woodrow Wilson "took steps to promote labor peace" by creating the War Labor Board.[28] The War Labor Board recognized the "right to organize in trade unions and to bargain collectively through chosen representatives."[29] As a result of the War Labor Board's efforts to resolve conflicts, employers and employees "agreed to refrain from strikes or lockouts."[30] This solution, however, did not last long.[31] In the years following the fallout, "unions lost major strikes in the steel, coal, and rail industries[,]" and union memberships dropped significantly.[32]

The conflict between labor and management heightened throughout the difficult economic times of the 1920s.[33] In response, Congress enacted the Railway Labor Act in 1926, which stressed the "importance of collective bargaining to minimize strikes and lockouts on railways."[34] This enactment was seen as a breakthrough in national labor policy.[35] During the harshest times of the Great Depression, Congress also enacted the Norris-LaGuardia Act, which significantly limited the power of courts to grant "injunctions or restraining orders against strikes" by limiting the injunctions to situations in which the strikes promoted

23. *See* Cooke, *supra* note 14, at 5.
24. Clayton Act, 15 U.S.C. § 17 (2017).
25. Cooke, *supra* note 14, at 4–5.
26. *See id.* at 5–10.
27. *Pre-Wagner Act Labor Relations*, NAT'L LAB. RELATIONS BD., https://www.nlrb.gov/who-we-are/our-history/pre-wagner-act-labor-relations (last visited Mar. 29, 2019).
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. 45 U.S.C. § 152 (2019); *Pre-Wagner Act Labor Relations*, *supra* note 27.
35. *Pre-Wagner Act Labor Relations*, *supra* note 27.

violence or were evidence of fraud.[36] Under this Act, Congress declared that it was "the policy of the United States" for workers to be "free to join unions and bargain collectively."[37] At this point in time, the national labor movement for employee unionization was well under way, but the enactment of the National Labor Relations Act was still on the horizon.[38]

B. The Enactment of the National Labor Relations Act

In February 1935, Senator Robert F. Wagner, recognizing the failures of previous labor legislation, introduced a bill to the Senate known as the Wagner Act or the National Labor Relations Act.[39] The NLRA intended to correct:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.[40]

Also, the NLRA formally created the National Labor Relations Board (NLRB) and delegated it the powers necessary "to enforce and maintain those rights . . . to arbitrate deadlocked labor-management disputes, guarantee democratic union elections, and penalize unfair labor practices by employers."[41] By July 1935, the Senate and the House passed the bill, and President Roosevelt signed it into law.[42]

President Roosevelt proclaimed that the NLRA represented "the right of self-organization of employees in industry for the purpose of collective bargaining, and provides methods by which the Government

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36. 29 U.S.C. §§ 101–15 (2019); *Pre-Wagner Act Labor Relations*, *supra* note 27.

37. *Pre-Wagner Act Labor Relations*, *supra* note 27.

38. *See id.*

39. *The 1935 Passage of the Wagner Act*, NAT'L LAB. RELATIONS BD., https://www.nlrb.gov/who-we-are/our-history/1935-passage-wagner-act (last visited Mar. 29, 2019).

40. 29 U.S.C. § 151 (2019).

41. *National Labor Relations Act (1935)*, U.S. NAT'L ARCHIVES & RECS. ADMIN. (June 14, 2019), https://www.ourdocuments.gov/print_friendly.php?flash=true&page=&doc=67&title=National+Labor+Relations+Act+%281935%29.

42. *The 1935 Passage of the Wagner Act*, *supra* note 39.

can safeguard that legal right."[43] He and Congress agreed that the National Labor Relations Board and the powers granted to it were necessary to the NLRA's enforcement.[44] However, President Roosevelt likely viewed the Act realistically, recognizing that it was not a perfect statute and would not be the end of labor disputes.[45] Nevertheless, he supported the bill because it served "as an important step toward the achievement of just and peaceful labor relations in industry."[46] Since then, the NLRA has been referred to as "perhaps the most radical piece of legislation ever enacted by the United States Congress."[47]

C. The Right to Organize and Engage in Concerted Activity

Section 7 of the NLRA codifies employees' right to form labor organizations.[48] It states that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.[49]

"'Concerted activity' is not defined in the Act," but, generally, it involves activities that employees undertake as a joint effort to achieve a common goal.[50] The Act protects employee concerted activity if it satisfies the following elements: "(1) there must be a work-related complaint or grievance; (2) the concerted activity must further some group interest; (3) a specific remedy or result must be sought through such activity; and (4) the activity should not be unlawful or otherwise

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43. Franklin D. Roosevelt, *Statement on Signing the National Labor Relations Act,* AM. PRESIDENCY PROJECT (July 5, 1935), https://www.presidency.ucsb.edu/documents/statement-signing-the-national-labor-relations-act; *National Labor Relations Act (Wagner Act) (1935)*, LIVING NEW DEAL, https://livingnewdeal.org/glossary/national-labor-relations-act-wagner-act-1935/ (last visited Mar. 15, 2019).

44. *See id.*

45. *See* William B. Gould IV, *Politics and the Effect on the National Labor Relations Board's Adjudicative and Rulemaking Processes*, 64 EMORY L. J. 1501, 1504 (2015).

46. *See* Roosevelt, *supra* note 43.

47. Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness,1937–1941,* 62 MINN. L. REV. 265, 265 (1978).

48. *See* 29 U.S.C. § 157 (2019).

49. *Id.*

50. NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 830 (1984).

improper."[51] If the concerted activity meets these elements and is a protected activity under the Act, an employer violates the Act by committing an unfair labor practice when they "interfere with, restrain, or coerce employees" from exercising these rights.[52]

Conversely, if the employees' concerted activity "unreasonably interfere[s] with the employer without placing any commensurate economic burden on the employees[,]" the activities are not protected under the Act.[53] In other words, if the concerted activity is not a reasonable means of obtaining the intended negotiation objectives, the NLRA does not protect the activity.[54] While concerted activity has been liberally construed by courts, there are cases when courts have found employee activities unprotected.[55] For example, the Fifth Circuit held that an employer did not commit an unfair labor practice when terminating an employee after the employee compared him to Cuban dictator Fidel Castro during a speech in front of other employees because the allegation was not a protected activity.[56] Similarly, the Seventh Circuit held that section 7 protects employees' concerted activity only if it is "not so defamatory or opprobrious as to isolate the allegation from the related protected activity."[57] Moreover, concerted activity constituting an unlawful act is not protected under the NLRA.[58]

Employers have long held the power to terminate an employee for wrongful conduct by law.[59] As long as the employer has a reason for the termination, other than opposing the employee's protected concerted activities, the employer has not engaged in an unfair labor practice.[60] Accordingly, the courts have stated that "[i]f a man has given his

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51. Shelly & Anderson Furniture Mfg. Co. v. NLRB, 497 F.2d 1200, 1202–03 (9th Cir. 1974).

