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Dysfunctional Disloyalty Standards in Employee Criticism Cases

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— Note —

DYSFUNCTIONAL DISLOYALTY STANDARDS IN EMPLOYEE CRITICISM CASES

CONTENTS

INTRODUCTION	917
I. THE ROOTS OF EMPLOYMENT LAW AND THE DUTY OF LOYALTY	921
II. THE PUBLIC POLICY EXCEPTION AND THE DIFFERENCE BETWEEN PRETEXT AND DISLOYALTY CASES	923
III. DISLOYALTY STANDARDS UNDER THE NLRA	929
IV. THE PROBLEM OF RELIANCE ON “DISLOYALTY”	936
V. AN OBJECTIVE, BURDEN-SHIFTING SOLUTION	939
CONCLUSION	942

INTRODUCTION

Paramedic Dawnmarie Souza was fired in 2009 after she called her supervisor at American Medical Response a “scumbag” on Facebook.¹ In response, Souza filed a complaint with the National Labor Relations Board (NLRB). American Medical Response justified the firing by citing the Facebook post and additionally accusing her of unprofessional conduct while on a call.² The NLRB determined that the firing was illegal because her comment came in the context of an online discussion about supervisory practices—a discussion protected by law. The NLRB found that the employer’s accusations of unprofessional conduct “appear[ed] to be pretextual.”³ The case settled before reaching an administrative law judge.⁴

The result differed in another case dealing with discipline for employee criticism of an employer. A BMW dealership fired salesman Robert Becker for making two Facebook postings that portrayed the

1. Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, to Jonathan B. Kreisberg, Reg’l Dir., Region 34, regarding Am. Med. Response of Conn., Inc., Case 34-CA-12576, at 3 (Oct. 5, 2010), *available at* <http://www.nlr.gov/category/case-number/34-ca-012576>.

2. *Id.* at 10.

3. *Id.* at 11.

4. Melanie Trotman, *Workers Claim Right To Rant on Facebook*, WALL ST. J., Dec. 2, 2011, at B1.

dealership unfavorably.⁵ The administrative law judge determined that one posting was protected concerted activity, but the other was not.⁶ Not surprisingly, Becker and the dealership disagreed about which post precipitated the firing. The A.L.J. found the dealership's testimony more credible and decided the firing for the unprotected activity was lawful.⁷ But the A.L.J. also found the dealership's policy that "[n]o one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership" unlawfully chilled protected employee conduct, and the NLRB affirmed that this policy was facially unlawful.⁸

These two examples are part of a larger body of complaints. In 2011 the NLRB received over one hundred charges from employees who were disciplined for criticizing their employers online.⁹ The NLRB determines whether to proceed with these complaints after a case-by-case factual analysis, which led one human resources professional to ask for more guidance, saying the NLRB "comes in and is pretty aggressive on these issues, but isn't really clear on drawing lines."¹⁰

These cases of employers disciplining employees for criticism are hard to decide because they require a balancing of interests. Employers want loyal employees they can trust and want to avoid the damaging fallout that can result from insider criticism. The law recognizes the substantial value of employee loyalty.¹¹ Employees, on

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5. Karl Knauz Motors, Inc., No. 13-CA-46452, 2011 WL 4499437 (NLRB Div. of Judges Sept. 28, 2011), *modified by* 358 N.L.R.B. 1 (2012).
 6. *Id.* at *9. In the protected posting, Becker complained about the quality of the food the dealership provided for customers at a major sales event. In the unprotected post, Becker made light of an incident where a salesperson allowed a Land Rover to roll off the lot and into a pond. *Id.* at *2-3.
 7. *Id.* at *9.
 8. Karl Knauz Motors, Inc., 358 N.L.R.B. 1 (2012) ("We find the 'Courtesy' rule unlawful because employees would reasonably construe its broad prohibition against 'disrespectful' conduct and 'language which injures the image or reputation of the Dealership' as encompassing Section 7 activity, such as employees' protected statements—whether to coworkers, supervisors, managers, or third parties who deal with the Respondent—that object to their working conditions and seek the support of others in improving them.").
 9. Trottman, *supra* note 4.
 10. *Id.*
 11. See RESTATEMENT (SECOND) OF AGENCY § 387 (1958) ("Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency."); *cf.* RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006) ("An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship.").

the other hand, want the freedom to criticize their employers. This desire of employees to criticize employers, like the employer desire for loyalty, can serve the interests of society as reflected in the legal protection of certain employee conduct, such as when employees criticize employers while advocating for collective bargaining rights¹² or reporting violations of public policy.¹³

Further, a wide variety of institutions and jurisdictions speak on this issue, adding complexity the law of employee criticism. Employment and agency are generally governed by state statutory and common law, so fifty sets of state legislatures and courts have addressed (or failed to address) the underlying question. Federal statutes (and for public employees, the Constitution) apply to certain areas of employment law, adding the views of Congress, federal courts, and executive agencies to the already clouded picture.

Despite this murkiness, cases of employees disciplined for criticism can be divided into two classifications: those dealing with pretexts or mixed motives, and those dealing with disloyalty. In a pretext case, the employer puts forward a bogus justification for disciplining the employee when the discipline was actually in response to the criticism. This is how the NLRB viewed American Medical Response's justification for firing Souza. In a mixed motive case, the employer has both legitimate and illegitimate reasons for the discipline. For instance, the BMW dealership could legally fire Becker for criticism of the dealership's ineptitude in allowing a Land Rover to roll into a pond because this did not relate to a term or condition of employment, but Becker's criticism of low-quality food served to customers at an event was legally protected because the dealership's customer service or lack thereof affected Becker's commissions.

When employees who have engaged in both protected employer criticism and other unprotected conduct challenge the imposition of discipline, the seemingly crucial "distinction between a pretext case and a dual motive case is sometimes difficult to discern."¹⁴ But this

12. See National Labor Relations Act, 29 U.S.C. §§ 151–69 (2006) (establishing and protecting employees' right to bargain collectively, among other rights).

13. See Wrongful Discharge From Employment Act, MONT. CODE ANN. § 39-2-904 (2011) ("A discharge is wrongful . . . if . . . it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy . . .").

14. Wright Line, a Div. of Wright Line, Inc., 251 N.L.R.B. 1083, 1084 n.5 (1980), *enforced sub nom.* NLRB v. Wright Line, a Div. of Wright Line, Inc., 662 F.2d 899 (1st Cir. 1981). The Board suggested the difference can be better conceptualized by viewing the employer's justification as an affirmative defense: "[I]n a pretext situation, the employer's affirmative defense of business justification is wholly without merit. If, however, the affirmative defense has at least some merit a 'dual motive' may exist

Note argues that courts and agencies are well equipped to handle such cases because courts have a number of tools to determine the difference, if any, between the asserted reasons for termination and the true reasons. One tool is the burden-shifting approach adopted by the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*.¹⁵

Under the *Mt. Healthy* test, the initial burden is on the plaintiff employee to demonstrate that the employee engaged in legally protected conduct that was a “substantial” or “motivating” factor in the discipline.¹⁶ Then the employer has the opportunity to prove that it would have “reached the same decision . . . even in the absence of the protected conduct.”¹⁷ This approach recognizes “the practical reality that the employer is the party with the best access to proof of its motivation.”¹⁸ And there is the added benefit that under the *Mt. Healthy* test “there is no real need to distinguish between pretext and dual motive cases”¹⁹—it brings to the fore the actual motivation for the discipline whether the asserted motive is wholly without merit, meritorious, or somewhere in between.

