

Hamilton County LAW LIBRARY NEWS

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September 2017

Federal Court Overturns NLRB, Says Jimmy John's Employees' Disloyal Conduct Not Protected

By Daniel B. Pasternak of Squire Patton Boggs. Reprinted with permission

In a closely-watched case, on July 3, 2017, the U.S. Court of Appeals for the Eighth Circuit refused to enforce a National Labor Relations Board (“NLRB” or “Board”) decision in which the Board found MikLin Enterprises, Inc. (“MikLin”), owner of 10 Jimmy John’s franchises in the Minneapolis, Minnesota area, violated the National Labor Relations Act (“NLRA” or “the Act”) when it disciplined employees for engaging in a public protest against MikLin’s sick leave policy during a labor organizing campaign. (See our prior post on the NLRB’s decision [here](#).) In doing so, the Eighth Circuit found that the employees’ public attacks – which included distributing flyers implying that Jimmy John’s sandwiches could be tainted by sick employees – were so disloyal, materially false, and misleading that they lost the protection provided by Section 7 of the NLRA, which shields employees who engage in concerted activities for mutual aid or

protection from adverse employment actions. For this reason, the Eighth Circuit held that MikLin’s discipline of these employees for their public sick leave crusade did not violate the Act. The decision is noteworthy due in part to the Eighth Circuit’s less-than deferential treatment of the Board’s decision, and its recognition that employees’ rights under the NLRA to protest the terms and conditions of their employment are not entirely unfettered.

The case, [MikLin Enterprises, Inc. v. NLRB](#), originated from a labor dispute between union organizers, employees, and the employer over MikLin’s sick leave policy, and arose during a union organizing campaign. To protest the Company’s sick leave policy, the pro-union MikLin employees hung posters complaining about the Company’s sick leave policies in public places and distributed them, along with press releases and “

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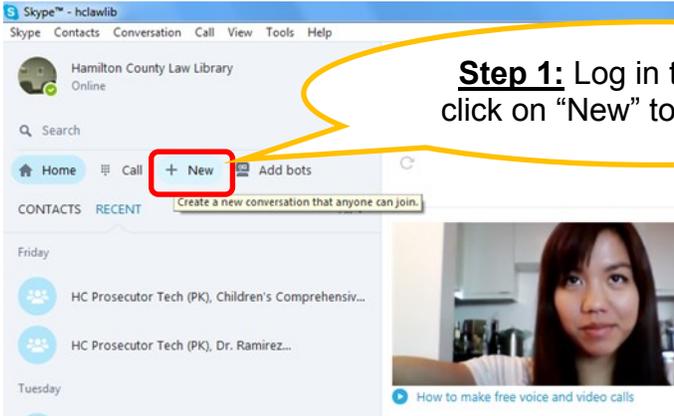
<http://lawlibrary.hamilton-co.org>

Tech Tip: Do you use Skype? Did you know you can video chat with a group even if they don't have a Skype account by using Skype for Web? By Systems Librarian, Julie Koehne

Follow these steps to get started.