52. 29 U.S.C. § 158 (2019).

53. *Shelly & Anderson Furniture Mfg. Co.*, 497 F.2d at 1203.

54. *Id.* at 1202–03.

55. Melissa K. Stull, Annotation, *Spontaneous or Informal Activities of Employees as "Concerted Activities," Within Meaning of § 7 of National Labor Relations Act, 29 U.S.C.A. § 157*, 107 A.L.R. Fed. 244, § 2 (1992).

56. *See* Boaz Spinning Co. v. NLRB, 395 F.2d 512 (5th Cir. 1968).

57. NLRB v. Ben Pekin Corp., 452 F.2d 205, 207 (7th Cir. 1971).

58. *See* NLRB v. Wash. Aluminum Co., 370 U.S. 9 (1962) (holding that section 7 of the Act does not protect concerted activities which are unlawful); Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345 (3d Cir. 1969) (holding that the Act protects concerted activity as long as the activity is lawful); NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503 (2d Cir. 1942) (holding that section 7 does not protect concerted activity that is independently unlawful), *superseded by statute*, Taft-Hartley Act, 61 Stat. 140, *as recognized in* Bhd. of Maint. of Way Emps. v. Guilford Transp. Indus., 803 F.2d 1228 (1st Cir. 1986).

59. Shell Oil Co. v. NLRB, 196 F.2d 637, 638 (5th Cir. 1952).

60. *See* NLRB v. McGahey, 233 F.2d 406 (5th Cir. 1956).

employer just cause for his discharge, the Board cannot save him from the consequences by showing that he was pro-union and his employer anti-union."[61]

If, however, the termination does constitute an unfair labor practice, then section 10(c), an amendment to the NLRA under the Taft-Harley Act, grants the NLRB the power to provide a remedy.[62] Section 10(c) states that:

> [T]he Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act].[63]

However, section 10(c) goes on further, stating that the Board shall not require reinstatement of an employee if the employer suspended or terminated them for cause.[64] Accordingly, there is an interplay between employees' section 7 rights and employers' section 10(c) rights to terminate an employee for cause.[65]

D. Jefferson Standard the Seminal Case of Employee Disloyalty

In *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers* (hereinafter *Jefferson Standard*), the Supreme Court held that when employees distributed a handbill, that was unrelated and made no mention of the ongoing labor dispute, to the public—harming the company's reputation—the employees committed a disloyal act constituting cause for discharge under section 10(c).[66] In 1949, the Jefferson Standard Broadcasting Company started a television service company.[67] In an effort to provide the new television service to the public, the company hired 22 technicians.[68] Negotiations between the technicians' union and Jefferson Standard to form a collective bargaining agreement failed, primarily due to disagreement over an arbitration

61. NLRB v. Soft Water Laundry, Inc., 346 F.2d 930, 934 (5th Cir. 1965) (quoting NLRB v. Birmingham Publ'g Co., 262 F.2d 2, 9 (5th Cir. 1959)).
62. 29 U.S.C. § 160(c) (2019).
63. *Id.*
64. *Id.*
65. *Id.*
66. 346 U.S. 464 (1953).
67. *Id.* at 466.
68. *Id.*

provision for discharged employees.[69] In July 1949, the union began peaceful protests against the company and distributed handbills to the public, stating the company's refusal to include an arbitration provision.[70] However, in August 1949, the employees distributed five thousand handbills to the public that made no reference to the ongoing labor dispute, but rather stated that the company was providing the public a sub-standard broadcasting product.[71] In September 1949, the company discharged ten employees found to be responsible for sponsoring and distributing the handbills.[72]

Later that month, the union filed an action with the NLRB stating that Jefferson Standard "engaged in an unfair labor practice" by discharging the ten technicians.[73] The Board found that one of the employees was not engaged in the distribution of the handbills and reinstated him with the company, but held that the employer did not commit an unfair labor practice by discharging the other nine employees.[74] In affirming the judgment of the Board, the Supreme Court found that "[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer."[75]

Further, while Congress provided employees the protections for concerted activity under section 7, it did not intend for these protections to weaken employees' duty of loyalty to their employer.[76] Accordingly, as long as the cause for termination was "separable from the concerted activities of others whose acts might come within the protection of § 7[,]" the employer has not committed an unfair labor practice.[77] The Supreme Court found that the handbills attacking the company's product did not relate to the labor practices of the company, that there was no mention in the handbills of the ongoing labor dispute, and that the handbills did not represent an attempt to gain public support in the labor dispute.[78] Accordingly, the acts amounted to employee disloyalty, constituting a cause for termination separable from the protected concerted activity of the employees.[79]

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69. *Id.* at 467.
70. *Id.*
71. *Id.* at 467–68.
72. *Id. at* 468.
73. *Id.* at 469.
74. *Id.* at 470.
75. *Id.* at 472.
76. *Id.* at 473.
77. *Id.* at 474.
78. *Id.* at 476.
79. *Id.* at 475–76.

The end of the Supreme Court's opinion included an ambiguous statement, which has led to the current circuit split.[80] The Court stated that:

> Even if the attack were to be treated, as the Board has not treated it, as a concerted activity wholly or partly within the scope of those mentioned in § 7, the means used by the technicians in conducting the attack have deprived the attackers of the protection of that section, when read in the light and context of the purpose of the Act.[81]

E. The Current Circuit Split

There is a split between the D.C. Circuit and the Eighth Circuit with regard to the test that courts should use when determining whether a concerted activity loses its section 7 protections and therefore becomes a cause for termination.[82] Both courts made an attempt to interpret the ambiguous statement made in *Jefferson Standard*.[83] In *DirecTV, Inc. v. NLRB*, the D.C. Circuit held that the *Jefferson Standard* Court allowed for consideration of the employee's subjective intent in disparaging the company over a labor dispute.[84] Conversely, in *MikLin Enterprises, Inc. v. NLRB*, the Eighth Circuit stated that the test is an objective test that looks to the means by which an employee makes a public attack.[85]

In *DirecTV, Inc.*, DirecTV wanted each of its receivers in customers' homes to be connected to a telephone line.[86] This service allowed the customer to access additional features provided by the company, and also allowed the company to track customers' habits.[87] In order to increase the number of receivers connected to telephone lines, DirecTV essentially implemented a "penalty" of five dollars on its contractors for each new receiver installation that was not connected to a telephone line.[88] The contractor then passed this "penalty" onto its technicians who failed to connect more than half of the receivers to a telephone line in a

80. *See infra* Section II.E.

81. *Jefferson Standard*, 346 U.S. at 477–48.

