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LEGAL ALERT



Legal Alert: California Supreme Court Holds that California Constitution Allows Union to Urge Mall Customers to Boycott Store

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In *Fashion Valley Mall, LLC v. National Labor Relations Board* (12/24/07), the California Supreme Court held that the right to free speech granted in the California Constitution gives a union the right to urge customers in a shopping mall to boycott one of the stores in the mall.

In this case, union members, who were employees of the Union Tribune newspaper, distributed leaflets to customers entering and leaving the Robinsons-May store at the Fashion Valley Mall. The leaflets stated that Robinsons-May advertised in the Union-Tribune newspaper and that the newspaper allegedly treated its employees unfairly. They also urged customers who believed “that employers should treat employees fairly” to call the CEO of the newspaper.

Mall officials advised the union members that they were trespassing and had not obtained a permit from the mall “to engage in expressive activity.” The mall permits certain “expressive activities” if a lengthy application process is followed. As part of the process, the individuals interested in engaging in “expressive activities” must assure that they will not engage in any form of boycott against any of the mall tenants.

The union filed a charge with the NLRB and an Administrative Law Judge (ALJ) ruled that the mall violated § 8(a)(1) of the NLRA by barring the employees from distributing the leaflets. The Board affirmed the ALJ’s opinion as modified. The Board held that the purpose of the anti-boycott provision was to protect the mall tenants from otherwise lawful consumer boycott handbilling, which violated § 8(a)(1).

The mall petitioned for review before the District of Columbia U.S. Circuit Court of Appeals. The Court of Appeals looked at two questions. First, the court considered whether, state law aside, the mall’s requirement for a permit for expressive activity, conditioned as it was upon the union’s agreement not to urge a boycott of any mall tenant, violated § 8(a)(1)? Second, if the answer to the first question was yes, did the mall act within its rights under California law? The court answered the first question in the affirmative. Hence, unless California state law permitted the mall to ban from its premises speech urging the public to boycott a tenant, the mall was in violation of § 8(a)(1). The D.C. Circuit Court of Appeals requested that the California Supreme Court resolve the second question.

Relying on its 1979 decision in *Robins v. Pruneyard Shopping Center*, the California Supreme Court held that the California Constitution grants broader rights to free expression than does the First Amendment of the United States Constitution by holding that a shopping mall is a public forum in which persons may exercise their rights to free speech. Accordingly, the mall's policy prohibiting the union's boycott violated the California Constitution.

Employers' Bottom Line:

This is yet another example of how California law is broader than federal law in its protection of individual rights. In this decision, the court held that the right to free speech under the California Constitution is significantly broader than the right to free speech contained in the United States Constitution.

Should you have any questions about this decision, or about any other way in which California employment law differs from the laws of other states, please contact the author of this Alert, Helene Wasserman, in the Firm's Los Angeles office at (213) 237-2403 or hwasserman@fordharrison.com.

Helene is also the host of the Employer Helpcast, which is a "one stop website" for both "nuts and bolts" employment law advice and insight into new legal developments affecting employers. The Employer Helpcast can be found at <http://employerhelpcast.blip.tv/>.