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UNION ACCESS TO PRIVATE PROPERTY: CALIFORNIA SUPREME COURT RULES SHOPPING MALLS CANNOT PROHIBIT UNION PROTESTERS FROM URGING BOYCOTT OF STORES

The California Supreme Court recently ruled in a 4-3 decision that a privately owned shopping mall could not restrict union members from peacefully handbilling on its property in connection with a labor dispute, even though the handbilling was designed to cause a consumer boycott of one of the mall's tenants. *Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742 (Cal. 2007). Writing to answer a question certified to the state court by a U.S. Court of Appeals, Justice Carlos R. Moreno said that under the California Constitution, a large shopping mall is a "public forum," and that mall managers cannot prohibit speech based on its content. The Court said that as long as the protesters do not disrupt a business or physically interfere with shoppers, the right of free speech outweighs the mall's right to protect its tenants' profits. The ruling follows a 1979 California Supreme Court decision that found that large shopping malls are public forums in which people's free speech rights are protected by the California Constitution. *Robins v. Pruneyard Shopping Center*, 592 P.2d 341 (1979), *aff'd,* 447 U.S. 74 (1980). The United States Court of Appeals for the District of Columbia refused to review the decision, including U.S. Constitutional arguments raised initially on appeal to the Circuit Court, and granted the NLRB's cross-application for enforcement. *Fashion Valley Mall, LLC v. NLRB*, 524 F.3d 1378 (D.C. Cir. 2008).

The decision in *Fashion Valley* has potentially wide-range implications for California employers and owners of private property who encourage, invite, or permit members of the general public to come upon their property. Indeed, owners of private property that may be deemed to be a "public forum," such as a large shopping mall, who attempt to restrict or regulate speech on their property based on content, may be in violation of the California Constitution as decided by the California Supreme Court in *Fashion Valley*.

FACTS GIVING RISE TO THE DISPUTE

The *Fashion Valley* case arose out of a protest at the Fashion Valley Mall (the "Mall") in October 1998. Pressroom employees of a California newspaper were involved in a labor dispute with their employer, the *San Diego Union-Tribune*, following the expiration of their collective bargaining agreement. With contract negotiations at a standstill, the union tried to put pressure on the newspaper by distributing leaflets urging a boycott of Robinsons-May, a store that advertised in the paper and had a store in the Mall. Approximately 30 to 40 members of Graphic Communications International Union Local 432-M came to the Mall, stood outside the department store, and handed out leaflets to individuals on the Mall's premises. The union leaflets stated that Robinsons-May advertised in the *San Diego Union-Tribune*, and urged store customers who believed that employees should be treated "fairly" to contact the newspaper's chief executive officer and not to patronize Robinsons-May.

The Mall maintained a policy that required parties that wished to engage in "expressive activity" on its premises to obtain a permit and required applicants to request the permit five business days prior to the activity. In addition, permits would be issued only if the requesting party agreed to abide by the Mall's rules, including a rule against interfering with the business of a Mall tenant and a prohibition on "[u]rging, or encouraging in any manner, customers not to purchase the merchandise or services offered by one or more of the stores or merchants in the shopping center." 172 P.3d at 744.

Shortly after the union members began distributing their handbills, Mall officials notified the union protesters that they were trespassing on Fashion Valley property because they failed to obtain a permit from the Mall management company. When they were warned that they would be subject to "civil litigation and/or arrest" if they did not leave the Mall, the union members moved to public property near the Mall entrance.

Thereafter, the union filed an unfair labor practice charge with the National Labor Relations Board ("NLRB"), alleging that by refusing to allow the leafletting in front of Robinsons-May, the Mall owners interfered with the union members' rights, in violation of section 8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1).

NLRB FOUND BAN UNLAWFUL; FASHION VALLEY APPEALS TO D.C. CIRCUIT

An NLRB administrative law judge found that the union members were engaged in peaceful handbilling to publicize their primary labor dispute with the *Union-Tribune* and that such activity was a lawful secondary activity under the NLRA. Fashion Valley appealed the administrative law judge's decision to the NLRB. The Board concluded that the Mall violated the statute both by maintaining the anti-boycott rule and by enforcing the rule by requiring application for a permit that forbids lawful activity, and held that "California law permits the exercise of speech and petitioning in private shopping centers, subject to reasonable time, place, and manner rules adopted by the property owner." *Equitable Life Assurance Society of the United States,* 343 N.L.R.B. 438, 439 (2004). Further, the NLRB held that Fashion Valley's anti-boycott rule was a "content-based restriction" on speech that was not permitted by California law. 343 NLRB at 439.