This Note argues that the real problem lies with the category of employee criticism cases where the decision is based on disloyalty. In these cases both the employer and employee agree that the criticism motivated the discipline. The employee argues that the criticism is protected, but the employer counters by saying that the employee’s lack of loyalty deprives the conduct of protection. This Note argues that courts are not well placed to determine what disloyalty means, and as a result, the decisions focusing on disloyalty are inconsistent. Courts should instead focus on whether conduct by employees causes actual detriment to the employer. This more concrete standard would provide firmer footing for these difficult judicial determinations than the dysfunctional standard of employee disloyalty.

The contours of the law of employee discipline for criticizing employers are shaped by its most prominent form, termination, and in turn by the at-will employment doctrine. Most employees in this country are employed at will, meaning that their employers can fire

and the issue becomes one of the sufficiency of proof necessary for the employer’s affirmative defense to be sustained.” *Id.*

15. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).
16. *Id.* at 287. The National Labor Relations Board adopted the *Mt. Healthy* test in *Wright Line*, 251 N.L.R.B. at 1089. In *Mt. Healthy* the question was whether the conduct was protected by the First Amendment. In *Wright Line* the Board dealt with issues of statutory interpretation.
17. *Mt. Healthy*, 429 U.S. at 287.
18. *Wright Line*, 251 N.L.R.B. at 1088.
19. *Id.* at 1083 n.4.

them for any reason.²⁰ Termination of at-will employment frequently follows after employee criticism of employers. And no firing of an at-will employee will be wrongful unless it fits into an exception to the at-will rule. Therefore, as background, this Note begins with a discussion of the at-will employment doctrine.

Part I addresses the roots of employment law and explores the origins of the employment-at-will doctrine and the development of some exceptions to the rule. Part II illustrates the difference between pretext cases and disloyalty cases. Part III addresses judicial reliance on disloyalty in deciding employee criticism cases under the National Labor Relations Act. Part IV explains why this reliance is misplaced. Finally, Part V suggests that by looking to the pretext cases, courts can develop a better methodology for resolving disloyalty cases.

I. THE ROOTS OF EMPLOYMENT LAW AND THE DUTY OF LOYALTY

Employment law in the United States descended from the English common law of master and servant.²¹ There was a presumption in English law that, unless otherwise specified, employment contracts lasted one year.²² This rule was a reflection of loyalty and fairness in a preindustrial, agrarian society²³—what Blackstone called “a principle of natural equity.”²⁴ It would be unfair for the master to dismiss the servant in winter when there was not much work in the fields. Likewise, it would be unfair for the servant to be supported by the master during the lean months of winter and leave before the heavy work of summer.

The law of employment in the United States diverged sharply from the old English rule in the late nineteenth century with the rise of the

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20. Rafael Gely & Leonard Bierman, *Social Isolation and American Workers: Employee Blogging and Legal Reform*, 20 HARV. J.L. & TECH. 287, 291 (2007) (“[M]ost employees in the United States are ‘employees-at-will’—that is, they can be fired by their employers at any time for essentially any reason, or for no reason at all.”).
 21. Benjamin Aaron & Matthew Finkin, *The Law of Employee Loyalty in the United States*, 20 COMP. LAB. L. & POL’Y J. 321 (1999).
 22. 1 WILLIAM BLACKSTONE, COMMENTARIES *425.
 23. Ken Matheny & Marion Crain, *Disloyal Workers and the “Un-American” Labor Law*, 82 N.C. L. REV. 1705, 1709 (2004).
 24. BLACKSTONE, *supra* note 22, at *425 (“If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as well when there is work to be done, as when there is not.” (footnote omitted)).

employment-at-will doctrine.²⁵ This rule has a “curious history.”²⁶ It first appeared in an 1877 treatise by Horace Gray Wood.²⁷ Later commentators suggested that case law in 1877 did not support this rule, but this is debated.²⁸ Commentators posit that the rule may be the “product of the American frontier mentality”²⁹ or “the natural offspring of a capitalist economic order”³⁰ or the result of increased industrialization.³¹ Whatever the provenance of the rule, it became the clearly established majority rule by the early twentieth century.³²

Under this American Rule of employment at will, an employer may terminate an employee at any time for any reason, and an employee may leave at any time for any reason.³³ Employees are told “if you don’t like your employer, don’t criticize or complain—leave.”³⁴ This strict rule often led to harsh results for employees.³⁵

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25. Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).
 26. Matheny & Crain, *supra* note 23, at 1709.
 27. *Id.* at 1709–10. Wood wrote: “With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof.” Feinman, *supra* note 25, at 126 (quoting H.G. WOOD, MASTER AND SERVANT § 134 (1877)).
 28. Compare Feinman, *supra* note 25, at 126 (noting that Wood relied on cases that did not support his position, stated incorrectly that no American court had recently applied the English rule, and offered no policy grounds for the rule), with Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 681 (1994) (arguing that seven states had adopted the rule by 1877), and Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of “Wood’s Rule” Revisited*, 22 ARIZ. ST. L.J. 551, 554 (1990) (arguing that the four cases cited by Wood supported his proposition).
 29. Matheny & Crain, *supra* note 23, at 1709.
 30. Freed & Polsby, *supra* note 28, at 558.
 31. *But see* Morriss, *supra* note 28, at 681 (refuting the “myth” that the rule was the byproduct of increased industrialization).
 32. Matheny & Crain, *supra* note 23, at 1710.
 33. *Id.* at 1709.
 34. In this way it is similar to the “Wall Street Rule” that held sway in the stock market for much of the last century: “If you don’t like management, sell your stock,” and if you don’t sell, vote with management and don’t complain. MELVIN ARON EISENBERG & JAMES D. COX, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS 304 (10th ed. 2011).
 35. See James J. Brudney, *Reluctance and Remorse: The Covenant of Good Faith and Fair Dealing in American Employment Law*, 32 COMP. LAB. L. & POL’Y J. 773, 778 (2011) (“Although employment-at-will has been firmly in place for well over a century, state judges in recent decades have become more cognizant of the doctrine’s harsh consequences.”);

In the late 1970s and throughout the 1980s, state courts reacted to the harshness of a strict at-will rule and began to fashion common law exceptions.³⁶ By 1993, the courts of forty-eight states had created significant exceptions to the at-will default rule.³⁷ The three most common judicial exceptions are the public policy exception, the implied contract exception, and the exception for breach of the covenant of good faith and fair dealing.³⁸ The most significant of these in the context of employee criticism is the public policy exception.

Additionally, there are statutory exceptions, the most prominent of which are in the federal National Labor Relations Act (NLRA).³⁹ Section 7 of the NLRA provides that employees have the right to “engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁴⁰ Section 8 makes it “an unfair labor practice” for employers to discharge or discipline employees who exercise their rights under section 7.⁴¹ The NLRA covers a broad range of activities and employees.

II. THE PUBLIC POLICY EXCEPTION AND THE DIFFERENCE BETWEEN PRETEXT AND DISLOYALTY CASES

The adoption of a “presumption of employment at will effectively shielded employers from legal challenges to their termination decisions.”⁴² But this presumption was weakened in many states by common law decisions during a period of “intense judicial activity” in the 1980s and 1990s.⁴³ During this period, discharged employees bringing suits for wrongful discharge were increasingly successful.

Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1844 (1980) (“This at will rule is based on outdated assumptions and leads to unnecessarily harsh results.”).