82. MikLin Enters., Inc. v. NLRB, 861 F.3d 812 (8th Cir. 2017) (en banc); DirectTV, Inc. v. NLRB, 837 F.3d 25 (D.C. Cir. 2016), *cert denied*, Mastec Advanced Techs. v. NLRB, 138 S. Ct. 92 (2017).

83. *MikLin Enters.*, 861 F.3d at 822; *DirecTV, Inc.*, 837 F.3d at 34–35.

84. *DirecTV, Inc.*, 837 F.3d at 34–35.

85. *MikLin Enters.*, 861 F.3d at 821.

86. *DirectTV, Inc.*, 837 F.3d at 28.

87. *Id.*

88. *Id.* at 29.

given month.[89] The technicians found it difficult to convince customers to allow them to connect their receivers to a telephone line because the connection was not required for the receiver to work properly.[90] When hearing the technicians' concerns, both DirecTV and the contractor suggested to the technicians that they should mislead or lie to the customers about the necessity of the telephone connection.[91]

When the technicians began to receive their paychecks, which included the penalties under the implementation of the new policy, the technicians protested and demanded a change to the policy.[92] The policy, however, remained unchanged.[93] The technicians took the protests a step further and conducted a television interview.[94] "The technicians arrived at the [interview] in their DirecTV vans and wearing DirecTV uniforms."[95] In the interview, the technicians announced their disapproval of the new policy and stated that they were directed to lie to customers.[96] After the interview aired, the contractor fired all the technicians who participated in the interview.[97]

The technicians brought a suit against their employer alleging unfair labor practices.[98] The administrative law judge held that the acts by the technicians were "so disloyal, disparaging and malicious as to be unprotected" by section 7, and thus, the employer had not engaged in an unfair labor practice.[99] The NLRB, however, disagreed with the judge and held that the acts were protected because the communications met the two prong test: (1) they indicated an ongoing labor dispute and (2) were "not so disloyal, reckless or maliciously untrue as to lose the Act's protection."[100] While both the administrative judge and the Board agreed that the communications indicated an ongoing labor dispute, the Board found that the statements were not untrue because they were "representations of what the [companies] told [the technicians] to do."[101]

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89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 30.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 31–32.
98. *Id.* at 32.
99. *Id.*
100. *Id.* at 31–32 (citing Am. Golf Corp. (*Mountain Shadows*), 330 N.L.R.B. 1238, 1240 (2000)).
101. *DirecTV, Inc.*, 837 F.3d at 32 (quoting Mastec Advanced Techs., 357 N.L.R.B. 103, 107–08 (2011)).

On appeal, the D.C. Circuit Court found that the ambiguous statement in *Jefferson Standard* did not apply to this case because the statement only applied when it was unclear if the first prong had been met.[102] In this case, it is agreed that the communications indicated an underlying labor dispute.[103] Accordingly, the court moved to the second prong of the test to determine whether the communications were "'so disloyal' [or] so 'maliciously untrue' as to fall outside the Act's protection."[104] In determining whether an employee's statements are "so disloyal," the court held that "an actor's state of mind" does "bear on whether the degree and nature of his disloyalty warrants denying him the Act's protections."[105] The court agreed with the Board that the subjective intent of the technicians was to gain public support in the ongoing labor dispute, rather than to encourage customers to terminate their services with DirecTV.[106] Thus, the Act protected the statements and the employer engaged in an unfair labor practice when terminating the employees.[107]

In *MikLin Enterprises, Inc.*, a Jimmy John's franchise had a company policy that employees could not simply call in sick, but were also responsible for finding a person to cover their shift.[108] The policy further stated that a failure to comply with the policy resulted in termination.[109] The union representing the employees protested against the policy by posting two pictures of identical sandwiches, asking whether you could tell which sandwich was made by a sick employee.[110] The poster then stated that the employees did not receive sick days and could not call in sick.[111] Initially, the posters were posted on bulletin boards, but then the union threatened to distribute them through different mediums to the public unless the employer complied with its requests.[112] The employer changed the policy, but it did not fully comply with the requests of the union, so the union carried out its threat.[113] The employer subsequently fired six of the employees involved in carrying out the attack and issued a warning to three other employees.[114] The union filed

102. *Id.* at 35.
103. *See id.* at 35–36.
104. *Id.* at 36.
105. *Id.* at 39.
106. *Id.* at 40–41.
107. *Id.* at 41.
108. MikLin Enters., Inc. v. NLRB, 861 F.3d 812, 815 (8th Cir. 2017) (en banc).
109. *Id.*
110. *Id.* at 816.
111. *Id.*
112. *Id.*
113. *Id.* at 816–17.
114. *Id.* at 817.

suit against the employer for engaging in unfair labor practices.[115] The administrative judge found that the posters were related to an ongoing labor dispute and were not so disloyal or maliciously untrue as to remove them from the Act's protection; therefore, the employees' activity was protected.[116] The Board affirmed the administrative judge's holding.[117]

The Eighth Circuit in reaching its conclusion interpreted *Jefferson Standard* to mean that communications would lose the protections of section 7 "if those communications 'mak[e] 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.'"[118] Unlike the D.C. Circuit, the Eighth Circuit rejected the notion that *Jefferson Standard* did not apply because the posters related to an ongoing labor dispute.[119] The court also rejected the Board's interpretation of *Jefferson Standard* that in order for employee communications to be disloyal they must first have a malicious motive.[120]

Instead, the court held that an objective test of whether the employee used appropriate means to carry out the objectives of the concerted activity was more appropriate.[121] The court stated:

> By requiring an employer to show that employees had a subjective intent to harm, and burdening that requirement with an overly restrictive need to show 'malicious motive,' the Board has effectively removed . . . the central Section 10(c) issue as defined by the Supreme Court—whether the means used reflect indefensible employee disloyalty[—from the *Jefferson Standard* inquiry.][122]

Thus, the test was not whether the employee subjectively believed that they were being disloyal by committing the acts, but rather whether the public statements "reasonably targeted the employer's labor practices, or indefensibly disparaged the quality of the employer's product or services."[123] In applying these principles to the facts of the case, the court found that the Board incorrectly determined that the Act

115. *Id.*
116. *Id.* at 817–18.
117. *Id.* at 818.
118. *Id.* at 820.
119. *Id.*
120. *Id.* at 821.
121. *Id.*
122. *Id.* at 822.
123. *Id.* at 822.

protected the communications simply because the purpose of them was to change the sick day policy.[124] The court held that the posters amounted to a devastating attack to the company's reputation and products.[125] Therefore, the acts were not protected under section 7.[126]

Thus, there is a clear circuit split over whether the test for determining whether an employee's act amounts to disloyalty involves a subjective test looking to the employee's motive or an objective test looking to the means used by the employee to obtain their objectives.[127] In the following section, this Note will attempt to determine which test is the correct test in light of the goals set forth under the NLRA.

