United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 30, 2001

TO : James S. Scott, Regional Director
Veronica I. Clements, Regional Attorney
Bruce I. Friend, Assistant to Regional Director
Region 32

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Wal-Mart Stores, Inc.
Case 32-CA-18427-1 512-5012-6712-6700
512-5012-8300

This case was submitted for advice as to whether a large, free-standing retail store violated Section 8(a)(1) by ejecting nonemployee Union handbillers from the property when they refused to abide by the Employer's "time, place, and manner" restrictions on petitioning and soliciting.

FACTS

Wal-Mart Stores, Inc. (the "Employer" or "Wal-Mart") operates a retail store in San Leandro, California. The San Leandro store is located in a large shopping center, Westgate Center. The San Leandro store is a free-standing 135,342 square-foot building with an adjacent 12,696 square-foot outdoor garden area. The Employer owns in fee simple the store building, the land where the building sits, and a portion of the large common parking lot shared by all Westgate tenants. The other stores at Westgate are housed in a separate building. Customers may park in any area of the parking lot, including the section owned by the Employer.

Wal-Mart sells a wide variety of products, including clothing, electronics, health and beauty aids, hardware, home furnishings, toys, food, sporting goods, lawn and garden items, pet supplies, jewelry, automotive products, and housewares. The partially outdoor garden center, which is accessible only from inside the store, sells plants and gardening supplies. Inside the San Leandro building are a restaurant (the Radio Grill) with tables and booths but no waitperson service, as well as an optometrist/vision center and pharmacy. Like the garden center, these cannot be accessed from the parking lot.

Wal-Mart maintains written rules and regulations governing non-employee access to its California facilities for purposes of solicitation and distribution ("California Rules"). The California Rules prohibit materials that "interfere with the commercial purpose" of the store; prohibit individuals from "urg[ing] or encourag[ing]...customers not to purchase" from the store; specify that Wal-Mart may designate an area for soliciting and petitioning; and require prior approval of signs and literature, and prior identification of participants.[1] Wal-Mart requires applicants to sign a registry, acknowledging that they have read and agree to abide by the California Rules, and that violation of the rules will result in removal from Wal-Mart property and forfeiture of re-application for one year. The designated area for distribution at the San Leandro store is a small block of sidewalk, bordered by yellow paint, located a few yards to the east of the store's front exit doors.

Food and Commercial Workers Local 870 (the "Union"), based in Hayward, California, does not represent and has not sought to organize any Wal-Mart employees. In August 2000, Union representatives distributed leaflets to Wal-Mart employees outside several Wal-Mart stores.[2] The leaflets state that non-profit public interest and women's legal groups are investigating whether Wal-Mart discriminates against women in making management promotions. The leaflets also provide a toll-free telephone number and a mailing address for obtaining further information. In addition, the leaflets state that all communications will remain confidential and protected by the attorney-client privilege, and that it is "illegal for your managers to threaten or retaliate against you for hearing about your employment rights or for helping an investigation into discrimination. "A disclaimer at the bottom of the leaflet states: "UFCW is distributing this information to women employed at Wal-Mart to inform them about public interest and women's legal groups working against discrimination in employment. These groups are not affiliated with the UFCW."

On August 4, Union representative Gary Smith and Union member Diane Powe (who are not Wal-Mart employees) arrived at the San Leandro store to distribute leaflets to female Wal-Mart employees. At 8:15 a.m., they began leafleting on

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[1] Other provisions of the California Rules include a "limitation on days" and an "insurance requirement."

[2] All dates are in 2000 unless otherwise noted.

the sidewalk between the two main sets of entrance and exit doors. Neither wore Union insignia. Over the next hour, they handed 15-18 leaflets to women they believed were Wal-Mart employees. Beginning about 9 a.m., the store manager and Westgate Center security personnel repeatedly asked Smith and Powe to either sign the store registry and stand in the designated area, or to leave. Although Smith and Powe eventually agreed to move to the designated area, they refused to sign the registry. The police were then called. An officer arrived and ordered Smith and Powe to leave the premises. Before Smith and Powe left, Smith asked the store manager if he would have permitted them to hand out the leaflets had they signed the registry. The store manager replied that he would have to consult with Wal-Mart's legal representative to determine whether the leaflets contained "objectionable material." Smith and Powe left the San Leandro store at about 10:15 a.m.[3]

ACTION

We conclude that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) by ejecting nonemployee Union handbillers from the storefront.

In Lechmere, the Court held that, except in narrow circumstances, "Section 7 guarantees do not authorize trespasses by nonemployee organizers."[4] However, an employer violates Section 8(a)(1) if it interferes with nontrespassory Section 7 activity. Thus, as a threshold matter, in order to assert a Lechmere privilege, an employer must have a sufficient property interest under state law to make the union's presence on the property a "trespass."[5] Under California law, two independent foundations act to limit private property interests: state

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[3] There is no evidence that Wal-Mart permitted non-Union groups to solicit at the San Leandro store without complying with the California Rules.

