
Endicott Interconnect Technologies, Inc. v. N.L.R.B.,
453 F.3d 532 (D.C. Cir. 2006)

Five Star Transportation, Inc. v. N.L.R.B.,
522 F.2d 46 (1st Cir. 2008)

Jolliff v. N.L.R.B.,
513 F.3d 600 (6th Cir. 2008)

* Gil A. Abramson
Emily J. Glendinning
Hogan & Hartson LLP

* Gil Abramson is a partner in the Baltimore office of Hogan & Hartson and heads the Labor & Employment practice in Maryland. Emily Glendinning is an associate in the Labor & Employment Group in the Firm's Northern Virginia office.
I. Introduction

Within the past three years, three different Circuit Courts of Appeals have addressed the issue of when an employee’s conduct regarding an ongoing labor dispute is so disloyal to an employer that it loses the protections of Section 7 of the National Labor Relations Act (“the Act”), the so-called “employee disloyalty exception.” Although each of the three cases – Endicott, Five Star, and Jolliff – purports to rely on the seminal Supreme Court case Jefferson Standard in its analysis, the cases give strikingly different guidance as to how employees and employers must order their conduct.1 As a result, the current state of the employee disloyalty exception is just as vague and confused as Justice Frankfurter predicted in his dissent in Jefferson Standard. In the face of this uncertainty, an employer must exercise caution in disciplining employees for perceived “disloyal” conduct.

II. Jefferson Standard

Section 7 of the Act protects “concerted activities . . . for mutual aid or protection” by employees in both unionized and non-union workplaces.2 In determining whether activity is “concerted,” the critical inquiry is “not whether an employee acted individually, but rather whether the employee’s actions were in furtherance of a group concern.”3 Under Section 8(a)(1) of the Act, an employer may not “interfere with, restrain, or coerce employees in the exercise of” their Section 7 rights.4 However, an employee’s rights under Section 7 are not without limit. An important exception to the general rule is the disloyalty exception, which permits employers to

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3 Five Star Transp., 522 F.2d at 51.
discipline and even discharge employees for conduct that otherwise would be protected under Section 7 because the conduct is so openly disloyal as to lose protection under the Act.

The Supreme Court first articulated this disloyalty exception in 1953 in Jefferson Standard. In Jefferson Standard, a union of television technicians in Charlotte, North Carolina had a dispute with their employer, the broadcasting company Jefferson Standard. As part of that dispute, several employees peacefully picketed outside the station on their own time, an activity all parties recognized as protected. Six weeks later, however, “several of its technicians launched a vitriolic attack on the quality of the company’s television broadcasts.” Several thousand handbills were distributed on the street and in local businesses, claiming that Jefferson Standard considered Charlotte to be a “second class city” because it did not present any local programs on its Charlotte station. The handbills made no reference to the union, to collective bargaining, or to any labor controversy. The “attack,” as the Court characterized it, continued until Jefferson Standard discharged ten of the employees charged with sponsoring or distributing the handbills.

The Board held that the terminations were an unfair labor practice, but the Supreme Court disagreed. The Court held that despite the fact that the employees were engaged in what otherwise might have been protected speech under Section 7, their communications were so disloyal as to lose protection under the Act. In so holding, the Court noted that: the handbills were distributed at a “critical time” in the company’s business; 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;” and the

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5 Jefferson Standard, 346 U.S. at 467-68.
6 Id. at 468-69.
7 Id. at 469-70 (citing Jefferson Standard, 94 N.L.R.B. 1507, 1527 (1951)).
handbills did not indicate that they were a part of an ongoing labor dispute. According to the Court, “[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer.”

In a strongly-worded dissent, Justice Frankfurter, joined by Justices Black and Douglas, wrote, advocating a remand to the Board for additional explanation of its conclusion:

The Board and the courts of appeals will hardly find guidance for future cases from this Court’s reversal of the Court of Appeals, beyond that which the specific facts of this case may afford. More than that, to float such imprecise notions as ‘discipline’ and ‘loyalty’ in the context of labor controversies, as the basis of the right to discharge, is to open the door wide to individual judgment by Board members and judges.

The dissent concluded, “[o]ne may anticipate that the Court's opinion will needlessly stimulate litigation.