36. Brudney, *supra* note 35, at 778; David J. Walsh & Joshua L. Schwarz, *State Common Law Wrongful Discharge Doctrines: Up-Date, Refinement, and Rationales*, 33 AM. BUS. L.J. 645, 655–57 (1996).
37. Morriss, *supra* note 28, at 682.
38. Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, BUREAU OF LAB. STAT. MONTHLY LAB. REV., Jan. 2001, at 3–4, available at <http://www.bls.gov/opub/mlr/2001/01/art1full.pdf>.
39. 29 U.S.C. §§ 151–169 (2006); see Aaron & Finkin, *supra* note 21, at 330 (describing this method of attacking employment-at-will).
40. 29 U.S.C. § 157.
41. *Id.* § 158.
42. Walsh & Schwarz, *supra* note 36, at 646.
43. *Id.* at 645.

Today, forty-three states recognize a public policy exception to the presumption of at-will employment.⁴⁴

The public policy exception to at-will employment recognizes that employers' private interests can conflict with the public good.⁴⁵ One of the major rationales for the doctrine is the need to "uphold or effectuate legislatively determined public policy."⁴⁶ Yet courts made it clear that the exception is limited and should not be construed as to overwhelm the rule.⁴⁷

In the 1980s, the number of courts adopting the public policy exception increased dramatically. Before 1980, the courts of only eight states had adopted the exception, but by the end of the decade the total stood at forty states.⁴⁸ Between 1983 and 1986 alone, fourteen states adopted the doctrine.⁴⁹ A primary reason for this "snowballing" effect was judicial awareness of the trend.⁵⁰ The doctrine gained legitimacy as more states signed on.

A few states have gone beyond common law and codified the public policy exception into statute. One of the first to do so was Montana.⁵¹ Other states followed.⁵² Colorado adopted a statute that

44. *Id.* at 648. Subsequent to the Walsh and Schwarz survey, Ohio also recognized the public policy exception. *Kulch v. Structural Fibers, Inc.*, 677 N.E.2d 308, 328-29 (Ohio 1997).

45. Walsh & Schwarz, *supra* note 36, at 646.

46. *Id.* at 662; *see also* *Petermann v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., Local 396*, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959) ("[I]n order to more fully effectuate the state's declared policy against perjury, the civil law, too, must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration, when the reason for the dismissal is the employee's refusal to commit perjury. To hold otherwise would be without reason and contrary to the spirit of the law.").

47. *See, e.g.*, *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380, 385 (Ark. 1988) ("This is a limited exception to the employment-at-will doctrine. It is not meant to protect merely private or proprietary interests."); *Vigil v. Arzola*, 699 P.2d 613, 619 (N.M. Ct. App. 1983) ("We do not abrogate the at will rule; we only limit its application to those situations where the employee's discharge results from the employer's violation of a clear public policy."), *overruled on other grounds by Chavez v. Manville Prods. Corp.*, 777 P.2d 371 (N.M. 1989).

48. Walsh & Schwarz, *supra* note 36, at 656 fig.1.

49. *Id.*

50. *Id.* at 663; *see also, e.g.*, *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1089 (Wash. 1984) ("We join the growing majority of jurisdictions and recognize a cause of action in tort for wrongful discharge if the discharge of the employee contravenes a clear mandate of public policy.").

51. MONT. CODE ANN. § 39-2-904 (2011) (originally enacted by 1987 Mont. Laws ch. 641, § 4) ("A discharge is wrongful . . . if . . . it was in

differs from Montana's in that it protects employees from discharge due to lawful activities outside of work.⁵³

Two Colorado decisions demonstrate the difference between "pretext" and "disloyalty" cases. In *Martin Marietta Corp. v. Lorenz*, the Colorado Supreme Court ordered a trial after finding prima facie evidence that the discharge of an employee who criticized his employer violated public policy.⁵⁴ Paul Lorenz was an engineer at Martin Marietta responsible for quality control on projects involving equipment for NASA's space shuttle program.⁵⁵ Lorenz became concerned about the lack of proper testing and poor communication with NASA engineers.⁵⁶ When his supervisors did not respond favorably to his concerns, Lorenz took his "evaluations and criticisms" directly to NASA personnel.⁵⁷ As a result of Lorenz's criticisms, representatives from Martin Marietta and NASA attended a technical review session. Lorenz took minutes of the meeting. Afterwards,

retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy").

52. See, e.g., ARIZ. REV. STAT. ANN. § 23-1501(A)(3)(b) (2012) (codifying the Arizona Supreme Court's creation of a civil damages remedy for employees discharged in violation of an Arizona statute); MINN. STAT. ANN. § 181.932, subdiv. 1(1) (West 2012) (prohibiting employers from discharging an employee because the employee reported in good faith a violation of federal or state law); N.J. STAT. ANN. §§ 34:19-1 to -14 (West 2011) (creating a civil action for employees discharged in retaliation for disclosing an unlawful policy or practice of the employer). But see, e.g., GA. CODE ANN. § 34-7-1 (2011) (codifying the employment-at-will doctrine without a statutory public policy exception).
53. COLO. REV. STAT. § 24-34-402.5 (2012):
- (1) It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours unless such a restriction:
 - (a) Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or
 - (b) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.
54. *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 100 (Colo. 1992) (en banc).
55. *Id.* at 102.
56. *Id.* at 103.
57. *Id.*

Martin Marietta officials instructed Lorenz to modify the minutes. Lorenz refused to do so, and he wrote a memorandum calling the changes “not mere corrections but rather . . . retractions of important representations made by Martin Marietta officials.”⁵⁸ His supervisor told him to “start playing ball with management.”⁵⁹ After another incident where Lorenz complained that the lack of sufficient testing by Martin Marietta “would constitute a fraud on NASA,”⁶⁰ Lorenz was laid off for “lack of work,” even though he was extremely busy at the time.⁶¹

Faced with these facts, the Colorado Supreme Court recognized for the first time a cause of action for wrongful discharge under the public policy exception to the at-will employment doctrine.⁶² Lorenz alleged that Martin Marietta ordered him to commit fraud on NASA, an agency of the United States government, in violation of 18 U.S.C. § 1001.⁶³ The court said there “is no question” that perpetrating a fraud on the federal government is against the public policy of Colorado.⁶⁴ “In light of Colorado’s long-standing rule that a contract violative of public policy is unenforceable,” the court found it “axiomatic” that termination of an at-will employee “should also be deemed unenforceable when violative of public policy.”⁶⁵

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 103–04.

62. *Id.* at 108. The Colorado Court of Appeals had previously recognized the exception in *Cronk v. Intermountain Rural Elec. Ass’n*, 765 P.2d 619 (Colo. App. 1988). The *Lorenz* court explicitly approved *Cronk* “with minor modifications.” *Lorenz*, 823 P.2d at 108.

63. The statute provides that

whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

- (1) falsifies, conceals, or covers up . . . a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years . . . or both.

18 U.S.C. § 1001(a) (2006).

64. *Lorenz*, 823 P.2d at 109.