[4] Lechmere, Inc. v. NLRB, 502 U.S. 527, 537 (1992)(emphasis supplied).

[5] See Bristol Farms, 311 NLRB 437, 438-39 (1993); Johnson & Hardin Co., 305 NLRB 690 (1991), enfd. in pertinent part 49 F.3d 237 (6th Cir. 1995).

constitutional freedom of speech guarantees,[6] and state labor law and policy.[7]

A. Constitutional parameters of union access rights.

In Robins v. Pruneyard, supra, the California Supreme Court held, and the United States Supreme Court affirmed, that the State of California could provide greater constitutional protections for speech than the First Amendment provides. Under California's broader constitutional guarantee, the court found that a shopping center did not have a right to expel high school students soliciting for a petition in its privately-owned central courtyard. In its decision, the court emphasized the public-forum-like aspects of the shopping center, and specifically noted that it was not considering "the property or privacy rights of ... the proprietor of a modest retail establishment."[8]

In determining whether private property is subject to state constitutional freedom of speech guarantees under Pruneyard, California courts weigh the competing interests of the property owner and of society with respect to the particular property at issue.[9] Courts assess the strength

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[6] Robins v. Pruneyard, 153 Cal.Rptr. 854 (1979), affd. 557 U.S. 74 (1980).

[7] Sears v. San Diego District Council of Carpenters, 158 Cal.Rptr. 370 (1979), cert. denied 447 U.S. 935 (1980).

[8] Robins v. Pruneyard, 153 Cal.Rptr. at 860.

[9] Trader Joe's Co. v. Progressive Campaigns, Inc., 86 Cal.Rptr.2d 442 (Cal. App. 1 Dist. 1999); Young v. Raley's, Inc., 107 Cal.Rptr.2d 172 (Cal. App. 3 Dist. 2001); Waremart, Inc. v. Progressive Campaigns, Inc., 102 Cal.Rptr.2d 392 (Cal. App. 3 Dist. 2000), review granted 105 Cal.Rptr.2d 386 (Cal. 2001). In other Advice Memoranda, we declined to follow Trader Joe's, arguing that it diverged from established precedent. See Salinas Hyundai, Case 32-CA-17419, Advice Memorandum dated September 20, 1999. Subsequent California decisions applying the Trader Joe's test have called that assessment into question. In any event, we do not need to decide whether Trader Joe's was an inappropriate expansion of the Pruneyard definition of "modest retail establishment," and thus an incorrect interpretation of California Supreme Court law, because we have concluded that the San Leandro Wal-Mart is a public forum even under the Trader Joe's test.

of the owner's property interest by considering factors such as: whether the property owner has opened its property to the public, the nature and extent of the public invitation to the property, and the nature, purposes, and primary uses of the property.[10] Courts assess the strength of the societal interest in permitting the speech by considering the relation of the speech to the property and the protected nature, if any, of the speech.[11] Recent court decisions applying this balancing test have held that stand-alone grocery stores could lawfully exclude individuals seeking signatures for statewide initiatives.[12] For the reasons discussed below, however, those decisions support a finding that the San Leandro Wal-Mart store is a "public forum" subject to state constitutional guarantees.

1. Society's interest in the Union's speech activity outweighs the Employer's property interest.

Under this test, Wal-Mart has a relatively weak property interest in the storefront of the San Leandro store. The California Supreme Court has stated: "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."[13] Like the shopping center in Pruneyard, Wal-Mart has opened its property to the general public for activities beyond the mere transaction of

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[10] See, e.g., Trader Joe's Co. v. Progressive Campaigns, Inc., 86 Cal.Rptr.2d at 448-450; Young v. Raley's, 107 Cal.Rptr.2d at 179-181; Allred v. Shawley, 284 Cal.Rptr. 140, 145-148 (Cal. App. 4 Dist. 1991).

[11] Id.

[12] The apparent bright-line rule set forth in Bank of Stockton v. Church of Soldiers of the Cross of Christ, 52 Cal.Rptr.2d 429, 434 (Cal. App. 3 Dist. 1996), which stated "[w]hatever 'modest retail establishment' means, it does not include...a 'large super-market-type grocery store,'" has been rejected in these decisions. Trader Joe's Co. v. Progressive Campaigns, Inc., 86 Cal.Rptr.2d at 436-37; Waremart, Inc. v. Progressive Campaigns, Inc., 102 Cal.Rptr.2d at 393, 401-402; Young v. Raley's, Inc., 107 Cal.Rptr.2d at 185. Cf. NLRB v. Calkins, 187 F.3d 1080, 1092 (9th Cir. 1999)(holding that grocery store was a limited public forum and citing Bank of Stockton), enfg. Indio Grocery Outlet, 323 NLRB 1138 (1997).