III. Recent Applications of Jefferson Standard in the Appellate Courts

The recent decisions in Endicott, Five Star, and Jolliff show that Justice Frankfurter’s words were prophetic: appellate courts still are struggling with Jefferson Standard and the issue of employee disloyalty. For example, in Endicott, the court found relatively benign employee conduct to be unprotected, while in Five Star and Jolliff, the courts extended protection to employee conduct that appears no less disloyal to the employer in question. The cases are discussed in more detail below.

A. Endicott Interconnect Technologies, Inc. v. N.L.R.B.

Endicott has its genesis in IBM’s divestiture of its printed circuit board business, an operation that employed some 4,000 employees in upstate New York. Seeing an opportunity and
concerned about the potential loss of local jobs, businessman William Maines and others, with the assistance of the State of New York, bought the business and renamed it Endicott Interconnect Technologies ("EIT"). Following the sale, IBM became the predominant purchaser of EIT’s circuit boards. At the time of the sale, Alliance@IBM/Communications Workers of America, Local 1701, AFL-CIO ("Local 1701") had been trying to organize the facility’s workers for several years without success.

Two weeks after the sale was completed, EIT laid off 200 employees, approximately ten percent of the workforce. Unsurprisingly, the local press took up the issue, and a reporter from the newspaper asked Local 1701 for its response. Local 1701 in turn asked Richard White, a union supporter with long-term experience at the Endicott plant, to respond to the newspaper’s request for comment. A newspaper article ran the next day, which read in part:

‘There’s gaping holes in this business,’ said Richard White, an employee with 28 years at the Endicott plant who, with nearly 2,000 other people, recently transferred from IBM to Endicott Interconnect. White, who kept his job, said development and support people with specific knowledge of unique processes were let go, leaving voids in the critical knowledge base for the highly technical business.12

The day the article was published, William Maines received a call from an IBM vice president who, having read the article, expressed concern that EIT had in fact “gutted” its workforce, leaving the “gaping holes” that White described.13 Maines assured him that there was no cause for concern.

Three days later, Maines called White into his office to discuss the newspaper article. Maines warned White that his comments disparaged the company in violation of a rule in the

12 Endicott, 453 F.3d at 534.
13 Id.
employee handbook, and he threatened to terminate White if it happened again. White said that he was “on board,” and that it would not happen again.\textsuperscript{14}

Less than two weeks later, White made a posting on a website the newspaper had set up as a public forum for comments on the EIT layoffs. Responding to an anti-union comment, White wrote:

\begin{quote}
Why do you continue to try to bundle reasons why a union is suspect and not so desirable for EIT employees? Why do you site [sic] all the bad things about Unions, and ignore all the bad things that IBM and EIT have done to the employees and their families and the community at large? Isn't it about time you seriously thought about the fact that no one else will help to stop the job losses, and root for the workers of the community instead of defending the likes of Bill Maines, George Pataki, and Tom Libous? Hasn't there been enough divisiveness among the people working in this area? Isn't it about time we stood up for our jobs, our homes, our families and our way of life here? Do you want to sit by and watch this area go to hell and dissolve into a welfare town for people over 70? This business is being tanked by a group of people that have no good ability to manage it. They will put it into the dirt just like the companies of the past that were ‘saved’ by Tom Libous and George Pataki, i.e., “Telespectrum,” “IFT (Flex).” When are you going to get it? A union is not just a protection for the employees. It's an organization that collectively fights for improvements and benefits for working people in communities like ours. Forget Jimmy Hoffa and the mob. Those people and situations are stereotypes of fools who chose to undermine the very system they vowed to protect. They are the minority and always have been. Look around. Do you think the government will help you when you lose your job and your house? Think again. A union is the beginning of a community standing up for itself. It's [sic] time is now.\textsuperscript{15}
\end{quote}

In response to the posting, Maines terminated White for disparaging the company again, consistent with the warning White received during their earlier meeting.

\textsuperscript{14} Id.
\textsuperscript{15} Id. at 534-35.
The General Counsel filed a complaint alleging that the threat to discharge White and his eventual discharge violated Sections 8(a)(1) and (3) of the NLRA. After a hearing, the ALJ found that EIT violated Section 8(a)(1) and ordered White’s reinstatement.