65. *Id.*

Because of the posture of the case, the court did not reach a decision on the merits. Instead, it decided that Lorenz presented enough “evidence at trial to establish a *prima facie* case for wrongful discharge” and ordered a new trial.⁶⁶ In doing so, the court confirmed the elements of the cause of action: (1) an employee plaintiff was directed “to perform an illegal act as part of the employee’s work related duties or prohibited . . . from performing a public duty or exercising an important job-related right or privilege”; (2) the ordered action “violate[d] a specific statute relating to the public health, safety, or welfare, or . . . undermine[d] a clearly expressed public policy”; (3) “the employee was terminated as the result of refusing to perform the act directed by the employer”; and (4) the employer knew or should have known that the ordered act was illegal or contrary to public policy.⁶⁷

Lorenz is an example of a pretext case, and it shows how courts are able to effectively deal with pretextual employee discipline. Martin Marietta claimed it was laying Lorenz off due to “lack of work.”⁶⁸ Lorenz argued that this justification was “blatant pretext.”⁶⁹ Because of the posture of the case, the Colorado Supreme Court did not determine whether it was pretext, but had it gone to trial on remand, the trial court would have taken evidence on the issue of pretext and made a determination.⁷⁰

Compare *Lorenz* to *Marsh v. Delta Air Lines, Inc.*, where the United States District Court for the District of Colorado determined whether a discharge for public criticism violated the Colorado wrongful discharge statute.⁷¹ Delta Airlines employee Michael Marsh was upset with Delta’s decision to replace laid-off employees with temporary workers. Marsh wrote a critical letter to the editor of the *Denver Post*,⁷² and Delta subsequently fired him “for conduct unbecoming a Delta employee.”⁷³

66. *Id.* at 111.

67. *Id.* at 109.

68. *Id.* at 104.

69. Answer Brief on Certiorari at 11, *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100 (Colo. 1992) (No. 90SC583), 1991 WL 11034482 at *11.

70. Presumably one reason there was no trial on remand is that the justification most likely was “blatant pretext.” And, according to Lorenz, Martin Marietta “admitted that Lorenz’ [sic] objections to design deficiencies was the real reason for his termination.” *Id.*

71. *Marsh v. Delta Air Lines, Inc.*, 952 F. Supp. 1458, 1460 (D. Colo. 1997).

72. The letter read, in part:

Delta Air Lines, a company which is renowned worldwide for its corporate family culture, enthusiastic and professional employees and superior service to customers, has decided to flush 60 years [sic] worth of care and paternalism down the executive

The court found “an implied duty of loyalty” in the “bona fide occupational requirements” of the statute.⁷⁴ It also rejected Marsh’s claim that he was acting as a whistleblower and consequently protected under Colorado law. Marsh “was not exposing public safety concerns, instead he was [merely] a disgruntled worker venting his frustrations.”⁷⁵

Marsh is a “disloyalty” case and harder to deal with than *Lorenz*. Loyalty is not mentioned at all in the statute, which instead makes an exception for “bona fide occupational requirement[s].”⁷⁶ From this, the court inferred that the statute created a “duty of loyalty, with regard to public communications, that employees owe to their employers.”⁷⁷ But, except to say that “loyalty” protects companies’ reputations from the “indiscriminate public blows” of employees, the court did not explain what “loyalty” means. Loyalty is not a legal term of art, and relying on this word in judicial decisions is problematic.⁷⁸

washroom toilet, putting thousands of loyal Delta employees and their families on hold or in the street.

The company is convinced it can continue to deliver its traditional high levels of customer service with \$6 an hour help. The thinking here, apparently, is that what works for the fast-food industry should work for the airline business just as handily.

. . . .

In betraying the trust and loyalty of more than 60,000 dedicated employees, Delta has lost the very thing that made it so prosperous and efficient over six decades.

And now has come the ultimate insult: Delta employees were called together and told that they would be responsible for training the cheap contract help that would be replacing them. This curious mandate speaks to corporate arrogance and ignorance of the first magnitude.

Id. at 1460–61.

73. *Id.* at 1461.

74. *Id.* at 1463.

75. *Id.*

76. COLO. REV. STAT. § 24-34-402.5(1)(a) (2012).

77. *Marsh*, 952 F. Supp. at 1463 (“By providing exceptions to the statute’s general rule, the legislature indicated that it did not intend this privacy statute to provide a sword to employees thereby allowing employees to strike indiscriminate public blows against the business reputation of their employer.”).

78. *See infra* Part IV.

III. DISLOYALTY STANDARDS UNDER THE NATIONAL LABOR RELATIONS ACT

The NLRA protects a broad range of employees and activities. While the NLRA is most commonly considered in the context of union organizing, the definition of employees under the Act is broad and covers most privately employed individuals.⁷⁹ Covered employees have the right to participate in “concerted activities for the purpose of . . . mutual aid or protection.”⁸⁰ The Act shields many concerted activities that would otherwise be considered “disloyal.”⁸¹ For example, work stoppages may be protected, depending on the circumstances.⁸²

The extent to which disciplining employees’ criticism of employers is permissible under the NLRA is muddled. In the leading Supreme Court case, known as *Jefferson Standard*, labor negotiations between a television station in Charlotte, North Carolina, and the technicians’ union broke down.⁸³ The technicians distributed handbills that criticized the station’s lack of live programming and suggested that the station considered Charlotte “a second class community.”⁸⁴ Ten

79. Cynthia L. Estlund, *What Do Workers Want? Employer Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 922 (1992) (“[S]ection 7 also protects employee protest and advocacy unrelated to traditional union activity.”). The NLRA defines “employee” as “any employee” except for agricultural laborers, individuals employed by a parent or spouse, independent contractors, and certain railroad employees. 29 U.S.C. § 152(3) (2006).

80. 29 U.S.C. § 157 (2006).

81. Aaron & Finkin, *supra* note 21, at 331.

82. *See* NLRB v. Wash. Aluminum Co., 370 U.S. 9, 10 (1962) (enforcing an NLRB decision reinstating seven unorganized employees who walked off the job because it was too cold in the shop where they were working). *But see* NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 255, 260 (1939) (refusing to reinstate workers who engaged in a “sit-down strike” because they were trespassing on their employer’s property).

83. NLRB v. Local Union No. 1229, Int’l Bhd. Elec. Workers (*Jefferson Standard*), 346 U.S. 464 (1953).

84. *Id.* at 468. The handbills read in full as follows:

IS CHARLOTTE A SECOND-CLASS CITY?

You might think so from the kind of Television programs being presented by the Jefferson Standard Broadcasting Co. over WBTV. Have you seen one of their television programs lately? Did you know that all the programs presented over WBTV are on film and may be from one day to five years old. There are no local programs presented by WBTV. You cannot receive the local baseball games, football games or other local events because WBTV does not have the proper equipment to make these pickups. Cities like New York, Boston, Philadelphia, [and] Washington receive such programs nightly. Why doesn’t the Jefferson Standard Broadcasting Company purchase the needed

technicians were fired for these handbills. The union challenged the firings as an unfair labor practice under the NLRA.

The Supreme Court focused on whether the technicians were discharged “for cause,” which is permitted and not an unfair labor practice under the NLRA.⁸⁵ The Court called the handbills “a vitriolic attack” and noted that they did not refer to the labor controversy but instead attacked the quality of the company’s service to its customers.⁸⁶ The Court noted that Congress did not intend for section 7 to “weaken the underlying . . . bonds and loyalties of employer and employee”⁸⁷ and reasoned that “[t]here is no more elemental cause for discharge than disloyalty to [one’s] employer.”⁸⁸ The distribution of the handbills was “of such detrimental disloyalty” to the company as to justify the firings.⁸⁹

The Court thus raised the question of what qualifies as “disloyalty.” In dissent, Justice Frankfurter, joined by Justices Black and Douglas, warned that “to float such imprecise notions as ‘discipline’ and ‘loyalty’ in the context of labor controversies, as the basis of a right to discharge, is to open the door wide to individual judgment by Board members and judges.”⁹⁰ Frankfurter worried that these imprecise terms would not provide guidance to the lower courts and would therefore “needlessly stimulate litigation.”⁹¹ Lack of clarity was “the near universal judgment of contemporaneous and later students of *Jefferson Standard*.”⁹² And history proved Justice Frankfurter and the early critics prescient. Subsequent decisions by the lower courts and the National Labor Relations Board varied significantly.⁹³

equipment to bring you the same type of programs enjoyed by other leading American cities? Could it be that they consider Charlotte a second-class community and only entitled to the pictures now being presented to them?