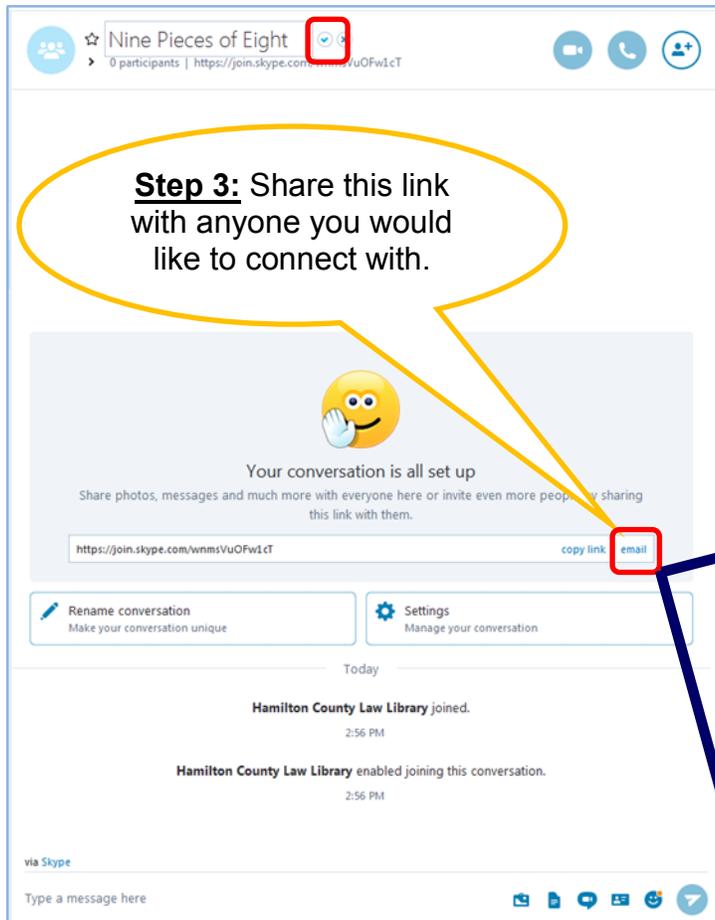
Step 1: Log in to Skype and click on "New" to start a group.



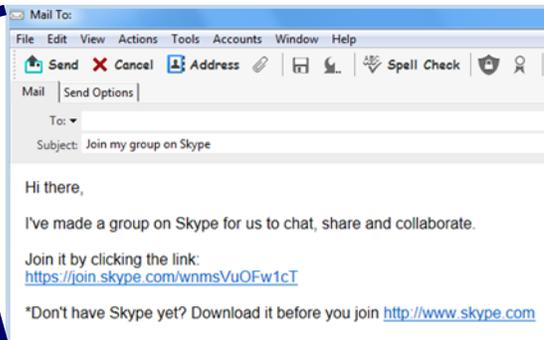
Step 2: Give your group a title by clicking on the Edit tool.

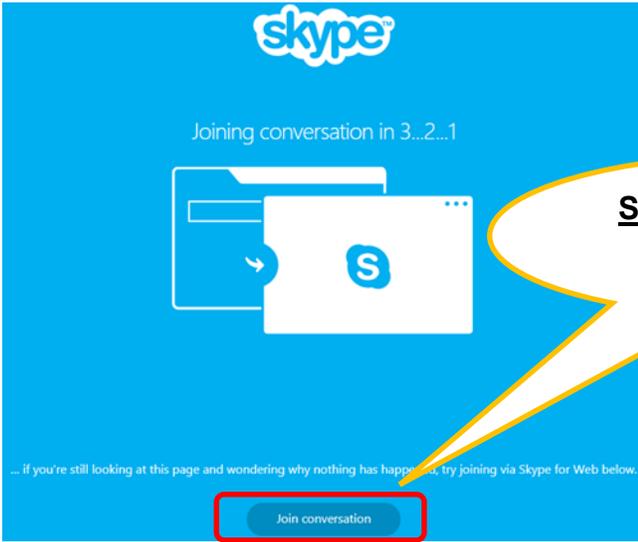


Step 3: Share this link with anyone you would like to connect with.



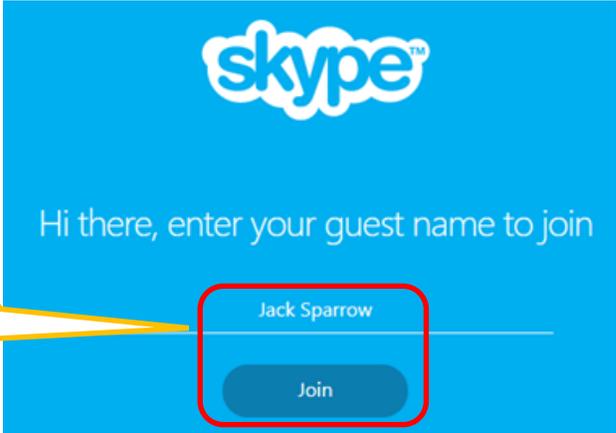
Skype offers a quick email option, but you can copy and paste the link into any application you use. Post the link to a particular group in social media or other means of communication.