On review, the Board upheld the ALJ’s order, holding that White’s statements were entitled to protection under Section 7, pursuant to the Supreme Court’s ruling in Jefferson Standard. Under the Board’s recitation of the two-part Jefferson Standard test, “employee communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless or maliciously untrue as to lose the Act’s protection.”16 All that is necessary for a “labor dispute” to exist is that there be a “controversy that relates to terms or conditions of employment.”17 The protected nature of the allegedly disloyal communication is to be evaluated in its entirety and in context.18

With relatively little analysis, the majority of Members Liebman and Schaumber concluded that the communications met the Jefferson Standard test because both the comment to the newspaper and the posting on the website contained more than enough information for an ordinary reader to see that they were related to an ongoing labor dispute and neither communication was so egregious in context that it should lose the protection afforded by Section 7. The majority noted that the Board has permitted “far more offensive comments to retain their protected character in similar circumstances.”19 Chairman Battista dissented on the

17 Endicott, 345 N.L.R.B. at 450.
18 Id.
19 Id. at 451, n.15.
grounds that the two communications lacked a clear nexus to any labor dispute and that they were harmful, disparaging, and disloyal to EIT.\footnote{Id. at 452.}

On appeal, the District of Columbia Circuit Court of Appeals reversed the Board’s decision, holding that the Board misapplied the second part of the \textit{Jefferson Standard} test: whether the communication is “so disloyal, reckless or maliciously untrue as to lose the Act’s protection.” The court held that in examining White’s communications, the Board ignored their “detrimental disloyalty,” the very attribute of the communications at issue in \textit{Jefferson Standard} that justified terminating those employees for cause.\footnote{Endicott, 453 F.3d at 537.} According to the court:

\begin{quote}
[T]he 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 Maines about EIT’s continuing ability to supply IBM’s circuit board needs.\footnote{Id.}
\end{quote}

The court held that the “critical nature and injurious effect” of White’s comments to the newspaper were enough to support his termination, and noted that despite having been warned about the consequences of further similar behavior, he “caustically attacked” EIT management and Maines just two weeks later.\footnote{Id.} The court concluded:

\begin{quote}
As in \textit{Jefferson Standard}, the communications here constituted a sharp, public, disparaging attack upon the quality of the company’s product and its business at a critical time for the company. Thus, as in \textit{Jefferson Standard}, the disloyal, disparaging, and injurious nature of White’s attacks on the company has deprived him of the protection of that section, when read in the light and context of the purpose of the Act.\footnote{Id. (internal citations and quotations omitted). In a concurring opinion, Judge Henderson wrote to express her opinion that White’s comments did not sufficiently relate to an on-going labor dispute, and so did not meet the first prong of the \textit{Jefferson Standard} test. Id. at 538.}
\end{quote}
B. **Five Star Transportation, Inc. v. N.L.R.B.**

In *Five Star*, the First Circuit Court of Appeals came to quite a different conclusion regarding allegedly “disloyal” employee conduct. In this case, the Belchertown, Massachusetts School District opened its contract for school bus transportation to competitive rebidding upon the expiration of its contract with First Student, Inc. While performing under the contract, First Student recognized the United Food and Commercial Workers Union, Local 1459 (“Local 1459”) as the bargaining representative for its school bus drivers, and First Student and Local 1459 entered into a series of collective bargaining agreements.

As part of the rebid, the School District required that any new vendor give current drivers first consideration for employment. In addition, Local 1459’s vice-president, Daniel Clifford, wrote to all prospective bidders and notified them of Local 1459’s representation of the current drivers and its desire to continue such representation regardless of which company won the new contract.

Five Star Transportation, Inc. (“Five Star”) submitted the lowest bid by $300,000, a figure so low Clifford was concerned that Five Star would not be able to maintain the drivers’ wage and benefit levels and maintain the level of service provided by First Student. Clifford wrote to the School District expressing his concerns, and he requested that all bidders be required to offer employment to the incumbent drivers at the same level of wages and benefits provided by First Student. Clifford also wrote to the president of Five Star, asking for a guarantee that Five Star voluntarily recognize Local 1459 and continue the drivers’ employment with full seniority. The letter, to which Five Star did not respond, also stated:

> If we do not hear back from you promptly on these issues, we will infer that you do not intend to cooperate in these reasonable demands on behalf of our members and if you are awarded the contract, we will exercise all of our legal options as aggressively as
a labor union could be expected to protect the hard-won benefits of its members.  