Id.

85. *Id.* at 465.

86. *Id.* at 468.

87. *Id.* at 473.

88. *Id.* at 472.

89. *Id.*

90. *Id.* at 481 (Frankfurter, J., dissenting).

91. *Id.*

92. Matthew W. Finkin, *Disloyalty! Does Jefferson Standard Stalk Still?*, 28 BERKELEY J. EMP. & LAB. L. 541, 547 (2007).

93. This phenomenon might be exacerbated by the political nature of the NLRB. The five-member Board is appointed by the President to staggered five-year terms. After a few years in office, the sitting President’s appointees will constitute a majority of the Board, and decisions may then reflect the leaning of the party in control of the

In *Community Hospital of Roanoke Valley, Inc. v. NLRB*,⁹⁴ the United States Court of Appeals for the Fourth Circuit enforced a Board decision reinstating a nurse who had been dropped from full-time employment for “disloyal conduct.”⁹⁵ The nurse gave a television interview in which she criticized the hospital’s staffing levels as well as the salary and benefits of nurses.⁹⁶ Because her statements were “directly related to protected concerted activities . . . in progress,” the court distinguished the facts from *Jefferson Standard* and rejected the hospital’s assertion that the statements were unprotected.⁹⁷

The United States Court of Appeals for the Second Circuit reached a similar result in *NLRB v. New York University Medical Center*⁹⁸—albeit via different reasoning. Several employees handed out leaflets to other hospital employees in advance of a union election. The leaflets were harshly critical of the hospital, accusing it of turning its “security guards into a fascist gestapo illegally searching workers and firing them.”⁹⁹ The hospital suspended several of the employees who distributed the leaflets and terminated one. It recognized that employees had a general right to distribute leaflets but argued that the contents of these specific leaflets were disruptive of discipline and “manifested disloyalty to the employer and hence lost all protection under the Act.”¹⁰⁰ The court found the leafleting was a protected activity because the leaflets were aimed at other employees and, unlike in *Jefferson Standard*, they did not disparage the employer’s product.¹⁰¹

White House. See Charles T. Goodsell & Ceferina C. Gayo, *Appointive Control of Federal Regulatory Commissions*, 23 ADMIN. L. REV. 291 (1971); see also Epilepsy Found. of Ne. Ohio v. NLRB, 268 F.3d 1095, 1097 (D.C. Cir. 2001) (“It is a fact of life in NLRB lore that certain substantive provisions of the NLRA invariably fluctuate with the changing compositions of the Board.”).

94. *Cnty. Hosp. of Roanoke Valley, Inc. v. NLRB*, 538 F.2d 607 (4th Cir. 1976), *enforcing* 220 N.L.R.B. 217 (1975).
95. *Cnty. Hosp. of Roanoke Valley, Inc.*, 220 N.L.R.B. 217, 222 (1975).
96. 538 F.2d at 609. The hospital, when admonishing the nurse, admitted that her critical statements may have been true but nevertheless complained that “the impression that you created with the public was disastrous to the hospital as far as [management] was concerned.” *Id.*
97. *Id.* at 610.
98. *NLRB v. N.Y. Univ. Med. Ctr.*, 702 F.2d 284 (2d Cir.), *vacated*, 464 U.S. 805 (1983), *aff’d on remand*, 751 F.2d 370 (2d Cir. 1984) (unpublished table decision).
99. *Id.* at 286.
100. *Id.* at 289.
101. *Id.* at 292.

In the first thirty years after *Jefferson Standard*, lower courts thus developed two analyses of criticism that is sufficiently “disloyal” to be excluded from section 7 protection. The *Community Hospital* analysis focused on the relationship between the criticism and concerted activity. *New York University Medical Center* focused on whether the employee disparaged the employer’s product as opposed to criticizing the employer’s labor practices.

In *Sierra Publishing Co. v. NLRB*, decided a few years later, the United States Court of Appeals for the Ninth Circuit recognized both of these analyses but gave much more weight to the analysis of relatedness to concerted activity.¹⁰² The court explained that later cases “confined” the reach of the disparagement analysis, “and made clear that *Jefferson Standard* was not to be read to equate criticism with disloyal product disparagement. Instead, appeals to third parties forfeit [section] 7 protection only if their connection to the employees’ working conditions is too attenuated.”¹⁰³ The court also noted that “the NLRB has progressively narrowed the areas of activity found to be unprotected because of disloyalty.”¹⁰⁴

The dispute in *Sierra Publishing* arose out of collective bargaining negotiations between *The Sacramento Union* and the Northern California Newspaper Guild, which represented most of the paper’s nonsupervisory personnel.¹⁰⁵ After the two sides were unable to reach an agreement, members of the guild’s bargaining committee sent a letter to the newspaper’s advertisers. The letter explained that as a result of stalled negotiations, the newspaper was “speeding downhill,” and the committee asked advertisers to call management to “help us save the . . . newspaper.”¹⁰⁶ The newspaper then discharged the employees responsible for the letter for disloyally disparaging the paper. The NLRB ordered reinstatement.¹⁰⁷

The Ninth Circuit agreed with the NLRB and enforced the decision. Summarizing the law, the court wrote that “the disloyalty standard is at base a question of whether the employees’ efforts to improve their wages or working conditions through influencing strangers to the labor dispute were pursued in a reasonable manner

102. See *Sierra Publ’g Co. v. NLRB*, 889 F.2d 210, 217 (9th Cir. 1989), enforcing 291 N.L.R.B. 540 (1988) (calling the relatedness analysis “central to the Supreme Court’s reasoning in *Jefferson Standard*, and . . . the [continued] focus of NLRB and judicial analysis”).

103. *Id.* at 216 (citing for this proposition, among others, *Cmty. Hosp. of Roanoke Valley, Inc. v. NLRB*, 538 F.2d 607 (4th Cir. 1976)).

104. *Id.*

105. *Id.* at 213–14.

106. *Id.* at 214.

107. *Sierra Publ’g Co.*, 291 N.L.R.B. 540, 550–51 (1988).

under the circumstances.”¹⁰⁸ Disparaging an employer’s product is unreasonable if not connected to a labor dispute, but when the employer’s treatment of its employees may negatively affect product quality, criticism is likely reasonable.¹⁰⁹ *Sierra Publishing’s* narrow and employee-friendly reading of *Jefferson Standard* diminished the force of the Court’s “detrimental disloyalty” standard that had been applied since the 1950s.