[13] In re Lane, 79 Cal.Rptr. 729, 732 (Cal. 1969).

business. In addition to shopping, it invites the general public to be entertained, to eat, and to congregate.[14]

For example, in an effort to draw customers, Wal-Mart holds itself out as providing "retailtainment": a retail strategy that melds shopping and entertainment. Wal-Mart broadcasts exclusive concerts featuring internationally known recording artists live via satellite at its stores. Wal-Mart publicizes these events via press releases and its internet website. Other recent examples of Wal-Mart's nationwide "retailtainment" efforts include Oreo stacking contests, clowns who paint children's faces, "Barbie" impersonators, and the "Gundam Invasion Tour 2001."[15] An article in Wal-Mart's on-line "1999 Annual Report" states: "[D]on't look now, but some Wal-Marts are beginning to see couples stopping by the store on dates, to check out the entertainment. Who needs the multiplex? Wal-Mart sells popcorn and soft drinks too!"[16]

In addition to providing entertainment, the San Leandro store has an indoor restaurant with booths and tables.[17] Thus, Wal-Mart invites the public to eat, sit, relax, and converse on its property.[18] Further, Wal-Mart sells electronics, toys, and clothing, products which

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[14] Cf. Young v. Raley's, Inc. 107 Cal.Rptr.2d at 180 (holding that free-standing supermarket was not a Pruneyard public forum, in part, because it "does not invite the public to meet friends, to eat, to rest, to congregate, or to be entertained at its premises"); Trader Joe's Co. v. Progressive Campaigns, Inc., 86 Cal.Rptr.2d at 448 (same); Waremart, Inc. v. Progressive Campaigns, Inc., 102 Cal.Rptr.2d at 399 (same).

[15] The "Gundam" event is scheduled for August 1-3, 2001 at the San Leandro store. Currently, there is no evidence that any of the other retailtainment events mentioned above actually took place at the San Leandro location. However, considering that the store is new and relatively large, it is likely that such events do take place there.

[16] http://www.walmartstores.com/newsstand/annual_1999/involve/involve1.htm. (last visited Jun. 27, 2001).

[17] Cf. Young v. Raley's, Inc., 107 Cal.Rptr.2d at 180.

[18] The Region has adduced evidence that Wal-Mart's corporate policy is to encourage people traveling in RVs to park and spend the night in Wal-Mart parking lots. The Employer states that such activity was not permitted at the San Leandro store.

encourage browsing, comparison-shopping, and product-testing. Thus, Wal-Mart's invitation to the public more closely resembles that of a shopping mall than a single-use grocery store.[19]

If Wal-Mart has opened up its internal space for such general public use, its exterior storefront space is at least equally open to the public. Furthermore, the San Leandro Wal-Mart shares the use of a parking lot with several other Westgate Center businesses, including Starbuck's, See's Candies, Carpeteria, Home Depot and Office Depot. Although Wal-Mart is a free-standing store, its relationship to these other nearby establishments further diminishes the strength of its property interest.[20]

The societal interest in the Union's leafleting on Wal-Mart's property, on the other hand, is relatively strong. The Union's message specifically relates to Wal-Mart and is aimed at Wal-Mart's female employees, who access Wal-Mart's property every day.[21] In contrast, the speech activity in the grocery store cases bore no relationship to the property at issue.[22] In addition, the public policy favoring protected labor activity further

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[19] Cf. Young v. Raley's, Inc., 107 Cal.Rptr.2d at 177 (in contrast to regional shopping centers, "[g]rocery stores have no common areas or non-retail events, so people generally do not make a family outing of going to the grocery store," and grocery stores "are designed for frequent, short trips and convenience and speed, rather than comparison shopping").

[20] See Slevin v. Home Depot, 120 F.Supp.2d 822, 833 ("Trader Joe's...carefully left open the possibility that a store that is not a public forum by itself may constitute a public forum due to its proximity to other stores...").

[21] See In re Lane, 79 Cal.Rptr. at 729 (union handbilling on privately owned sidewalk outside supermarket involved in labor dispute); Schwartz-Torrance Investment Corp. v. Bakery & Confectionary Workers Union, 40 Cal.Rptr. 233 (1964), cert. denied 380 U.S. 906 (1965)(union picketing on private sidewalk outside bakery involved in labor dispute).