Two weeks later, Clifford held a meeting with a group of school bus drivers to discuss the implications of Five Star’s bid. Following his presentation, Clifford asked the drivers to write to the School District expressing their concerns. Clifford provided them with the names and addresses of the School District officials as well as a sample letter requesting a re-bid of the contract with a stipulation that the bidders commit to honoring the terms of the current collective bargaining agreement.

Shortly thereafter, the School District received fifteen letters from school bus drivers. While the letters varied in content, most expressed concern that the bus drivers be allowed to continue in their current jobs at then current wage and benefit levels in the event Five Star won the contract. The president of Five Star was notified of the existence of the letters, and she was given copies at her request. The School District delayed awarding the contract bid while it considered the letters, but ultimately it awarded the contract to Five Star.

Subsequent to the award, seventeen former First Student drivers applied for work with Five Star. Six were hired, and the Five Star president admitted the other eleven were not even considered for hire because they wrote letters to the School Board.

Local 1459 filed a charge, and the ALJ concluded that Five Star violated Section 8(a)(1) with respect to nine drivers but not with respect to the other two, who had written letters that were not protected by the Act. In a divided decision, Chairman Battista and Member Schaumber concluded that Five Star had violated Section 8(a)(1) with respect to only six drivers – the six whose letters primarily raised employment-related concerns. The conduct of the other five drivers, the majority held, was not protected because the letters primarily raised generalized

\[25\] Five Star Transp., 522 F.2d at 48.
safety concerns rather than employment-related concerns. Rejecting the dissent’s suggestion to the contrary, the majority held that a duty of loyalty is owed to prospective employers as well as to current employers, noting that in both cases “the goal is the same – not to have disloyal employees on the payroll.” Member Liebman dissented on the grounds that the eleven employees’ letters should not be analyzed individually, but should be viewed as part of a concerted letter-writing campaign arising out of a labor dispute and that Five Star discriminated against all eleven letter writers on that impermissible basis.

On appeal, Five Star raised three arguments: (1) that Section 8(a)(1) did not apply because no employer/employee relationship existed between the parties; (2) that the letters did not constitute concerted activity; and (3) even if the letters did constitute concerted activity, the communications were unprotected because they were intended to sabotage and undermine Five Star’s reputation and prevent Five Star from winning the contract.

The court made short work of Five Star’s first argument, noting that the statutory definition of “employee” in the Act includes “any employee, and shall not be limited to the employees of a particular employer.” Because the individuals were employees of First Student at the time they wrote the letters and because Five Star is an employer, the court held that the Act’s protections apply.

The court also dismissed Five Star’s argument that the letters were not concerted activity and its apparent contention that because it did not know the letters resulted from the meeting

27 Id. at 48.
28 Five Star Transp., 522 F.2d at 50.
29 Id.
30 Id. at 50-51 (citing Fabric Servs., Inc., 190 N.L.R.B. 540, 541-42 (1971) (“[The NLRB] find[s] no basis . . . for construing Section 8(a)(1) as safeguarding employees . . . only from infringements at the hands of their own employer. To the contrary, the specific language of the Act clearly manifests a legislative purpose to extend the statutory protection of Section 8(a)(1) beyond the immediate employer-employee relationship.”).
with Local 1459, the letters could be considered concerted action. The court took note of several factors in upholding the Board’s conclusion that the letters constituted a concerted action: the letters spoke to the same concerns raised at the union meeting; two of the six drivers asked the School District to re-bid the contract to comport with the conditions of the First Student collective bargaining agreement; and, most importantly, it was Local 1459 that urged the drivers to write to the School District in the first place, even going so far as to supply them with a sample letter.\footnote{Five Star Transp., 522 F.2d at 51.} The court also rejected any argument that Five Star did not know of the concerted nature of the drivers’ activity, pointing to Clifford’s letter to Five Star’s president and the content of the letters themselves as putting Five Star on notice that the drivers were acting as a group to maintain their current working conditions.\footnote{Id. at 51-52.}

The court gave its most detailed analysis to Five Star’s contention that even if the drivers had engaged in protected activity, their actions did not satisfy either prong of the Jefferson Standard test. Examining the first part of the test, the court held that the drivers were engaged in an ongoing labor dispute because the Act broadly defines that term to include “any controversy concerning terms, tenure or conditions of employment . . . regardless of whether the disputants stand in the proximate relation of employer and employee.”\footnote{Id. at 53.} Although the drivers were not employees of Five Star, there was a controversy between them as to whether the drivers would be able to retain their current working conditions should Five Star become their employer, given Five Star’s history as a non-union employer, its rebuffing of the Union’s advances, its low bid, and the text of the letters themselves.