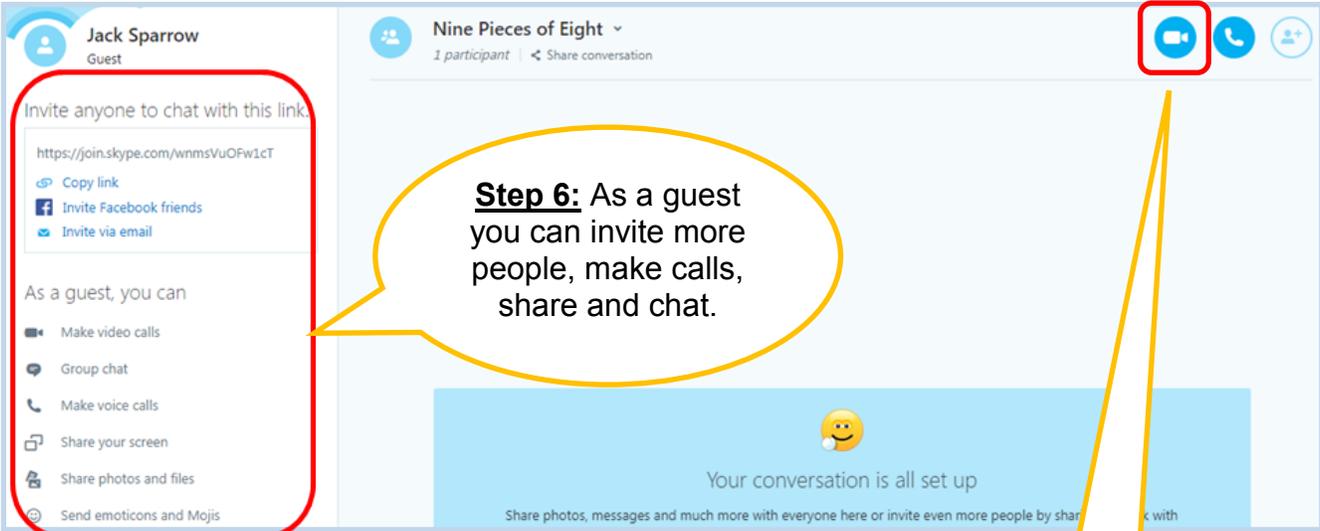


If you are using a browser you may need to download a plug-in.

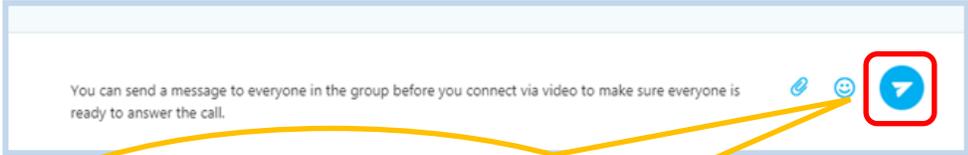
Step 4: Click on "Join conversation."



Step 5: Enter your name then click on "Join."



Step 6: As a guest you can invite more people, make calls, share and chat.



Step 7: Send a text message to the group to make sure everyone is ready to answer the call before making the video call.

Step 8: To make a call using video chat, click the video camera icon.

For more help, see <https://support.skype.com/en/faq/fa10613/how-do-i-make-a-call-on-skype>

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open letters,” to local media outlets. Some of the posters stated that MikLin workers reported to work with the flu, strep throat, and colds because: “SHOOT, WE CAN’T EVEN CALL IN SICK.” The posters implied that these sick workers infected the food they prepared for customers. The documentation provided to the media also stated that the Company violated health codes on a daily basis, and “shoved [customers] to the bottom of the well of importance.” As part of its response to this attack, MikLin’s owners fired six employees who coordinated the posters and media push, and issued written warnings to other employees who assisted. The union challenged MikLin’s actions, and ultimately, the NLRB found that MikLin’s discipline and termination of employees involved in the sick leave attacks violated Section 8(a)(1) of the Act by interfering with the employees’ rights to protected concerted activity, as well as discriminated against the employees in violation of Section 8(a)(3) for engaging in concerted activity. MikLin appealed the Board’s decision to the Eighth Circuit, and the NLRB cross-petitioned for enforcement of its Order. Initially, a panel of Eighth Circuit judges agreed to enforce the entire NLRB Order. MikLin petitioned for re-hearing *en banc* (hearing by the entire Eighth Circuit court), and the Court granted MikLin’s re-hearing request.