Fashion Valley appealed the decision of the NLRB to the United States Court of Appeals, D.C. Circuit. The federal appellate court, with Chief Justice Ginsburg writing, ruled that the union's activities were protected under federal labor law unless the Mall had a constitutional right under California law to exclude the union employees from the Mall's premises. But, the court said, California law was uncertain, and "no California court has squarely decided whether a shopping center may lawfully ban from its premises speech urging the public to boycott a tenant." *Fashion Valley Mall, LLC v. NLRB*, 451 F.3d 241, 246 (2006). Refusing to speculate, the D.C. Circuit certified to the California Supreme Court the question of whether Fashion Valley could maintain and enforce its anti-boycott rule against the union. 451 F.3d at 246.

THE CALIFORNIA SUPREME COURT OPINION

The California Supreme Court's decision began by noting that the California Constitution provides broader protection for free expression than the First Amendment to the U.S. Constitution and protects speech and petitioning in public forums such as shopping centers, even when they were privately owned. The Court then recapped the levels of scrutiny under which any restriction of free speech activity is reviewed. A content-based restriction is subjected to strict

scrutiny; it must be necessary to serve a compelling state interest and narrowly tailored to achieve that end. Content-neutral regulation of the time, place, or manner of speech is subjected to intermediate scrutiny to determine if it is narrowly tailored to serve a significant government interest and leaves open ample alternative avenues of communication. The Court was clear that reasonable time, place, and manner restrictions may be necessary in certain settings and are permitted. *See Los Angeles Alliance for Survival v. City of Los Angeles*, 993 P.2d 334, 340 (2000). The Mall contended that its ban was content-neutral because it applied equally to any and all requests for a consumer boycott regardless of the subject matter or viewpoint of the speaker advocating the boycott. The Court rejected this argument and held that the Mall's prohibition was not a content-neutral time, place, or manner of speech regulation, but rather was a content-based regulation since it bans speech urging boycotts.

The Court also rejected the Mall's contention that boycotts could be prohibited for the same reason that the solicitation of funds could be prohibited. In-person solicitation of funds, the Court stated, may disrupt business, impede the flow of traffic, and create a risk of fraud and duress to those who are the target of the solicitation. A ban on solicitation of funds can thus be justified by legitimate concerns having nothing to do with content. The Court held, however, that a rule prohibiting speech that advocates a boycott cannot similarly be justified by legitimate concerns that are unrelated to content. Peacefully urging a boycott in a mall, the Court said, does not by its nature cause congestion, nor does it promote fraud or duress.

Finding that the regulation in question was content-based, the Court concluded the Mall's ban on boycotts was subject to strict scrutiny analysis. Under the strict scrutiny standard, the Mall's policy must be necessary to serve a compelling state interest and narrowly drawn to achieve that end. Under that analysis, the Court found the Mall's purpose to maximize the profits of its merchants was not compelling compared to the union's right to free expression. The Court held that urging customers to boycott a store lies at the core of the right to free speech and therefore the Mall could not lawfully prohibit speech that urged a boycott of one or more of the stores in the Mall.

The California Supreme Court did not address the D.C. Circuit's decision in *Waremart Foods v. NLRB* regarding viability of the Moscone Act. 354 F.3d 870 (D.C. Cir. 2004). The Moscone Act, Cal. Civ. Proc. Code § 527.3, was passed in 1975 and deprived state courts of jurisdiction to issue injunctions against persons distributing information about a labor dispute in "any place where any person or persons may lawfully be" and against "[p]eaceful picketing or patrolling involving any labor dispute." § 527.3(b). The D.C. Circuit stated in *Waremart*, "We believe that if the meaning of the Moscone Act came before the California Supreme Court again, it would either hold the statute unconstitutional or construe it to avoid unconstitutionality." 354 F.3d at 875. The *Fashion Valley* decision left that question unanswered.

DISSENT: "THE MAJORITY IS TRAMPLING ON TRADITION"

Justice Chin, joined by Justices Baxter and Corrigan, filed a vigorous dissent, defending *Fashion Valley*'s rule. The justices noted that California had become increasingly removed from the courts around the country in its expansive view that public free speech rights exist on private property, calling its position one of "magnificent isolation." The dissent noted that "jurisdictions throughout the nation have overwhelmingly rejected" this position. They also took issue with the majority's view that protestors could come on private property specifically to interfere with the commercial purpose of the owner's enterprise. "The time has come for us to forthrightly overrule *Pruneyard* and rejoin the rest of the nation in this important area of the law," Chin said, noting that "[p]rivate property should be treated as private property, not as a public free speech zone."