III. ANALYSIS

Under section 7 of the NLRA, employees have the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[128] Section 8 states that it is an unfair labor practice for an employer to interfere with any rights granted to employees under Section 7.[129] Section 10(c) provides an exception to the general rules found in Sections 7 and 8, stating that the NLRB shall not reinstate an employee, with or without back pay, if the employer terminated them with cause.[130] Employee disloyalty is a section 10(c) exception to the general rule that employees' concerted activity is protected under Section 7 because "[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer."[131] The difficulty for the NLRB, and any court reviewing a Board decision, arises when determining whether an employee termination was for a "separable cause" or for concerted activity that was protected under Section 7.[132]

This section analyzes the decisions of the NLRB and various court decisions deciding whether employee termination was for a "separable cause" or was the product of an unfair labor practice. The goal is to attempt to analyze which test for determining whether disloyal employee

124. *Id.* at 824.
125. *Id.* at 826.
126. *Id.*
127. *See supra* Section II.E.
128. 29 U.S.C. § 157 (2019).
129. 29 U.S.C. § 158(a)(1) (2019).
130. 29 U.S.C. § 160 (2019).
131. NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers (*Jefferson Standard*), 346 U.S. 464, 472 (1953).
132. *Id.* at 475.

activity rises to the level of cause for termination best achieves the NLRA's general purpose.[133]

A. Congressional Purpose of Section 10

Congress enacted section 10 as an amendment to the NLRA enacted under the Taft-Hartley Act.[134] The purpose of section 10 was to strengthen, not weaken, the relationship between employees and employers.[135] Congress' theory was that employees and employers combine in a common enterprise and a crucial element to common success is loyalty between employers and employees.[136] Thus, section 10 was not intended to interfere with employers' right to choose which employees to hire or which to discharge.[137] Nevertheless, it is an unfair labor practice for an employer to exercise these rights under a disguise of attempting to interfere with employees' rights under section 7.[138] Moreover, the conference report that led to the enactment of section 10 stated that courts had already enforced the disloyalty exception under the existing section 7.[139] Thus, the enactment of section 10 was not intended to alter the existing rules but rather attempted to provide the NLRB with guidelines for deciding an unfair labor practice claim against an employer.[140]

Accordingly, when examining *Jefferson Standard* and subsequent cases to determine the proper test, we must keep in mind that loyalty is the underlying theory of a common enterprise.[141]

B. Deciphering Jefferson Standard

The overall goal of the NLRA is to "promote industrial peace" between employers and employees, which is consistent with the furtherance of a common enterprise.[142] Employee disloyalty certainly

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133. *Id.* at 472.

134. 29 U.S.C. §§ 141–97 (2019).

135. *Jefferson Standard*, 346 U.S. at 472.

136. *Id.* (stating that the relationships between employers and employees involving "cooperation, continuity of service and cordial contractual relation" is reliant on their loyalty "to their common enterprise").

137. *Id.* at 474 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45–46 (1937)).

138. *Id.* (citing *Jones & Laughlin Steel Corp*, 301 U.S. at 45–46).

139. *Id.* at 473–74 (quoting H.R. REP. NO. 510, at 38–39 (1947) (Conf. Rep.)).

140. *Id.* (quoting H.R. REP. NO. 510, at 38–39 (1947) (Conf. Rep.)).

141. *Id.* at 472.

142. *Jones & Laughlin Steel Corp.*, 301 U.S. at 45; *see also Jefferson Standard*, 346 U.S. at 472.

disrupts industrial peace and hinders the furtherance of a common enterprise, thus, "[t]here is no more elemental cause for discharge" than employee disloyalty.[143] Accordingly, the Court in *Jefferson Standard* recognized the undisputed fact that "insubordination, disobedience or disloyalty is adequate cause" for termination.[144] Thus, the Court's decision in *Jefferson Standard* must be read in the context of these underlying theories.

In *Jefferson Standard*, the Court analyzed the employees' concerted activity under two separate scenarios.[145] First, whether section 7 protects the employees' concerted activity if there had been no pending labor controversy.[146] Second, whether the existence of a pending labor dispute would provide the employees the protection of section 7.[147]

Under the no pending labor dispute scenario, the Court held that the concerted activity of the employees "unquestionably would have provided adequate cause for their disciplinary discharge within the meaning of § 10 (c)."[148] Without the existence of a pending labor dispute, the handbills the employees distributed to the public merely attacked the quality of the company's product and adversely affected public relations.[149] Accordingly, without the existence of a pending labor dispute, "[n]othing would contribute less to the Act's declared purpose of promoting industrial peace and stability" than to allow employees to attack the "very interests . . . [they] were being paid to conserve and develop."[150] This scenario offered by the Court stands for the simple principle that to constitute concerted activity under section 7, there must be a pending labor dispute.[151]

In the second scenario, the Court analyzed whether the existence of a pending labor dispute would allow the employees' activity to constitute concerted activity under section 7.[152] The Court agreed with the Board's decision and held that the existence of the labor controversy did not provide the employees the protection of the Act because the distribution of the handbills was effectively separate from the pending labor dispute.[153] In reaching this decision, the Court distinguished the

143. *Jefferson Standard*, 346 U.S. at 472.
144. *Id.* at 475.
145. *See id.* at 476–77.
146. *Id.* at 476.
147. *Id.* at 476–78.
148. *Id.* at 476.
149. *Id.*
150. *Id.*
151. *See id.*
152. *Id.* at 476–77.
153. *Id.* at 476–78.

employees' claims against the company on the picket line and their claims in the handbill.[154] The posters used on the picket line claimed that the company was treating their technicians unfairly and "emphasized the company's refusal to renew the provision for arbitration of discharges."[155] The posters also "named the union as the representative of the . . . technicians."[156]

In contrast, the handbills the employees subsequently distributed to the public made no reference to the existence of a labor dispute.[157] Unlike the posters on the picket line, which referenced the pending labor dispute, the handbills actually diverted the public's attention away from the pending labor dispute.[158] The handbills only "attacked public policies of the company which had no discernible relation to that controversy."[159] In fact, the only connection the handbills had to the pending labor dispute was the "ultimate and undisclosed purpose or motive on the part of some of the sponsors that, by the hoped-for financial pressure, the attack might extract from the company some future concession."[160] The Court also noted that if the employees had disclosed this underlying motive on the handbill, they may have received less support because the public would have viewed this as a coercive tactic.[161] In sum, the handbills the employees distributed to the public made no reference to the existing labor dispute and, therefore, the distribution did not constitute concerted activity protected under section 7 because it was not connected to the labor dispute.[162] Thus, the rule derived from this scenario is that even if there is a pending labor dispute, employee activity is not concerted activity under section 7 if the activity makes no reference to the labor dispute because it constitutes an unconnected separable act.[163]

