

## Eighth Circuit Sides With Jimmy John's And Finds Employee Actions Were Not Protected Activity

July 7, 2017 | [National Labor Relations Board, Labor And Employment](#)

The U.S. Court of Appeals for the Eighth Circuit found on July 3 that employees of a Jimmy John's franchisee made false and calculated accusations that were intended to hurt the business interest of their employer, rather than to encourage change in workplace policies. [The ruling](#) reverses an NLRB decision and an initial verdict by an Eighth Circuit panel. In 2010, the Jimmy John's Workers Union, an affiliation of the Industrial Workers of the World, fought for changes in workplace policies, including the grant of paid sick leave for employees. As part of the campaign, union activists posted fliers in and around various Jimmy John's locations which pictured two identical sandwiches accompanied by the phrase "Can't tell the difference?" The flier stated that the first sandwich was made by a healthy worker and the other by a sick worker. Essentially, the flier asserted that Jimmy John's employees could not call in sick and carried the implication that Jimmy John's served unhealthy food. The Jimmy John's franchisee fired six employees for their participation in the "flier campaign." The NLRB found that the terminations violated the NLRA and that the employees were entitled to reinstatement and back pay. On appeal, the franchisee argued that the employees did not engage in protected activity because the flier campaign was disloyal and intended to do nothing more hurt its business interests by implying that it forced employees to work and handle food even when they were sick. Initially, a three-judge panel on the appeals court upheld the NLRB's decision; however, the court subsequently granted the franchisee's request for an en banc rehearing. The fully empaneled Eighth Circuit came to the opposite conclusion and held that the communications in the fliers were not protected because they constituted a "sharp, public, disparaging attack upon the quality of the company's product and its business policies," and such an attack is "likely to have a devastating impact on its business." The full court further said that the NLRB misconstrued the law when it found that employee disparagement of an employer was unprotected only when "maliciously motivated to harm the employer." Such a standard, the court said, was far too burdensome on employers and did not adequately address the impact that the fliers had on Jimmy John's reputation. The employees' dissemination of the fliers was not protected activity under the NLRA and they were not entitled to back pay or reinstatement.

### RELATED PRACTICE AREAS

Labor and Employment

Labor Relations

National Labor Relations Board (NLRB)