The dissenters argued that the union had "plenty of outlets" for protest, including standing on public property just outside the shopping center, including near the entrances, or utilizing other forms of mass communication, such as the internet. The dissent submitted that free speech rights and private property rights can and should coexist, but that outsiders had no right to engage in speech activity on private property over the owner's objection. Finally, the dissent stated that the Court should not forbid "private property owners from controlling expressive activity on their property—urging a boycott of its tenants—that is inimical to the purpose for which the property is being used."

U.S. SUPREME COURT PRECEDENT

Notably, the California Supreme Court quoted and relied on an earlier U.S. Supreme Court case on striking the balance between public access and private property:

> The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.

Marsh v. Alabama, 326 U.S. 501 (1946).

Accordingly, the greater the efforts of private property owners to open up their property to members of the general public, the greater the rights of such invitees and the lesser the rights of the property owner to restrict speech and peaceful protests, including handbilling.

PRACTICAL IMPLICATIONS

The ruling in *Fashion Valley* arguably affects only boycott campaigns and peaceful handbilling in public forums such as shopping centers. Moreover, the *Fashion Valley* holding also arguably leaves in place lower-court holdings in California that have held that stand-alone business entities, such as grocery stores, do not have to permit on their premises the boycott activities that have been found to be valid in a large shopping mall, or public forums such as the Fashion Valley Mall.

However, even "public forum" private property owners, it would appear, can still prohibit certain activities that physically interfere with the conduct of business on their private property, including disruptive fundraising activities. Further, such property owners can adopt regulations that reasonably control the time(s) of such activities, the place where the activities take place, and the manner in which such activities are carried out. A reasonable deposit or bond could perhaps also be required of the outside group. Such regulations should not regulate the "content" or "viewpoint" of the speech or writing (*e.g.*, handbill) absent a "compelling interest" that is narrowly drawn to meet that end.

Finally, *Fashion Valley* leaves unanswered how the Court would treat other private properties that are only open to the public in a limited manner, such as health care facilities. Employers and private property owners who permit public access only for limited purposes may not constitute a public forum and thus have broader rights to restrict activities of third parties on their property.

EMPLOYER "TO DO" LIST AFTER THE *FASHION VALLEY* HOLDING

First, an employer who invites members of the general public upon its property to further its business objectives should attempt to determine if it would be defined as a public forum under the California Supreme Court decisions of *Pruneyard* or *Fashion Valley*. For example, large shopping malls that have characteristics of the Fashion Valley Mall in San Diego should develop time, place, and manner regulations that are not content or viewpoint based. Such regulations could regulate the time (and perhaps the length of time) "expressive conduct" by entrants to the property can occur and the place on the private property where the conduct can occur. Arguably, a large shopping mall could establish an area on its property (*e.g.*, a "free speech zone") where outside groups could engage in expressive activity yet have a minimum opportunity to disrupt or interfere with the property owners' or tenants' business. Further, outside groups can be limited in how they engage in their "expressive activity." For example, prohibition on use of bull horns or other loud noise devices, physical blocking of entrances and exits, solicitation of funds, and similar acts could be prohibited. Additionally, it may be possible to limit the number of entrants and how they conduct their activity, *i.e.*, no marches or massing in front of a store perhaps would be found reasonable. Imposing a requirement of the filing of a permit a certain number of days before the activity in question could be required, and the furnishing of a cash deposit or bond may be permissible to cover the cost of any clean-up or additional security needed for the activity. Restricting what an outside group can say or include in its messages likely would not be permitted since it would be considered "content-based" or "viewpoint-based" regulation of free speech.

Lessees should be certain that their property interest is clearly defined in the governing lease. Lessees should bargain for and obtain the right to exclude persons from the leased premises and adjacent sidewalks and common areas, rather than agree to nonexclusive use of those areas. Only those who possess a sufficient interest in property, an exclusory interest, may properly seek to exclude union agents or other third parties. *See Bristol Farms*, 311 NLRB 437, 438 (1993).

For other nonpublic-forum land owners or occupants, such as freestanding retail stores and other similar land owners, or entities that have a clearly definable "property interest" (*e.g.*, lease holders), the principles of *Fashion Valley* and *Pruneyard* would not appear to be applicable because the property in question does possess the characteristics of a "public forum" due to the small size of any common or "public" areas and the relatively small number of square footage of shopping or selling space. Nevertheless, such entities might wish to consider designating a relatively small space on their property as a "free speech zone" where outside groups could stand and offer any leaflet or handbill to members of the general public who enter the property in question. This approach may avoid litigation in California courts regarding trespass issues and also avoid litigation under the National Labor Relations Act.

Finally, employers with limited and special missions that involve entry of the public onto their private property, such as health care providers, may be able to successfully prohibit any entry onto their private property by protesters. The argument to support this approach is that the special mission of the property owner, such as rendering health care services to the public, should not be interfered with by outside organizations.

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