However, the Court also created another rule when it held that remanding the case to the Board would be unnecessary because:

> Even if the attack were to be treated, as the Board has not treated it, as a concerted activity wholly or partly within the scope of those mentioned in § 7, the means used by the technicians in

154. *Id.* at 476–77.
155. *Id.* at 467.
156. *Id.*
157. *Id.* at 476–77.
158. *Id.*
159. *Id.*
160. *Id.* at 477.
161 *Id.*
162. *Id.*
163. *See id.*

> conducting the attack have deprived the attackers of the protection of that section, when read in the light and context of the purpose of the Act.[164]

In other words, even if the employee activity constitutes concerted activity under section 7 and it relates to an ongoing labor dispute, the activity still may not receive the protection of section 7 if the means used conflict with the purpose of the Act.[165] Recall, the purpose of the NLRA was to correct "[t]he inequality of bargaining power between employees . . . and employers."[166] However, Congress' enactment of section 10 also shows that the NLRA was not meant to hinder an employer's right to discharge or terminate employees for cause.[167] Thus, this final rule adopted by the *Jefferson Standard* Court merely reinforces the employer's right to terminate employees for cause even during an ongoing labor dispute.[168] Similarly, it stands for the principle that section 7 does not protect all employee concerted activity if it unreasonably disrupts the furtherance of the common enterprise, in conflict with the NLRA's goals.[169] These rules are consistent with the Court's statement that "[t]here is no more elemental cause for discharge" than employee disloyalty.[170]

In sum, in order to constitute concerted activity under section 7, there (1) must be a pending labor dispute; and (2) the activity must make reference or connect to the pending labor dispute.[171] Additionally, even if the employee activities constitute concerted activity, they may still not receive the protection of section 7 if the means used conflicts with the purposes of the Act, namely the furtherance of a common enterprise.[172]

C. Related to an Ongoing Labor Dispute

Under *Jefferson Standard*, the employees' concerted activity is protected by section 7 only if it is related to an ongoing labor dispute.[173] Section 2 of the NLRA defines 'labor dispute' broadly as "any

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164. *Id.* at 477–78.
165. *See id.*
166. 29 U.S.C. § 151 (2019).
167. *See* 29 U.S.C. § 160(c) (2019) (stating that the Board should not reinstate an employee terminated for cause).
168. *See Jefferson Standard*, 346 U.S. at 464.
169. *Id.* at 472–73; *see also* 29 U.S.C. § 151 (2019).
170. *Jefferson Standard*, 346 U.S. at 472.
171. *See id.* at 476–77.
172. *Id.* at 477–78.
173. *Id.* at 476–78.

controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."[174] However, this definition of "labor dispute" is significantly affected by the Act's definition of "employee."[175]

The NLRA defines employee as "any employee, and shall not be limited to the employees of a particular employer . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice."[176] These definitions stand for the proposition that an individual does not even have to be an employer's employee in order to bring an unfair labor practice claim against that employer.[177] For example, in *Five Star Transportation, Inc. v. NLRB*, the First Circuit held that a group of bus drivers were sufficiently connected to a labor dispute even though they were not employees of the employer. The drivers claimed that the employer committed an unfair labor practice.[178] In addition, although the employees' letters to the school district did not explicitly reference a labor dispute, the court nevertheless held that the existence of a labor dispute was apparent in the letters.[179]

Since the Act has defined labor dispute and employee so broadly, it encompasses nearly all employee activity that has some connection to a labor dispute.[180] Thus, whether an employer can lawfully exercise their section 10(c) rights will depend primarily on whether the employee activities constitute cause for termination.[181]

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174. 29 U.S.C. § 152(9) (2019).

175. *See* 29 U.S.C. § 152(3) (2019).

176. *Id.*

177. *See* Five Star Transp., Inc. v. NLRB, 522 F.3d 46, 53 (1st Cir. 2008).

178. *Id.* In this case, a school district was in the process of accepting bids for a student busing service. *Id.* at 48. Five Star Transportation placed the lowest bid and received the contract. *Id.* at 48–49. The employees claimed that Five Star, due to the excessively low bid, would engage in unfair labor practices with employees of the previous bus service. *Id.* at 48. The group of bus drivers made complaints to the school district claiming that the low bid would not allow Five Star Transportation to provide its drivers with sufficient benefits and pay. *Id.* at 48–49. The court ultimately held that the group of bus drivers were sufficiently connected to the labor dispute because Five Star hired at least some of the bus drivers. *Id.* at 49, 53.

179. *Id.* at 53.

180. *Id.* at 53; *see also* 29 U.S.C. § 152(3).

181. *See* 29 U.S.C. § 160(c) (2019).

D. Confusion over Disloyalty as an Unprotected Concerted Activity

The basis of the Court's holding in *Jefferson Standard* was that even if the employees engaged in concerted activity under section 7, the activity was nevertheless unprotected because the means used provided cause for termination.[182] The terminable cause was "detrimental disloyalty."[183] The employees' distribution of the handbills was disloyal because they were "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."[184] The Board even went as far as to say that the employees' public attack of the company's product was no less indefensible than physical sabotage on the company.[185] Thus, it appears that the Court's test for determining whether disloyal activities by an employee amounts to cause for termination is whether the activities were detrimentally disloyal to the employer.[186] However, the Court never provided a clear definition of what is detrimental or disloyal and, as the dissenting opinion predicted, lower courts have struggled with applying a consistent standard.[187]

In NLRB cases following *Jefferson Standard*, the Board held that section 7 protected employee concerted activity related to an ongoing labor dispute so long as the communications to third-parties to gain public support are "not so disloyal, reckless or maliciously untrue as to lose the Act's protection."[188] In *Five Star Transportation*, the First Circuit followed the Board's test.[189] The court noted that "[i]t is widely recognized that not all employee activity that prejudices the employer, and which could thus be characterized as disloyal, is denied protection by the Act."[190] The court ultimately held that protected employee activity

182. NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers (*Jefferson Standard*), 346 U.S. 464, 476 (1953).

183. *Id.* at 472.

184. *Id.* at 471.

185. *Id.* at 477.

186. *See id.* at 472.

187. *Id.* at 481 (Frankfurter, J., dissenting) (stating that the NLRB and lower courts "will hardly find guidance for future cases"); *see also* MikLin Enters., Inc. v. NLRB, 861 F.3d 812 (8th Cir. 2017); DirecTV, Inc. v. NLRB, 837 F.3d 25 (D.C. Cir. 2016).