\footnote{Five Star Transp., 522 F.2d at 51.}
\footnote{Id. at 51-52.}
\footnote{Id. at 53.}
Turning to the second part of the Jefferson Standard test, the court began its discussion by noting 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 . . . . Indeed, were harm or potential harm to the employer to be the determining factor in the Court’s Section 7 protection analysis, it is doubtful that the legislative purposes of the Act would ever be realized.”

Instead, the court stated, “whether concerted employee activity is deemed to be protected depends on whether the employee’s actions appeared necessary to effectuate the employees’ lawful aim.” It is worth citing the court’s application of this standard to the facts of the case in its entirety:

In this case, the [drivers’] letters to the District were reasonably necessary to carry out their lawful aim of safeguarding their then-current employment conditions. This is because the Union had already contacted Five Star in an effort to be recognized as the drivers’ bargaining representative, and Five Star had ignored its advances. This, in conjunction with Five Star's non-union history and its very low bid for the Belchertown bus service contract, raised an alarm among the Belchertown bus drivers that they might not be able to retain the work conditions they enjoyed under the then-current collective-bargaining agreement. In response to this reasonably perceived threat, the drivers’ letter-writing campaign was narrowly tailored to effectuate the drivers’ aims: the drivers’ letters were addressed solely to the District, not the public at large; the letters only requested that the award of the contract be reconsidered or rebid to preserve the drivers’ then-current pay and work conditions; and the [drivers’] letters concern[ed] primarily working conditions and . . . avoid[ed] needlessly tarnishing [Five Star’s] image.

34 Id. at 53-54.
35 Id. at 54.
Accordingly, because the drivers’ conduct met both parts of the First Circuit’s understanding of the Jefferson Standard test, the court entered judgment enforcing the Board’s order.36

C. Jolliff v. N.L.R.B.

The Sixth Circuit Court of Appeals addressed the same subject in Jolliff. In this case, Emerson Young, a truck driver at TNT Logistic’s (“TNT”) East Liberty, Ohio facility approached the United Auto Workers (“the UAW”) about organizing employees at the facility.37 The UAW advised him to wait, but when approached by his fellow workers about moving forward in the representation process, Young and the employees decided to send a letter to TNT management describing their complaints. Because of his prior contact with the UAW, the group decided Young should draft the letter based on the input of the group, including John Jolliff and Steven Daniels. Jolliff had voiced his complaints earlier during a safety meeting, claiming that company management should be “disciplined” for refusing to give the drivers the routes to which they were entitled.38

The letter was sent to TNT management and to TNT’s biggest customer, Honda of America. The letter stated it was “being sent to protest the management & managers” and that “[w]e hope that our management at our home office will get an idea of how we the dock workers and truck drivers at these contracts are being treated & do something about it.”39 Under a section titled “Logbooks,” the letter read as follows:

Some drivers are being asked to fix their logbooks to make extra runs. These drivers are being asked by dispatchers and management to do these runs and either fix their logbooks or turn their heads on it. Mr. John Cox [TNT’s Safety Manager] once said he would not go to jail for fixing logbooks for anyone. Well Mr.

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36 Interestingly, the court claims that this was a “close case,” but does not explain why, and the opinion suggests the court was unimpressed with Five Star’s arguments. See id.
37 This summary is taken in large part from the Board’s summary of the case on remand.
39 Id.
Cox pack your suitcase, it has and is presently being done at [East Liberty].

TNT terminated Young, Jolliff, and Daniels on August 26, 2002, for their participation in writing and sending the letter to Honda of America.

The ALJ found in the employees’ favor, holding that the employees’ activity – writing a letter complaining about working conditions – was protected under the Act. The Board disagreed and found that the letter lost the Act’s protection because the statement accusing TNT of asking employees to “fix” the logbooks was maliciously false. In so finding, the Board relied on Jolliff’s admission that management never requested drivers to alter the logbooks and the absence of any other evidence supporting such a claim. The Board also held that Jolliff’s comment that management should be “disciplined” supported an inference that the employees intended to “discipline” the management by circulating false and damaging accusations to Honda. The Board concluded that the evidence supported a conclusion that the statement regarding fixing the logbooks was made with knowledge of its falsity or at least reckless disregard for the truth. As such, the termination of the employees did not violate the Act.