In 2006, the United States Court of Appeals for the District of Columbia Circuit “breathed fresh life into” *Jefferson Standard*.¹¹⁰ In *Endicott Interconnect Technologies, Inc. v. NLRB*, the court set aside the Board’s decision calling for the reinstatement of an employee terminated for criticism.¹¹¹ Endicott Interconnect Technologies (EIT) purchased a circuit board manufacturing facility from IBM. Two weeks after the sale, EIT laid off ten percent of its new workforce. The local paper quoted an EIT employee, Richard White, in an article about the downsizing. White told the paper that there were “gaping holes” in the company after the layoffs.¹¹²

EIT management accused White of “disparag[ing] the Company in violation of the company Handbook” and “threatened to terminate [him] if it happened again.”¹¹³ A week later White posted a message on the newspaper’s public comment forum. White’s pro-union message argued that “no one else [but the union] will help” stop “all the bad things that IBM and EIT have done to the employees and their families and the community at large” and that the “business is being tanked by a group of people that have no good ability to manage it.”¹¹⁴ EIT management determined that White had “disparaged EIT again” and discharged him.¹¹⁵

The NLRB, in a two-to-one decision, found that White’s statements were protected and ordered his reinstatement.¹¹⁶ The Board

108. *Sierra Publ’g*, 889 F.2d at 220.

109. *Id.* (suggesting that “[p]roduct disparagement unconnected to the labor dispute, breach of important confidences, and threats of violence” are probably unreasonable, while casting as probably reasonable “suggestions that a company’s treatment of its employees may have an effect upon the quality of the company’s products, . . . or the company’s own viability”).

110. Finkin, *supra* note 92, at 541.

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

112. *Id.* at 534.

113. *Id.*

114. *Id.* at 534–35.

115. *Id.* at 535.

116. *Endicott Interconnect Techs., Inc.*, 345 N.L.R.B. 448, 460 (2005).

concluded that White's statements were connected to a labor dispute and therefore "concerted activities" under section 7.¹¹⁷ The statements "were 'not so misleading, inaccurate, or reckless, or otherwise outside the bounds of permissible speech, to cause [him] to lose the Act's protection.'"¹¹⁸ Citing *Jefferson Standard*, the Board determined that "White's statements evince no more than the kind of bias and hyperbole that the Board has found within the acceptable limits of Section 7."¹¹⁹

The District of Columbia Circuit disagreed. While accepting the Board's formulation of the *Jefferson Standard* holding and its determination that White's statements were part of an ongoing labor dispute, the court concluded that "the Board misapplied the second part of the test."¹²⁰ It did not matter that White's statements were not misleading, inaccurate, or reckless because the Board had left one attribute off the list—disloyalty. "And White's communications were unquestionably detrimentally disloyal."¹²¹ Therefore White was not protected by the NLRA, his discharge was legal, and the Board's decision was vacated.

The District of Columbia Circuit's interpretation of *Jefferson Standard* disloyalty conflicts with the interpretation by the Ninth Circuit in *Sierra Publishing*. The Ninth Circuit focused on the connection between the criticism and concerted activity. But even though the District of Columbia Circuit agreed with the Board's determination that the criticism in *Endicott* was connected to concerted activity,¹²² it nevertheless vacated White's reinstatement.¹²³

The *Endicott* decision is also at odds with *New York University Medical Center* and other cases that analyze whether the criticism is aimed at the employer's product or its labor practices. In deciding that White's statements were "detrimentally disloyal," the District of Columbia Circuit focused on harm to EIT's product and customer relationships. The court more than once mentioned the adverse reaction

117. *Id.*

118. *Id.* at 451 (quoting *Titanium Metals Corp.*, 340 N.L.R.B. 766, 766 n.3 (2003), *enforcement denied on other grounds*, 392 F.3d 439 (D.C. Cir. 2004)).

119. *Id.* at 451–52.

120. *Endicott*, 453 F.3d at 537.

121. *Id.*

122. *Id.* at 535.

123. *Id.* at 536 ("[T]he fortuity of the coexistence of a labor dispute affords . . . no substantial defense." (quoting *NLRB v. Local Union No. 1229, Int'l Bhd. Elec. Workers (Jefferson Standard)*, 346 U.S. 464, 476 (1953))).

of IBM on reading the interview.¹²⁴ But the court could have just as easily said that White was not criticizing EIT's products, but rather its labor practices, namely laying off ten percent of its workforce. Certainly other courts would have decided this case the other way.¹²⁵

Even the *Jefferson Standard* Court might have decided *Endicott* differently. The *Jefferson Standard* Court emphasized that the technicians' handbills made no reference to any labor dispute. Had the handbills done so, the public would have read them with a more discerning eye, knowing that the technicians were self-interested.¹²⁶ This lack of disclosure was a major reason that the Court found the technicians disloyal. In *Endicott*, there was no doubt that White was criticizing labor practices—the newspaper's article and Internet forum were about the layoffs.

The language *Endicott* cited from *Jefferson Standard*—“[t]he fortuity of the coexistence of a labor dispute affords . . . no substantial defense”¹²⁷—has a slightly different meaning when read in its original context. In the paragraph immediately preceding this sentence, the *Jefferson Standard* Court described the unrelatedness of the criticism in the handbills to the labor dispute.¹²⁸ The lack of this

124. *See id.* at 534 (“[IBM] expressed concern over whether EIT had ‘gutted’ its engineering staff and as a consequence had ‘gaping holes.’”); *id.* at 537 (“The damaging effect of the disloyal statements, made by an experienced insider at a time when EIT was struggling to get up and running under new management, is obvious from the immediate reaction of IBM’s vice president, who telephoned [an EIT official] concerned about EIT’s continuing ability to supply IBM’s circuit board needs.”).

125. *See Sierra Publ’g Co. v. NLRB*, 889 F.2d 210, 220 (9th Cir. 1989) (“[S]uggestions that a company’s treatment of its employees may have an effect upon the quality of the company’s products, or may even affect the company’s own viability are not likely to be unreasonable, particularly in cases when the addressees of the information are made aware of the fact that a labor dispute is in progress.”).

126. *Jefferson Standard*, 346 U.S. at 476–77 (“The only connection between the handbill and the labor controversy was an ultimate and undisclosed 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. A disclosure of that motive might have lost more public support for the employees than it would have gained, for it would have given the handbill more the character of coercion than of collective bargaining.”).

127. *Endicott*, 453 F.3d at 536 (quoting *Jefferson Standard*, 346 U.S. at 476).

128. *Jefferson Standard*, 346 U.S. at 476 (“[The technicians’] attack related itself to no labor practice of the company. It made no reference to wages, hours or working conditions. The policies attacked were those of finance and public relations for which management, not technicians, must be responsible. . . . It was a continuing attack, initiated while off duty, upon the very interests which the attackers were being paid to preserve and develop.”).

connection is what makes the existence of a labor dispute fortuitous. Had the handbills criticized the wages, hours, or working conditions of the company, the labor dispute would not be fortuitous but would be the handbills' obvious *raison d'être*. The unrelated criticism in *Jefferson Standard* stands in sharp contrast to White's criticism of the layoffs, a labor practice of his employer. In *Endicott*, the coexistence of a labor dispute was not a mere fortunate happenstance.