188. Am. Golf Corp. (*Mountain Shadows*), 330 N.L.R.B. 1238, 1240 (2000); *see, e.g.*, Cincinnati Suburban Press, 289 N.L.R.B. 966, 967–68 (1988), *overruled by* Lafayette Park Hotel, 326 N.L.R.B. 824 (1998); Emarco, Inc., 284 N.L.R.B. 832, 833 (1987); Richboro Cmty. Mental Health Council, Inc., 242 N.L.R.B. 1267, 1268 (1979).

189. Five Star Transp., Inc. v. NLRB, 522 F.3d 46, 52 (1st Cir. 2008).

190. *Id.* at 53.

depends on whether the activity "appeared necessary to effectuate the employees' lawful aims."[191]

Conversely, in *Endicott Interconnect Technologies, Inc. v. NLRB*, the D.C. Circuit relied on *Jefferson Standard*'s "detrimental disloyalty" test to find the employee activity was unprotected, even though the Board found that the activities were not "so disloyal, reckless or maliciously untrue as to lose the Act's protection."[192] The D.C. Circuit found that the test applied by the Board was a correct characterization of the test, but that the Board ignored the fact that the employee's "communications were unquestionably detrimentally disloyal."[193] These cases show that both the NLRB and courts continue to struggle with applying a consistent test for determining whether disloyalty amounts to cause for termination under section 10.

E. Why Courts Should Apply an Objective Test and Reject the Subjective Test

The basic difference between the tests applied in these two cases is the nature of the test. The Eighth Circuit in *MikLin* applied an objective test, which looked to whether the employees used reasonable means to gain support for an ongoing labor dispute; and the D.C. Circuit in *DirecTV* applied a subjective test, which looked to whether the employees—even though the activities were objectively disloyal—had a malicious motive when carrying out the concerted activity.[194] An examination of each court's reasoning for applying these different standards is necessary to determine which test is appropriate and consistent with the congressional purposes for enacting the NLRA.[195]

In *MikLin*, the Board applied the same malicious motive test as the Eighth Circuit to find that the employee activities were not so disloyal as to provide cause for termination.[196] The Eighth Circuit, however, found that the application of the malicious motive test "fundamentally misconstrued *Jefferson Standard* in two ways."[197] First, even though the

191. *Id.* at 54 (quoting NLRB v. Mount Desert Island Hosp., 695 F.2d 634, 640 (1st Cir. 1982)).

192. Endicott Interconnect Techs., Inc. v. NLRB, 453 F.3d 532, 537 (D.C. Cir. 2006).

193. *Id.*

194. MikLin Enters., Inc. v. NLRB, 861 F.3d 812, 821 (8th Cir. 2017); DirecTV, Inc. v. NLRB, 837 F.3d 25, 40 (D.C. Cir. 2016).

195. *See* 29 U.S.C. § 151 (2019).

196. *MikLin Enters., Inc.*, 861 F.3d at 821 ("To lose the Act's protection as an act of disloyalty, an employee's public criticism of an employer must evidence a malicious motive . . . ." (citing MikLin Enters., Inc., 361 N.L.R.B. 283, 286 (2014))).

197. *Id.*

employees' subjective intent is relevant to the inquiry, "the *Jefferson Standard* principle includes an objective component that focuses, not on the employee's *purpose*, but on the *means* used."[198] Thus, by finding that section 7 protects all employee activities so long as the employees do not have a subjective intent to harm, "the Board has not interpreted Jefferson Standard [but instead they have rather] overruled it."[199]

Second, the Board's definition of "malicious motive" "refuses to treat as 'disloyal' any public communication intended to advance employees' aims in a labor dispute, regardless of the manner in which, and the extent to which, it harms the employer."[200] This construction also attempts to overrule *Jefferson Standard*, in which the Court held that concerted activity could be unprotected even if the activity related to an ongoing labor dispute.[201] Furthermore, placing the burden on employers to prove employees had a subjective intent to harm removes the section 10(c) inquiry of "whether the means used reflect indefensible employee disloyalty."[202] In rejecting the malicious motive test and requiring an objective test, the Eighth Circuit reasoned that the test used should be consistent with Supreme Court precedent rather than overrule it.[203]

In *DirecTV*, the D.C. Circuit followed the malicious motive test and found that it was permissible for the Board to consider whether the employees intended to seek public support or intended to harm the employer.[204] Unlike the Eighth Circuit, that based its reasoning on *Jefferson Standard*, the D.C. Circuit reached its conclusion by distinguishing a prior D.C. Circuit case, *George A. Hormel & Co. v. NLRB*, and disproving the dissenting opinion.[205] Even conceding that *Hormel*[206] "require[d] an objective test of disloyalty", the court nevertheless reasoned that the issue in the present case was different and, thus, not restricted by *Hormel*.[207] The court held that *Hormel* only applied an objective test to determine whether the employee engaged in a disloyal act, not to whether the disloyalty amounted to cause for

198. *Id.* at 821 (stating that the subjective inquiry of intent derives from whether the activities were a "sharp, public, disparaging attack," but that the objective inquiry derives from whether the attack was "reasonably calculated to harm the company's reputation and reduce its income." (citing NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers (*Jefferson Standard*), 346 U.S. 464, 476 (1953))).

199. *Id.*

200. *Id.*

201. *Id.* at 820–22.

202. *Id.* at 822.

203. *See id.* at 815, 834.

204. DirecTV, Inc. v. NLRB, 837 F.3d 25, 40 (D.C. Cir. 2016).

205. *See id.* at 37–41.

206. George A. Hormel & Co. v. NLRB, 962 F.2d 1061 (D.C. Cir. 1992).

207. *DirecTV, Inc.*, 837 F.3d at 38–39.

termination.[208] Thus, the court reasoned that because *Hormel* did not apply the Board was not restricted by it and could consider the employees' subjective intent to determine "whether the degree and nature of . . . disloyalty warrants denying . . . the Act's protections."[209]

The Eighth Circuit's objective test not only uses reasoning based on *Jefferson Standard* and the Act, but also provides a test that better advances Congress' goal in enacting the NLRA.[210] Accordingly, there are several reasons why we should reject the D.C. Circuit's subjective test.

First, a cardinal canon of construction states that "courts must presume that a legislature says in a statute what it means and means in a statute what it says."[211] Thus, courts must interpret Congress' section 10(c) language, which prohibits the Board from reinstating employees discharged for cause, to have meaning.[212] Contrary to this rule of interpretation, the subjective standard fails to provide employers their section 10 right to terminate employees for cause.[213] Rather, as the Eighth Circuit stated, a subjective inquiry effectively removes the question of whether the means used were appropriate.[214] A subjective test "does not . . . entail a 'permissible construction' of the NLRA because it is inconsistent with the statutory policy of preserving the employer's right to discharge an employee for disloyalty."[215] Accordingly, an objective test for determining employee disloyalty is more appropriate because it interprets section 10(c) in a manner that gives it meaning.[216]

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208. *Id.* at 38.