On appeal to the Sixth Circuit, the employees argued that the logbooks statement was mere hyperbole and not capable of carrying a defamatory meaning, and even if the statement were construed literally, the Board did not have enough evidence to conclude that it was made with actual malice. The Sixth Circuit considered that the Board must engage in a two-part inquiry in order to determine whether the logbooks statement loses its protection under the Act. First, the Board must determine whether the statement is false within the context of defamation

40 Id.
41 Chairman Bathista, Member Schaumber concurring, Member Walsh dissenting. On remand, Chairman Schaumber and Member Walsh.
42 Id. at *2.
43 Id.
44 Jolliff, 513 F.3d at 608.
law (as opposed to being pure opinion, hyperbole, or rhetorical exaggeration) and that it was actually false. If the first inquiry is answered in the affirmative, the Board then must determine whether the statement was made with actual malice.

Following a lengthy discussion of general defamation law, the court concluded that the logbooks statement was sufficiently factual to be capable of carrying a defamatory meaning because the common meaning of the words does not suggest hyperbole, because the statement is verifiable, and because surrounding context suggests the statement was intended to be taken literally.45 Because there was no evidence that the logbooks statement was true, the court proceeded on the assumption that the statement was false.

Turning to the second part of the inquiry, the court held that the Board erred in finding that the statement was made with actual malice. In so holding, the court found four facts persuasive: (1) the Board was removed from the witnesses and gave no weight to the ALJ’s assessment of Jolliff’s credibility; (2) the Board improperly conflated “falsity” with “knowledge of falsity;” (3) Jolliff’s admission was not conclusive as to Young’s knowledge of the falsity of the logbooks statement; and (4) the Board misinterpreted Jolliff’s statement about “disciplining” management.46 The court remanded the case to the Board for further proceedings consistent with its holding.

Accepting the court’s remand as law of the case, the Board found that there was insufficient evidence in the record to find that Young either knew the logbook statement was false or acted in reckless disregard for the statement’s truth or falsity. Accordingly, it concluded

\[45\] Id. at 612-613.
\[46\] Id. at 615.
that TNT violated Section 8(a)(1) in discharging the employees, and it ordered their reinstatement with backpay.47

IV. The Current and Confused State of the Employee Disloyalty Exception

Considering these three cases, it is easy for both employers and employees to wish the majority in Jefferson Standard had heeded the warning of its dissenting colleagues and provided more definite guidance on the contours of the employee disloyalty exception. Relying on Jefferson Standard, three different courts have come to two very different conclusions, bringing little clarity to an already confused area of law.

Indeed, it appears one cannot satisfactorily reconcile Endicott with Five Star and Jolliff. In Endicott, the court found that the employee’s statements to the press and on the discussion board were impermissibly disloyal, but it made no finding that the statements were misleading, reckless, inaccurate, or malicious. For the Endicott court, it was enough that the statements had the potential to do harm to the employer. Under the Endicott analysis, it appears employers can demand “loyalty” from their employees, even if the employee’s communication is truthful, measured, and even if it is not intended to do harm. This is a significant expansion of the employee disloyalty exception, one that arguably goes beyond the bounds of even the “imprecise” grey area Justice Frankfurter described. In contrast, in Five Star and Jolliff, the courts found that communications that had similar potential for harm to the employer were not impermissibly disloyal and that the employees continued to enjoy the protections of the Act.

At first glance, it seems one might distinguish Endicott’s holding on the grounds that the comments there were made to the general public, whereas the comments in Five Star and Jolliff

were made to specific audiences. This, however, appears to be a distinction without a difference. In *Jolliff*, the comments were made directly to the employer’s biggest customer, and the *Jolliff* court suggests they were made with an intent to harm the employer that is not present in *Endicott*. Similarly, in *Five Star*, the communications were made directly to Five Star’s customer. It is difficult to see how comments in a newspaper article and on a website are categorically more harmful than comments made directly to the employer’s customer.