One academic has criticized the District of Columbia Circuit for following *Jefferson Standard*. Professor Matthew Finkin argued that the "legal and ideological underpinnings of *Jefferson Standard* have become thoroughly eroded over the ensuing half century; that, at best, disloyalty is a worthless guide to decision; at worst, it chills speech of social value, and ought to be abandoned."¹²⁹ According to Finkin, developments in the jurisprudence of public employee free speech have changed the employment law landscape.¹³⁰ For example, starting with *Pickering v. Board of Education*,¹³¹ the duty of loyalty not to criticize one's employer "abutted freedom of speech."¹³² At least when dealing with matters of "legitimate public concern," public employees could criticize their public employer.¹³³ Finkin also noted the changes that have occurred since 1953 in common law tort doctrine—"that an employee in the private sector publicly criticizes her company's product or management can no longer be said to be such an act of disloyalty as to warrant discharge *per se*."¹³⁴

IV. THE PROBLEM OF RELIANCE ON "DISLOYALTY"

The passage of time has confirmed the accuracy of Justice Frankfurter's warning that "the courts of appeals [would] hardly find guidance" from *Jefferson Standard*.¹³⁵ Attempting to rely on the "imprecise notion[]"¹³⁶ of disloyalty led the circuit courts to develop at least four different analyses. The Fourth Circuit found that

129. Finkin, *supra* note 92, at 541.

130. *See id.* at 551–53 ("[N]o longer do we see an employee's public utterance critical of the quality of her employer's management or service as an egregious breach of the duty of loyalty, we see it today as an act of responsible citizenship that contributes to a constitutionally valued robust debate on matters of legitimate public concern whatever the potential impact on the employer's 'bottom line.'").

131. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968).

132. Finkin, *supra* note 92, at 551.

133. *Pickering*, 391 U.S. at 571.

134. Finkin, *supra* note 92, at 553–54.

135. *NLRB v. Local Union No. 1229, Int'l Bhd. Elec. Workers (Jefferson Standard)*, 346 U.S. 464, 481 (Frankfurter, J., dissenting).

136. *Id.*

criticism “directly related to protected concerted activities” was not disloyal.¹³⁷ The Second Circuit found that criticism that was “directed at fellow employees” and did not “publicly disparage the employer’s product” was not disloyal.¹³⁸ The Ninth Circuit distanced itself from the disparagement analysis and instead adopted a reasonableness standard.¹³⁹ And the District of Columbia Circuit returned full-circle to *Jefferson Standard* by deciding that “disloyal, disparaging and injurious . . . attacks” lose protection without further qualification or analysis.¹⁴⁰ And, while not interpreting the NLRA or *Jefferson Standard*, the Colorado District Court relied on loyalty to prevent what it considered the “indiscriminate public blows” of an employee.¹⁴¹

The reason these decisions are problematic is that “loyalty” and “disloyalty” are not legal terms of art. Dictionaries are of no avail.¹⁴² Nor does Justice Cardozo’s famous formulation of “finest loyalty”— “[n]ot honesty alone, but the punctilio of an honor the most sensitive”¹⁴³—help to resolve these cases. The Restatement of Agency is somewhat more precise, explaining in a comment that an “agent is . . . under a duty not to act or speak disloyally in matters which are connected with his employment except in the protection of his own interests or those of others.”¹⁴⁴ But even this only describes the situation; it does not give guidance on how to resolve it.

One could conceive of the employment-at-will doctrine as placing an obligation on employees not to act or speak disloyally, as disloyalty saps the will to employ and may lead to termination. But the common law public policy exception, the Colorado statute, and the NLRA recognize interests that an employee can protect—the right to speak out when the employer violates the law, the right to participate in lawful activities outside the workplace, and the right to engage in con-

137. *Cnty. Hosp. of Roanoke Valley, Inc. v. NLRB*, 538 F.2d 607, 610 (1975).

138. *NLRB v. N.Y. Univ. Med. Ctr.*, 702 F.2d 284, 292 (2d Cir.), *vacated*, 464 U.S. 804 (1983), *aff’d on remand*, 751 F.2d 370 (2d Cir. 1984) (unpublished table decision).

139. *Sierra Publ’g Co. v. NLRB*, 889 F.2d 210, 216, 220 (9th Cir. 1989).

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

141. *Marsh v. Delta Air Lines, Inc.*, 952 F. Supp. 1458, 1463 (D. Colo. 1997).

142. *Compare* BLACK’S LAW DICTIONARY 1033 (9th ed. 2009) (defining loyalty as “[f]aithfulness or allegiance to a person, cause, duty, or government”), *with* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1342 (1986) (defining loyalty as “fidelity or tenacious adherence (as to a government, principle, practice, or custom)”).

143. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

144. RESTATEMENT (SECOND) OF AGENCY § 387 cmt. b (1958).

certed action. Sometimes, as recognized by the Restatement comment, protecting these interests requires an employee to speak disloyally.

The *Jefferson Standard* Court recognized that while the NLRA protects some conduct or speech that would otherwise be considered disloyal,¹⁴⁵ there comes a point where disloyalty crosses the line, becomes “detrimental,”¹⁴⁶ and thus justifies dismissal “for cause” under section 10.¹⁴⁷ The problem posed by this and similar cases is locating that line. As Justice Frankfurter explained, “‘Concerted activities’ by employees and dismissal ‘for cause’ by employers are not dissociated legal criteria under the Act. They are like the two halves of a pair of shears.”¹⁴⁸ Using this analogy, it is the job of courts to determine where the shears meet the paper.

The problem with courts relying on “disloyalty” is not in defining the word, but rather in using the word to define this boundary.¹⁴⁹ Employing such a sweeping and imprecise term “open[s] the door wide to individual judgment by Board members and judges.”¹⁵⁰ It simply does not enable consistent judicial resolution.

Moreover, equating criticism with disloyalty is a mistake. If your company is doing things you disagree with, is it more loyal to quit your job or to stay and advocate for change? Economist Albert Hirschman defined loyalty as “[t]he reluctance to exit in spite of disagreement with the organization of which one is a member.”¹⁵¹ Michael Marsh and Richard White did not want to hurt their companies. Marsh was concerned that the quality of customer service at Delta would decrease if experienced employees were replaced by temporary workers. White worried that the layoffs at EIT would hurt the company in the long run. They did not want to leave, and they fought hard to reclaim their jobs when discharged. Under Hirschman’s

145. *See* NLRB v. Local Union No. 1229, Int’l Bhd. Elec. Workers (*Jefferson Standard*), 346 U.S. 464, 479–80 (1953) (Frankfurter, J., dissenting) (“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.”).

146. *Id.* at 472 (majority opinion).

147. 29 U.S.C. § 160(c) (2006) (“No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.”).

148. *Jefferson Standard*, 346 U.S. at 480 (Frankfurter, J., dissenting).

149. Another problem with courts employing a “disloyalty” standard is the strong emotions it conjures up. Few faults are as reviled as disloyalty: Dante reserved the center of hell for those guilty of treachery and names like Benedict Arnold and Vidkun Quisling have entered the lexicon.

150. *Jefferson Standard*, 346 U.S. at 481 (Frankfurter, J., dissenting).

151. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 98 (1970).

definition, their criticisms were manifestations of loyalty, not disloyalty.

V. AN OBJECTIVE, BURDEN-SHIFTING SOLUTION

Courts should take a lesson from what they are able to do well: place the burden on the parties to bring forward evidence to substantiate their factual claims. This is what courts do in the pretext and mixed motive contexts, and they could also do so in the disloyalty context. This Part examines how cases addressing discipline of employees who criticize employers can be more effectively resolved under this burden-shifting framework.

The *Jefferson Standard* Court held that the conduct of the technicians—passing out the critical flyers—removed them from the protection of the NLRA because it manifested “detrimental disloyalty.”¹⁵² And while “disloyalty” is not a standard that courts are well positioned to determine, the same is not true for “detrimental.” If prompted, the parties could have presented evidence on whether the actions of the technicians actually were detrimental to the television station. Justice Frankfurter called for this type of inquiry in his dissent: “[O]n a remand the Board could properly be asked to leave no doubt whether the technicians, in distributing the handbills, were, so far as the public could tell, on a frolic of their own”¹⁵³

This type of inquiry would provide a more concrete basis for judicial determination, but courts should go further and utilize the additional tool of burden shifting. Evidence about whether employee criticism has actually impaired the employer is likely to be in the hands of the employer. This parallels the situations in *Mt. Healthy*, where the school was the party with knowledge of what actually motivated the teacher’s firing,¹⁵⁴ and *Wright Line*, where only the employer knew whether it was the employee’s union activities or alleged timesheet falsification that led to the firing.¹⁵⁵ The Court has employed similar burden-shifting approaches in other work-related cases.¹⁵⁶ It would be effective here as well.

