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Legal Alert: California Supreme Court Reverses Court of Appeal; Declares State Labor Picketing Laws Constitutional in 6-1 Decision

January 2, 2013

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Executive Summary: In a case that will significantly strengthen labor's hand regarding picketing activities in the state, the California Supreme Court reversed a Court of Appeals decision that had declared unconstitutional two state laws restricting the ability of employers to enjoin conduct on their property if the conduct relates to a labor dispute. Specifically, the Supreme Court found that California's Moscone Act (Code of Civil Procedure Section 527.3) and California Labor Code Section 1138.1 are constitutional even though they: 1) favor speech related to a labor dispute over other forms of speech, and 2) favor such "labor speech" over the private property rights of employers. The Court further found that the two statutes in question are consistent with the First and Fourteenth Amendments of the United States Constitution. *Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8*, Case No. S185544 (December 27, 2012).

Background

Ralphs Grocery Company owns and operates warehouse grocery stores under the name "Foods Co." One such store is located in a retail development in Sacramento called College Square, which also contains restaurants and other stores. The College Square Foods Co. store has only one entrance for customers. A paved walkway approximately 15 feet wide extends outward from the building's south side, where the customer entrance is located, to a driving lane that separates the walkway from the store's parking lot, which also serves customers of other retail establishments within College Square. When the Foods Co. store opened in 2007, the United Food and Commercial Workers Union, Local 8 began picketing the store, advising customers that employees were not represented by a union. Picketing and handbilling took place on the store's entrance walkway. Ralphs issued regulations in January 2008 seeking to prohibit "speech activities" within 20 feet of its entrance and to prohibit all such activities during certain hours and for a week before certain designated holidays. Ralphs sought injunctive relief to restrict union picketing consistent with its speech activity regulations.

California has two separate statutes that provide preferential treatment to "labor speech" and picketing related to labor disputes. The Moscone Act states that conduct relating to a labor dispute - such as peaceful picketing - is legal and cannot be enjoined, provided that such conduct does not involve a "breach of the peace, disorderly conduct, the unlawful blocking of access or egress to premises where a labor dispute exists or other similar unlawful activity." The Act thus prohibits courts from issuing any restraining order or injunction against such conduct. As a result of the Moscone Act, unions are arguably able to picket on private property when such conduct would otherwise amount to trespass.

In its July 19, 2010 *Ralphs* decision striking down the Moscone Act (and Labor Code Section 1138.1), the Court of Appeals had summarized the Act to impermissibly declare that "labor protests on private property are legal, even though a similar protest concerning a different issue would constitute trespassing... (a)nd it denies the property owner involved in a protest over a labor dispute access to the equity jurisdiction of the courts even though it does not deny such access if the protest does not involve a labor dispute."

The second statute, California Labor Code Section 1138.1, establishes prerequisites for obtaining an injunction against labor protesters that do not apply when the protest concerns other forms of speech. Those prerequisites include requiring the court to hold an evidentiary hearing with live witnesses and proof of an unlawful act other than trespass by the protesters, irreparable harm to the property itself, and the inability or unwillingness of police to provide protection. These additional requirements, the Court of Appeals pointedly (and correctly) noted, "make it virtually impossible for a property owner to obtain injunctive relief" when faced with labor picketing on its private property.

The Supreme Court's Decision

In its decision, the Supreme Court agreed with the Court of Appeals that the store's privately owned entrance area is not a public forum under the California Constitution's liberty of speech provision, holding that a union's picketing activities in such a location do not have state *constitutional* protection. However, the Court further found that such activities did enjoy *statutory protection* under the Moscone Act and Labor Code Section 1183.1, which, in reversing the Court of Appeals, the Court found to be consistent with both federal law and federal constitutional provisions dealing with content discrimination in speech regulations.

The Court concluded that the two state statutes do not violate the First and Fourteenth Amendments of the United States Constitution merely because they provide protections to labor speech that are not afforded to speech concerning other topics. The Court specifically noted that decisions of the U.S. Supreme Court, as well as its own prior decisions, support the proposition that labor-related speech may be treated differently than speech on other topics, and may be singled out for particular protection or regulation, "in the context of a statutory system of economic regulation of labor relations, without violating the federal Constitution." The Court went on to hold that a private sidewalk in front of a customer entrance to a retail store in a shopping center is not a public forum for purposes of expressive activity under the California Constitution's liberty-of-speech provisions (as construed in its *Robins v. Pruneyard Shopping Center* decision (23 Cal. 3d 899 (1979))), and that on the private property of a shopping center, the public forum portion is limited to those areas that have been designed and furnished to permit and encourage the public to congregate and socialize at leisure. However, the Court went on to hold that California's Moscone Act and Labor Code Section 1138.1 afford both substantive and procedural protections to peaceful union picketing on a private sidewalk outside a targeted retail store during a labor dispute, and such union picketing may not be enjoined on the ground that it constitutes a trespass, inasmuch as neither, in the Court's view, violate the federal Constitution's free speech or equal protection guarantees because they give labor speech more protection than speech on other subjects.

What the Court's Decision Means

It is important to note that while the Court's decision centers on a retail store situated in a shopping center which, like *Pruneyard*, may arguably constitute a "public forum," its decision is by no means limited to "public forum" labor speech. As noted by the concurring and dissenting opinion by Justice Chin, "(i)t is not clear what the court would have done had it correctly found the property *not* to be a public forum...(placing) California on a collision course with the federal courts." Employers may thus expect organized labor to continue "pushing the envelope" with respect to expressive activities – including picketing and handbilling – on private property in non-retail, non-shopping center settings, given the Court's ruling. Unless and until the U.S. Supreme Court again takes up the issues of enhanced labor speech protections as well as private property trespass equal protection issues raised by the *Ralphs* decision, organized labor will doubtless continue efforts to engage in and expand such activities on employer private property.

If you have any questions regarding this Alert, please contact the author, [Stephen Lueke](mailto:slueke@fordharrison.com), slueke@fordharrison.com, who is a partner in our Los Angeles office, or the FordHarrison attorney with whom you usually work.

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