Although several of MikLin’s employment actions in response to union activity were at issue in the initial complaint filed by the union, the public sick leave attacks were the focus of the Eighth Circuit’s *en banc* opinion. In coming to its conclusion that MikLin violated the Act, the NLRB had analyzed whether the employees’ public sick

leave communications, which might otherwise be protected under Section 7 because they were connected to a labor dispute, were so disloyal that they lost Section 7 protection. In its analysis, the NLRB referenced the disloyalty test articulated by the United States Supreme Court in *NLRB v. Local Union No. 1229, IBEW*, commonly referred to as the “*Jefferson Standard*” case. The NLRB posited that the disloyalty test not only requires proof that the employees’ actions were “so disloyal, reckless or maliciously untrue,” but also that their actions “evidence a malicious motive.” Over a dissent, the Eighth Circuit *en banc* majority stated that a “malicious motive” was not required to determine whether MikLin’s employees’ actions were so disloyal as to lose protection under Section 7. They explained that the test instead focuses on an objective standard of whether the “employees’ public communications reasonably targeted the employer’s labor practices, or indefensibly disparaged the quality of the employer’s product or services.” Citing *Jefferson Standard*, the majority held that employees indeed disparaged MikLin when they used a “sharp, public disparaging attack upon the quality of the product in a manner reasonably calculated to harm company reputation and its income.”

In finding the employees’ sick leave posters and media contacts were sufficiently disloyal as to lose protection under the Act, the Court noted that the employees’ selected communications “were sure to harm MikLin’s reputation and reduce its income” because the attacks directly targeted MikLin’s product – its sandwiches. The Court also found that the damage done would “not easily dissipate” after the labor dispute was over. The Court went on to state that the damage to the Com-

pany was exactly the type of harm that employees are expected to protect their employers from, and that Section 7 rights do not disturb an employer's right to expect loyalty from employees and their continued efforts in support of the business. Going further than the NLRB's analysis of MikLin's employees' conduct, the Court also found that the employees' allegations that MikLin workers were not allowed to call in sick, and that MikLin had daily health code violations were "materially false and misleading," which removed the statements from protection under the Act. Thus, the Court found that although the employees' sick leave communications were connected to a concerted effort to improve the terms and conditions of their employment, the "indefensible" nature of their communication removed them from protection under the Act and provided "cause" for MikLin to discharge the responsible employees.

This case was closely watched, as it was viewed as an illustration of how the NLRB had become out of touch with reality, and how it exalted workers' rights over of the rights of employers to run their business, rather than seeking to find a proper balance between those equally legitimate interests. It is hoped that with the impending shift in the makeup of the NLRB – see our post [here](#) – decisions such as its now-overruled ruling in *MikLin* will be a thing of the past, and instead, in their place will be decisions that properly weight the rights, interests, and concerns of not just employees and unions, but also employers.

For more information, contact [Daniel B. Pasternak](#).

Upcoming CLE

Free to subscribers; \$50 for non-subscribers

Registration is required.

To register, call 513.946.5300, email reference@cms.hamilton-co.org, or register via the website

<http://lawlibrary.hamiltoncountyohio.gov/classes/calendar/>

Fundamentals of Auto Accident Intake and Investigation

Presenter: Albert J. Brown Jr.

Wednesday, October 4

Noon-1:30

Lexis Digital Library

Do you like the content of Lexis treatises, but find it challenging to make your way to the courthouse to check out materials (or return them)? Take a look at our Lexis Digital Library, available to subscribers through remote access to our databases, to view our collection of ebooks. There, you'll find many Matthew Bender treatises across substantive areas of law, accessible right from your office. You don't need an e-reader to access them – you can check out titles on your computer. The digital materials offer the added bonus of easy search ability. Just turn to the table of contents and click the link to go directly to the content you want. If you'd like more information about how to access our ebooks please call 946-5300 or email us at reference@cms.hamilton-co.org for more info.