209. *Id.* at 39.

210. *Id.* at 25–27.

211. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992).

212. 29 U.S.C. § 160(c) (2019).

213. *See* 29 U.S.C. § 160 (2019) (stating that it is not an unfair labor practice for an employer to terminate an employee for cause); *see also* George A. Hormel & Co. v. NLRB, 962 F.2d 1061 (D.C. Cir. 1992).

214. MikLin Enters., Inc. v. NLRB, 861 F.3d 812, 822 (8th Cir. 2017).

215. *Hormel*, 962 F.2d at 1065. For example, consider the situation in which "an employee who wears in public a t-shirt advocating a boycott of his employer." *Id.* Hypothetically, an employee could truthfully (or falsely) state he liked the color of a shirt in response to an inquiry into his motivation for wearing the shirt. *Id.* Under a subjective test, the employer could not lawfully terminate the employee because the employee did not have the requisite malicious motive. *Id.* Thus, "whatever [the employee's] reason" (absent a malicious motive) it would effectively prevent an employer from exercising their section 10(c) rights to terminate the employee. *Id.* As a result, the employer would effectively be required to prove that the employee's subjective motive offered was not in fact their actual motive, which is a burden the employer is unlikely to be in a position to meet. *See id.*

216. *Id.*

Second, *Jefferson Standard* held that even if the employee activities constituted concerted activity under section 7, the activities were nevertheless unprotected because they were "detrimentally disloyal."[217] The subjective test appears to abandon this principle because, under the malicious motive test, all activities intended to advance a labor dispute would be protected, even if they are detrimentally disloyal to the employer.[218] Recall that loyalty is the underlying theory of a common enterprise and to restrict an employer's right to terminate a detrimentally disloyal employee would weaken, not strengthen, the furtherance of the common enterprise.[219]

Third, if "a 'subjective test' couldn't be squared with the NLRA's 'statutory policy of preserving the employer's right to discharge an employee for disloyalty[,]'"[220] how could a subjective test comply with this right when determining whether the disloyalty arises to the level of cause for termination?[221] The answer is that it cannot.[222] The subjective test places an enormous burden on the employer to prove that the employee acted with a harmful intent, not only does the employer lack objective proof of an employee's intent, but even if they had proof the employee could offer any number of reasons why their intent was not to harm the employer.[223]

Fourth, the subjective test could potentially allow employees to detrimentally attack the employer's product, so long as their motive is to gain public support for the labor dispute.[224] The issue with this is that an unreasonable attack on the company's product could adversely affect the employer's business far beyond the resolution of the labor dispute.[225] This is far from a complete list of reasons why the subjective test fails to achieve the goals of the Act, but it does shed light on why the Supreme Court should reject it and follow an objective test.

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217. NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers (*Jefferson Standard*), 346 U.S. 464, 472 (1953).

218. *MikLin Enters., Inc.*, 861 F.3d at 821.

219. *Jefferson Standard*, 346 U.S. at 472.

220. DirecTV, Inc. v. NLRB, 837 F.3d 25, 48 (D.C. Cir. 2016) (Brown, J., dissenting) (quoting *Hormel*, 962 F.2d at 1065).

221. *Id.* at 49 (Brown, J., dissenting).

222. *Id.*

223. *See id.* at 48–49.

224. MikLin Enters., Inc. v. NLRB, 861 F.3d 812, 822 (8th Cir. 2017).

225. *Id.*

F. Does an Objective Test Render Employee Activity Unprotected Whenever the Activity Harms the Company's Reputation or Product?

The simple answer is no; an objective test would not render all employee activities that potentially harm a company's reputation or product unprotected.[226] The *Jefferson Standard* Court's inquiry focused on the "means" the employee used to determine whether disloyalty constituted a separable cause for termination.[227] In particular, the Court asked whether the means used were "reasonably calculated to harm the company's reputation and reduce its income" to the extent that it was an "indefensible" disparagement.[228] Indefensible is ordinarily defined as "incapable of being justified or excused."[229] The general inquiry, therefore, is whether the employee used appropriate and defensible means to carry out the objectives of the concerted activity.[230] Thus, as long as the means the employee used are defensible, meaning that the activities are justified and reasonable, even though potentially harming the company's reputation or product, section 7 may still protect the activities.[231]

Whether the activity is defensible will necessarily depend on the relationship between the company's product and the point at issue in the labor dispute.[232] The theory behind this principle is that "[w]hen employees convince customers not to patronize an employer because its labor practices are unfair, subsequent settlement of the labor dispute brings the customers back, to the benefit of both employer and employee."[233] In other words, if an employee's activities during a labor dispute incidentally harm the company's reputation or product, it should not render the activity unprotected because upon resolution of the dispute any lost customers should return.[234] Employee disparagement of a

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226. *See id.* at 821.

227. NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers (*Jefferson Standard*), 346 U.S. 464, 477–78 (1953).

228. *Id.* at 471, 477; *see also MikLin Enters., Inc.*, 861 F.3d at 821.

229. *Indefensible*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/indefensible (last visited Mar. 31, 2019).

230. *Jefferson Standard*, 346 U.S. at 477; *see also MikLin Enters., Inc.*, 861 F.3d at 821.

231. *See MikLin Enters., Inc.*, 861 F.3d at 820–21.

232. *See id.* at 819.

233. *Id.* at 822. The Eighth Circuit also noted that "[b]y contrast, sharply disparaging the employer's product or services as unsafe, unhealthy, or of shoddy quality causes harm that outlasts the labor dispute, to the detriment of all employees as well as the employer." *Id.*

234. *See id.*

company product, however, is not unlimited.[235] Even if the product is at the base of the labor dispute, the employee activity disparaging the company's product must use means that are appropriate and justified.[236] Accordingly, when the company's product or service is the basis of the labor dispute, section 7 should protect an employee's activity when it is an appropriate and reasonable means to gain public support, even if it potentially harms the company's reputation or product.[237] This principle holds true when reevaluating the cases discussed above.[238]

In *Jefferson Standard*, the employer engaged in the business of providing television service to the public.[239] The basis of the labor dispute derived from the inclusion of an arbitration provision for employee discharge in the collective bargaining agreement.[240] The handbills that the employees distributed to the public, however, only attacked the company by stating the television service was sub-standard.[241] The quality of the company's television service was wholly unrelated to the inclusion of an arbitration provision in the collective bargaining agreement.[242] Since the product was not at the basis of the labor dispute, the means that the employees used were indefensible and the Court's holding still holds true.[243]