An attempt to distinguish the cases on the disloyal nature of the communications seems similarly doomed. The protected communications in both *Five Star* and *Jolliff* appear to be more critical and more disparaging – indeed, more disloyal – than the unprotected communications at issue in *Endicott*. In *Five Star*, one of the employees wrote to the School District arguing that Five Star was unsafe:

> Five Star has a long publicized history of problems. The primary issue is safety. Five Star buses are of low standard and maintained inadequately. Some drivers are poorly trained and of questionable character. There have been reported incidences of drivers with criminal records. One such driver was allowed to operate while his license was suspended. Five Star lacks the values of its competitors and fails to warrant the responsibility for transporting our children.”

In *Jolliff*, the letter to the company’s biggest customer suggested that managers were engaged in illegal conduct in asking employees to “fix” their logbooks. Both statements appear more critical of and potentially harmful to the employer than White’s statement in *Endicott* that there were “gaping holes” in the business.

Of course, any attempt to harmonize *Endicott* with *Five Star* and *Jolliff* is hampered by the fact that neither the Board nor the court in *Endicott* provide substantive, detailed analysis of

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the employee disloyalty exception. The Endicott court states that the Board misapplied Jefferson Standard and its progeny, but it does not discuss any post-Jefferson Standard case in any detail, and it is content to conclude that “[t]he critical nature and injurious effect of White’s newspaper comments alone gave EIT ‘cause’ to immediately discharge him” without discussing the basis for that conclusion.50

The Five Star and Jolliff courts also are guilty of providing less than rigorous analyses of the employee disloyalty exception. Indeed, it appears that the Five Star and Jolliff courts deliberately ignored Endicott, which was decided two years earlier. Interestingly, Five Star cites Endicott for its articulation of the Jefferson Standard test, but it does not discuss Endicott’s expansive reading of the employee disloyalty exception, leaving open the question of how the Five Star court could come to its conclusion without even acknowledging Endicott’s differences.51

In sum, it appears Endicott, Five Star, and Jolliff have done little to clarify the employee disloyalty exception, leaving the state of the law just as confused and susceptible to individual judgment as Justice Frankfurter predicted it would be fifty-five years ago.

V. Employee Disloyalty After Endicott, Five Star, and Jolliff

What is an employer to do in the face of these seemingly irreconcilable rulings? The flip answer might be that an employer whose case would be heard in the District of Columbia Circuit Court of Appeals should feel confident disciplining an employee for even the slightest disloyalty while an employer in First Circuit or Sixth Circuit should think twice before doing so. A more considered response, however, appears to be that employers should carefully consider the ramifications of employee discipline (including refusing to hire an individual) where there is a

50 Endicott, 453 F.3d at 537.
51 Five Star Transp., 522 F.2d at 52.
suggestion that arguably disloyal communications may be considered protected conduct in 
furtherance of a labor dispute.

Crucially, this caution includes non-union workplaces as well as unionized workplaces. 
Although an employer may have a non-union workforce, Section 7 applies with equal force to 
non-union employees, and a non-union employer could find itself facing an unfair labor practice 
charge for disciplining an employee if that employee’s conduct is protected under the Act.

Every employer, therefore, should consider the employee disloyalty exception when 
considering whether to discipline an employee (or whether to deny employment to an applicant) 
for perceived “disloyal” conduct and ask itself the following questions. First, are the 
communications “concerted activity”? In other words, are the communications, even if made by 
an individual employee, in furtherance of a group concern? If they are not, Section 7 does not 
apply, and the communications are unprotected by the Act.

Second, if the communications are concerted activity, are they part of an ongoing labor 
dispute? A labor dispute need not be between a union and an employer. As the Five Star court 
noted, the term “labor dispute” is defined broadly as “any controversy concerning terms, tenure 
or conditions of employment 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.”52

If the communications are part of an ongoing labor dispute, the employer must ask the 
third question: is the communication so disloyal, reckless or maliciously untrue as to lose the 
Act’s protection? Of course, it is this last question that is most difficult for employers, especially

as the answer seems to depend on which body is adjudicating the case. The future of the employee disloyalty exception remains uncertain, but all employers must be wary before taking adverse action against an employee or applicant for perceived “disloyalty,” just as unions should exercise diligence in encouraging employees to engage in “disloyal” conduct detrimental to their employers.