A Timely Analysis of Legal Developments

ASAP®

In This Issue:

February 2011

Two important statutes that permit labor unions to trespass on the private property of California employers have been found unconstitutional for the second time by a California appellate court.

Statutes Authorizing Union Trespassing Again Found Unconstitutional by a California Appellate Court

By William Emanuel

In a decision of significance to many California employers, the state court of appeal has held that two statutes authorizing labor unions to engage in picketing and handbilling on private property are invalid under the free speech provisions of the state constitution. *Ralphs Grocery Company v. UFCW Local 8* (1/27/11). The ruling, issued by a 2-1 majority of the Fifth Appellate District in Fresno, follows a similar decision last year by the Third District in Sacramento, which reached the same result under the free speech provisions of the U.S. Constitution, in a case involving the identical parties. *Ralphs Grocery Company v. UFCW Local 8*, 186 Cal. App. 4th 1078 (2010). See Littler's July 2010 ASAP, *California Court Restricts Trespassing by Labor Unions on Private Property.*

Legal Background

A statute known as the Moscone Act (Code of Civil Procedure section 527.3) limits the jurisdiction of California courts to issue injunctions in labor disputes. Several decades ago, in a case known as *Sears II*, the California Supreme Court construed this statute as authorizing handbilling by a labor union on the private sidewalk of a retail store. *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 25 Cal. 3d 317 (1979). A more recent anti-injunction statute, Labor Code section 1138.1, imposes a number of difficult requirements on employers that seek injunctive relief in a labor dispute.

Under these statutes and the *Sears II* decision, California trial courts have been reluctant to enjoin union trespassing on private property. Consequently, aggressive union agents routinely disregard the property rights of employers.

The legal tide began to turn, however, in 2004 when the U.S. Court of Appeals for the D.C. Circuit determined that the Moscone Act, as construed by the *Sears II* decision, was unconstitutional. The court held that the statute did not withstand scrutiny under the First Amendment to the U.S. Constitution because it discriminated in favor of labor union speech. *Waremart Foods v. NLRB*, 354 F.3d 870 (D.C. Cir. 2004).

The D.C. Circuit's decision was based on two U.S. Supreme Court decisions. In the

first case, the Court held that a city ordinance could not prohibit picketing near a school but exempt picketing by a labor union. *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972). The Court found that the ordinance was unconstitutional because it made an impermissible distinction between labor picketing and other peaceful picketing.

In the second case, the U.S. Supreme Court found unconstitutional a state statute that prohibited picketing of private residences but exempted picketing of a residence involved in a labor dispute. *Carey v. Brown*, 447 U.S. 455 (1980). The Court explained that a government cannot presuppose that labor picketing is more deserving of constitutional protection than public protests over other issues, and therefore the State of Illinois could not discriminate in favor of union picketing.

The Second *Ralphs* Decision

The decision of the court of appeal in this case involves facts very similar to those of the earlier *Ralphs* case. The store in question is located at a Fresno shopping center but the picketing occurred on Ralphs' private property. The union routinely picketed in front of the store in violation of rules established by Ralphs for expressive activities. After the local police refused to remove the union trespassers, Ralphs requested an injunction from the trial court. The trial court denied injunctive relief in light of the state statutes described above.

The court of appeal reversed the trial court's decision. Relying on the *Mosley* and *Carey* decisions of the U.S. Supreme Court, a majority of the appellate court found that the California statutes were unconstitutional because they make an impermissible distinction between labor picketing and other peaceful picketing. The majority explained that, without a compelling reason, the state cannot establish a priority for particular speech based on its content. It added that there was no compelling reason for the state to single out labor speech as the only form of speech that can be exercised despite the objection of the owner of the private property on which the speech occurs.

The decision emphasized that the actual impact of the statutes is to discriminate by providing a forum on public and private property for speech related to labor disputes while not providing the same forum for speech relating to other issues. As such, the statutes impermissibly select which views the state is willing to have discussed or debated. In addition, the decision pointed out that the discriminatory effect of the statutes apparently was not presented to—and clearly was not considered by—the state supreme court in the *Sears II* decision many years earlier.

The union contended (and the dissenting justice concluded) that Ralphs did not have standing to bring the lawsuit because Ralphs' own free speech rights were not abridged. The majority rejected this reasoning, however, explaining that: (1) the constitutionality of the statutes in question is a matter of public interest; (2) Ralphs' interests as a property owner and the public interest were sufficiently congruous; and (3) the union's position would deprive Ralphs and all other employers of any means of judicial resolution of the dispute between the parties.

In conclusion, the court declared that the state may not act to selectively create a free speech right applicable only to the few, while excluding all others, in the absence of a compelling state interest, and that the statutes in question contravene the free speech provisions of the California Constitution by discriminatorily conferring speech rights on some, but not all, Californians.

Further Review of the *Ralphs* Decisions

The California Supreme Court has granted review of the first *Ralphs* decision described above. As a result, under California rules, that decision has been "depublished" and cannot be cited to the trial courts as precedent. It is anticipated that the court will also grant review of the recent *Ralphs* decision under a "grant and hold" procedure. If so, this decision will also be "depublished" at that time. However, it is citable authority until review is granted.

In view of the importance of this issue to California employers, Littler Mendelson filed briefs with the courts of appeal in both of the Ralphs cases on behalf of several trade associations. In addition, Littler attorneys are currently preparing a brief to file in the California Supreme Court on behalf of the same associations.

William Emanuel is a Shareholder in Littler Mendelson's Los Angeles office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Emanuel at wemanuel@littler.com.