Subscriber Benefits

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Circulation privileges to borrow from over 40,000 print volumes for up to six weeks at a time

Access to extensive legal information databases from the Law Library, including Westlaw, IntelliConnect, Lexis Digital Library e-books, HeinOnline, and Loislaw treatises

Wireless network throughout the Law Library

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Professional reference service by our law librarians, available via e-mail, telephone, and in person

Free document delivery by fax or e-mail of print and electronic materials

CLE seminars throughout the year, on legal research and substantive topics

Subscribers' lounge, magazines, daily newspapers, and coffee

Bi-weekly news alerts by practice area

Discounted rates for photocopying

In addition, solos and attorneys whose firm has a subscription have 24 hour remote access to Fastcase.com case law, Aspen/LOISLaw treatises, HeinOnline (for under 50 attorney firms), EBSCOhost, and IntelliConnect Law, Business, Tax, and Accounting

An add-on plan for Lexis access is available for subscribers in solo practice

You and the Legal System: Domestic Relations

Join us as attorney Blake Somers discusses Domestic Relations Law on Friday, September 15 at noon in the Law Library. The session will cover the difference between dissolution and divorce, division of property, spousal and child support and child custody/parenting time.

To register, call 513.946.5300 or register via our website at

<https://lawlibrary.hamiltoncountyohio.gov/event-registration/?ee=121>

Please note that this is not a CLE event; it is intended for the general public. However, attorneys are welcome to attend and may want to pass along the program announcement to clients, staff and community organizations. If you would like more information, please contact [Vanessa Seeger](#).

You and the Legal System is brought to you as a public service by the Hamilton County Law Library, in conjunction with the Cincinnati Bar Association's Lawyer Referral Service. Be on the lookout for the next event in our *You and the Legal System* Series, TBA.



Discovery Resources

Law Library subscribers have access to a variety of resources on Discovery. If you have questions, or have a suggestion for a title to add, contact the reference staff at reference@cms.hamilton-co.org or 513.946.5300

Bender's forms of discovery
KF8900 .A3 B4

Cross-examination : science and techniques
KF8920 .P68 2009-

Discovery problems and their solutions
KF8900 .G758 2013

E-Discovery: from 50,000 feet to ground level : what every attorney needs to know in order to practice law in this century.
KF8902.E42 E44 2016

Electronic discovery : law and practice
KF8902.E52 C642 2012-2016

Electronic discovery and records management guide : rules, checklists, and forms
KF8902.E42 G74

The expert expert witness : more maxims and guidelines for testifying in court
KF8965 .B757 2016

Expert witnesses, valuation, & damages : the expert's point of view
KF8961 .A967 2013

Family law : relocation, social media evidence, same sex unions, and other current issues [in Ohio].
KFO100.A75 F36 2015

Model interrogatories.
KF8900 .C852

Ohio State Bar Association forensics conference
KF320 .F67 2016

Online Resources-Remote Access*

CCH IntelliConnect

Discovery Practice
Electronic Discovery: Law and Practice
Mauet Trial Techniques and Trials

Fastcase Loislaw Treatises

Discovery Practice, 8th edition
Electronic Discovery, Law and Practice, 2nd edition,
Witness Preparation
Scientific Evidence and Expert Witness Handbook

EBSCO

Criminal Law Handbook
Nolo's Deposition Handbook.
Represent Yourself in Court

Overdrive (Lexis Ebooks)

Discovery in Construction Litigation

*Remote access is available to subscribers who are solos or firm attorneys whose entire firm has a subscription to the Law Library.

Upcoming Events:

September 15: You and the Legal System: Domestic Relations Law

October 4: CLE: Fundamentals of Auto Accident Intake and Investigation

Law Library Holidays

The Law Library will be closed on Monday, September, 4 in observance of Labor Day.



September 2017 Law Library Newsletter

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