In *MikLin*, the employer engaged in the business of selling sandwiches to the public.[244] The basis of the labor dispute derived from an employee sick day policy, which stated that a sick employee must find a replacement for their shift or face termination.[245] The employees distributed posters to the public picturing two identical sandwiches and then asked if you could tell whether a sick employee made one of the sandwiches.[246] Even if we assume that there is a sufficient relationship between sick employees and contaminated sandwiches, the employees' activities still do not receive the protection of section 7 because the means used were inappropriate to achieve the employees' labor objectives.[247] Suppose the employees' objective in the labor dispute was

235. *Id.* at 820.
236. *Id.* at 824–25.
237. *Id.* at 820–21.
238. *See supra* Section III.E.
239. NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers (*Jefferson Standard*), 346 U.S. 464, 466 (1953).
240. *Id.* at 467.
241. *Id.* at 468.
242. *Id.* at 476.
243. *Id.* at 476–77.
244. MikLin Enters., Inc. v. NLRB, 861 F.3d 812, 815 (8th Cir. 2017).
245. *Id.*
246. *Id.* at 816.
247. *Id.* at 824–26.

to totally eliminate the policy, thereby allowing the employees to call in sick without finding a replacement.[248] An appropriate means to accomplish this objective would have been to publicize the unfairness of the policy in order to gain public support and to pressure the employer into changing the policy.[249] Instead, the employees made an attack on the quality of the company's product that "cause[d] harm that outlasts the labor dispute."[250] The means used were inappropriate and lost the protection of section 7 because they hindered, rather than furthered, the common enterprise.[251]

In *DirecTV*, the employer also engaged in the business of providing television service to the public.[252] The basis of the labor dispute derived from a company policy that charged a "penalty" to the employees who failed to connect a telephone line to at least half of the receivers installed.[253] At the television interview, the employees essentially stated that the company was encouraging them to mislead customers by telling them that a telephone line connection was necessary for the service to work properly.[254] The Board recognized that this "could lead some consumers to cancel their service[,]" thereby harming the company's reputation and product.[255]

When applying the objective "appropriate means" test to this case, instead of a subjective test, we reach the same conclusion that section 7 protects the employees' activity.[256] Even though the employees' means could have potentially harmed the company's reputation and product, there was an essential nexus between the labor dispute and the employees' activities.[257] The labor dispute derived from employees notifying the public of a company policy that essentially forced the employees to mislead customers.[258] The employees notified the public to gain support to change the policy, which caused harm to the company's reputation.[259] Therefore, under an objective test, the means the employees used were appropriate and the employees received the protection of section 7.[260]

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248. *See id.* at 816.
249. *Id.* at 825–26.
250. *Id.* at 822.
251. *Id.* at 824–26.
252. DirecTV, Inc. v. NLRB, 837 F.3d 25, 28 (D.C. Cir. 2016).
253. *Id.* at 29.
254. *Id.* at 29–31.
255. *Id.* at 37.
256. *See id.* at 39–40.
257. *See id.* at 35, 37.
258. *Id.* at 42–45.
259. *See id.*
260. *See id.* at 33.

A critic of this Note may argue that if we reach the same result in all these cases regardless of the test employed, then the distinction between the two tests appears to be superficial. This argument, however, overlooks the advantages of an objective test. As discussed above, an objective test provides a proper interpretation of Congress' section 10(c) language by maintaining an employer's right to terminate an employee for disloyalty.[261] An objective test also looks primarily to the harm caused by the employee's disloyal acts, which is consistent with the NLRA's purpose of promoting the furtherance of a common enterprise.[262] For example, if an employee engages in disloyal activities, the company still suffers the same amount of harm, regardless of whether the employee had a malicious motive or not.[263] Thus, regardless of the employee motive, the common enterprise has suffered as a whole.[264]

Finally, adopting an objective test will help to promote consistency and predictability in this area of law. If courts apply an objective test when analyzing employee disloyalty, this will in turn provide more consistency from decision to decision.[265] As a result, employers will be able to better predict whether an employee's disloyal activities rise to the level of cause for termination under an objective test.[266] Overall, the benefits of an objective test outweigh those of a subjective test.

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261. *See supra* Section III.E (arguing that a subjective test is an impermissible construction of section 10(c) because it fails to preserve the employer's right to terminate an employee for disloyalty).

262. *See* NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers (*Jefferson Standard*), 346 U.S. 464, 472 (1953); MikLin Enters., Inc. v. NLRB, 861 F.3d 812, 821–22 (8th Cir. 2017).

263. *See Jefferson Standard*, 346 U.S. at 471–473.

264. *See id.* at 472.

265. *See* NLRB v. Joe B. Foods, Inc., 953 F.2d 287, 294 (7th Cir. 1992); Int'l Longshore and Warehouse Union v. ICTSI Oregon, Inc., 15 F.Supp.3d 1075, 1085 (D. Or. 2014); Lauren K. Neal, *The Virtual Water Cooler and the NLRB: Concerted Activity in the Age of Facebook*, 69 WASH. & LEE L. REV. 1715, 1719–20 (2012). I concede that this proposition could also be used to support the adoption of a subjective test. After all, when courts apply two different tests, the mere application of the differing tests will in and of itself create inconsistencies. Thus, the adoption of either test could create more consistency in this area of law. However, one could argue that a subjective test, in this already highly fact-intensive area of law, could inherently cause inconsistencies due to the additional inquiry into the employee's mental state. Thus, this Note takes the position that the adoption of one test would create more consistency but that the adoption of the objective test would best help create consistency from decision to decision.

266. George A. Hormel & Co. v. NLRB, 962 F.2d 1061 (D.C. Cir. 1992).

IV. CONCLUSION

An objective test determining whether employees' disloyal activities rise to the level of cause for termination is the most appropriate test to determine whether they are unprotected under section 7.[267] It advances the NLRA's goals, which are to "promote industrial peace" and to further a common enterprise.[268] An objective test also preserves employers' section 10(c) right to terminate disloyal employees for cause.[269] It promotes consistency from decision to decision, which will in turn put employers in a better position to evaluate employee activities and determine whether they rise to the level of cause for termination.[270] Unlike under a subjective test, employers would not have to attempt to ascertain the employee's intent, which could prove to be an impossible task because only the employee knows their true intentions. Overall, the tests applied by the Board and courts to disloyal employee activities are inconsistent, to say the least.[271] The Supreme Court should grant certiorari in a case to clarify exactly what principles *Jefferson Standard* stands for and which test lower courts should apply. For the reasons discussed above, this Note takes the position that the Supreme Court should apply an objective test, because it best achieves the NLRA's goal of furthering the common enterprise to the benefit of both the employee and the employer.

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267. *See supra* Section III.E.

268. 29 U.S.C. § 151 (2019); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937).

269. *See supra* Sections III.A, III. E.

270. *See supra* Section III.F.

271. *See supra* Section II.E.