152. *Jefferson Standard*, 346 U.S. at 472 (majority opinion).

153. *Id.* at 481 (Frankfurter, J., dissenting).

154. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

155. *Wright Line*, a Div. of *Wright Line, Inc.*, 251 N.L.R.B. 1083, 1088 (1980) (noting “the practical reality that the employer is the party with the best access to proof of its motivation”), *enforced sub nom.* *NLRB v. Wright Line*, a Div. of *Wright Line, Inc.*, 662 F.2d 899 (1st Cir. 1981).

156. *See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270–71 n.21 (1977) (noting in a rezoning case that proof of an impermissible racial motivation would have “shifted to the Village the burden of establishing that the same decision would have resulted even

Although the Second Circuit did not explicitly employ burden shifting in *NLRB v. New York University Medical Center*, the court did analyze the content of the criticism to determine if it had been detrimental. The employees' leaflets accused the hospital of using gestapo tactics.¹⁵⁷ The hospital argued that this "provocative language" was "disruptive of discipline."¹⁵⁸ The court recognized the need to "determine if the language in the leaflets was likely to produce misconduct or generally disrupt discipline."¹⁵⁹ But the hospital did not "produce[] any evidence that it had a reasonable expectation that misconduct would ensue,"¹⁶⁰ and the court held "that substantial evidence supports the Board's determination that the objectionable language in the leaflets posed no danger of breach of employee discipline."¹⁶¹ The Second Circuit's analysis demonstrates that this approach is practical and effective. This approach is further supported by the decisions of other courts that have analyzed the critical language for detrimental effects on the employer.¹⁶²

had the impermissible purpose not been considered"); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (requiring employers in Title VII civil rights actions to show a legitimate business reason for disciplining an employee once the employee has established a prima facie case of discrimination); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967) ("[O]nce it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.").

157. *NLRB v. N.Y. Univ. Med. Ctr.*, 702 F.2d 284, 286 (2d Cir.), *vacated*, 464 U.S. 804 (1983), *aff'd on remand*, 751 F.2d 370 (2d. Cir. 1984) (unpublished table decision).

158. *Id.* at 289.

159. *Id.* at 290.

160. *Id.*

161. *Id.* at 291.

162. *See, e.g.*, *NLRB v. Owners Maint. Corp.*, 581 F.2d 44, 50 (2d Cir. 1978) (analyzing leaflets for disparagement, "deliberate or reckless untruths," and violence); *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 329 (7th Cir. 1976) ("[C]ommunications occurring during the course of otherwise protected activity remain likewise protected unless found to be 'so violent or of such serious character as to render the employee unfit for further service.'" (quoting *NLRB v. Ill. Tool Works*, 153 F.2d 811, 816 (7th Cir. 1946))); *cf.* *Md. Drydock Co. v. NLRB*, 183 F.2d 538, 541 (4th Cir. 1950) ("The right of the company to prohibit the distribution of insulting and defamatory literature must necessarily depend upon the character of the literature itself and the effect which it might normally be expected to produce, not upon ex post facto proof of the results which actually flowed from its distribution.").

This method also illustrates the problem in *Endicott Interconnect Technologies*. The District of Columbia Circuit called White's communications "unquestionably detrimentally disloyal,"¹⁶³ but it is not clear exactly what the detriment was. The court focused on the concerned phone call from IBM, the company's main customer, and suggested that the "damaging effect . . . is obvious."¹⁶⁴ But a customer's call or concern is not any more "unquestionable" or "obvious" in this context than it would be in the context of clearly protected concerted action such as a strike. It is not hard to imagine that IBM would have been more concerned and perhaps would have called EIT or even shifted its business elsewhere had it received word of a strike at the plant.¹⁶⁵

One possible criticism of the suggested approach is that it just moves the line. Under a "detrimental" standard, courts will still have to determine just how much detriment is necessary to cause the criticism to be unprotected. In *Endicott*, the District of Columbia Circuit thought a nervous telephone conversation with a customer was enough detriment. But the Ninth Circuit recognized that not all economic harm is sufficient to justify removing otherwise protected employee conduct from the aegis of the NLRA, and instead focused on the reasonableness of the means under the circumstances.

The truth is that no clear, bright line can be drawn to solve these cases. Each case must be examined on its own facts.¹⁶⁶ But while this is the reality facing courts, detriment is a more concrete and determinable standard than disloyalty. Unlike disloyalty inquiries that focus on the subjective, detriment to the employer may be shown objectively. And since the employer is typically the party with the best access to evidence of objective detriment, the employer should bear the burden of producing evidence of detriment when challenged for disciplining an employee for criticism.

The objectivity of the detriment standard not only serves to protect employees and facilitate adjudication, but it also greatly enhances the disciplinary process for employers. When faced with an employee's disparaging Facebook posting, employers face uncertainty

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

164. *Id.*

165. *See Sierra Publ'g Co. v. NLRB*, 889 F.2d 210, 220 (9th Cir. 1989) ("The mere fact that economic pressure may be brought to bear on one side or the other is not determinative, even if some economic harm is actually suffered. The proper focus must be the manner by which that harm is brought about.").

166. *See id.* ("Each situation must be examined on its own facts, but with an understanding that the law does favor a robust exchange of viewpoints.").

in the legality of a disciplinary response under the disloyalty standard. The employer has no objective indicia of the elements of disloyalty. While employers can respond to this uncertainty by erring on the side of not disciplining employees, this approach leaves them open to the very “indiscriminate public blows” of employee criticism that the disloyalty standard is designed to shield from employers.¹⁶⁷

The disciplinary process for employers facing employee criticism is better off if the standard for discipline of employees who criticize employers is based on whether the criticism causes a detriment to the employers business. The employer can investigate the conduct and its consequences to determine whether the employer has been harmed, looking for evidence of detriment. If the employer finds no such evidence, the employer saves face by not responding to the harmless criticism. If the employer finds substantial evidence of detriment, the legality of discipline is more certain, and it may be imposed with far less anxiety than the employer would face under the subjective disloyalty standard.

In this way, the solution serves the interests of both employers and employees. Detriment is a better line to fight on than disloyalty because the inquiry is objective. It carves out for legal protection harmless criticism. And when handbills, leaflets, speeches, and Facebook posts are directed at improving the terms and conditions of employment, the evident self-interested nature of the criticism shields the employer from harm that is not a consequence of labor practices.

CONCLUSION

Employee criticism raises conflicting social values: the need for employers to have loyal workers who do not undermine the company and the need for employees to speak critically when the employer’s practices are inappropriate. While loyalty is an important value, it is a poor standard for judicial resolution. “Disloyalty” does not provide courts with a consistent yardstick, but opens the door to the individual judgment of judges. Instead of relying on disloyalty, courts should examine whether the criticism was detrimental to the employer. And courts should assign to the employer the burden of proving that the employee’s criticism caused the harm.

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167. *Marsh v. Delta Air Lines, Inc.*, 952 F. Supp. 1458, 1463 (D. Colo. 1997).

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