[22] Trader Joe's Co. v. Progressive Campaigns, Inc., 86 Cal.Rptr.2d at 442 (soliciting signatures for initiative petition); Waremart, Inc. v. Progressive Campaigns, Inc., 102 Cal.Rptr.2d at 392 (same); Young v. Raley's, Inc., 107 Cal.Rptr.2d at 174 (same). See also Slevin v. Home Depot, 120 F.Supp.2d at 824 (same, at home improvement store).

strengthens the societal interest in the Union's leafleting.[23]

The Employer contends that the Union's message was "commercial speech" entitled to less protection than ideological or political speech. We disagree. The Supreme Court of California has stated:

> [C]ommercial speech is that which has but one purpose – to advance an economic transaction. By contrast, noncommercial speech encompasses activities extending beyond that purpose. For example, an advertisement that cherries can be purchased for a dollar a box at store X may be commercial speech, but an advertisement informing the public that the cherries for sale at store X were picked by union workers is more: it communicates a message beyond that related to the bare economic interests of the parties.[24]

While the Union leaflets relate to the economic interests of Wal-Mart's female employees, they also educate employees regarding their legal rights. The leaflets contain "the kind of discussion of 'matters of public

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[23] See Sears v. San Diego District Council of Carpenters, 158 Cal.Rptr. 370 (1970), cert. denied 447 U.S. 935 (1980)(state policy favors concerted activities of employees). See also Allred v. Shawley, 284 Cal.Rptr. at 148 (noting the heightened weight given to speech rights pertaining to union interests); Young v. Raley's, 107 Cal.Rptr.2d at 183-84 (labor protests involve protected activity in addition to the expression of opinions); Slevin v. Home Depot, 120 F.Supp.2d at 833-34.

[24] Spiritual Psychic Science Church of Truth, Inc. v. City of Azusa, 217 Cal.Rptr. 225, 229-30 (Cal. 1985)(holding that fortune-telling for consideration is "noncommercial speech"). See also Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council, 485 U.S. 568, 576 (1988)(union's "do not patronize" message not commercial speech); San Antonio Community Hospital v. Southern Cal. Dist. Council of Carpenters, 137 F.3d 1090, 1092 (9th Cir. 1998)(although unprotected commercial speech has been subject to prior restraint, speech regarding labor disputes is not commercial speech); Blatty v. New York Times Co., 232 Cal.Rptr.2d 542, 551 at n. 3 (Cal. 1986), cert. denied 485 U.S. 934 (1988)(commercial motivation does not transform noncommercial speech into commercial speech).

concern' that the First Amendment both protects and implicitly encourages."[25]

The relatively strong societal interest in the Union's leafleting outweighs Wal-Mart's relatively weak interest in excluding the Union from its property. Thus, under the Trader Joe's test, the San Leandro Wal-Mart is a Pruneyard "public forum," and Wal-Mart cannot prohibit the Union from speaking on its property.

2. Wal-Mart's California Rules

An owner of private property that is a Pruneyard public forum cannot exclude a union or others entirely from its premises, but may condition access to its property pursuant to legitimate time, place, and manner restrictions.[26] Such restrictions are constitutional to the extent they do not seek to regulate the content of speech; are narrowly tailored to serve significant interests; and leave open ample alternative channels for communication of the information.[27]

We conclude that Wal-Mart maintained certain unconstitutional restrictions on speech and thus unlawfully conditioned the Union's access to the property upon compliance with those restrictions. Wal-Mart's California Rule 3 requires prior approval of signs and literature and prohibits materials that "interfere with the commercial

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[25] Pacific Gas & Elec. Co. v. Public Utilities Comm'n, 102 Cal.Rptr.2d 20, 25 (Cal. App. 1 Dist. 2000). The Employer relies on Leoni v. State Bar of California, 217 Cal.Rptr. 423 (Cal. 1985), which held that unsolicited letters and informational disclosures sent by attorneys to potential clients, and which referred to specific services offered by attorneys, constituted commercial speech. That case is distinguishable, however, because the Union's leaflets do not reference an existing or potential lawsuit, are not advertisements for specific goods and services, and merely provide employees with a resource to obtain, or to provide, information about possible employment discrimination by Wal-Mart.

[26] Robins v. Pruneyard, 153 Cal.Rptr. at 859-860.

[27] See Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 648 (1981), quoting Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 536 (1980); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989), quoting Clark v. Community for Creative Non-Violence, 485 U.S. 288, 293 (1994).

purpose of the Wal-Mart store." A similar prohibition on materials in H-CHH Associates v. Citizens for Representative Government,[28] allowing shopping center management to reject activity that would "adversely affect the shopping center environment, atmosphere or image," was found unlawful. The court stated that any procedure that "confers such unbounded discretion permits a decision to be made impermissibly on the content of the expression."[29] Further, prior approval of written materials is permissible only if the review of the materials is limited to objective considerations.[30] In UNITE, the court noted that the review of signs in that case was lawful because the review was limited to objective considerations such as "compatibility with the general aesthetics of the mall, neatness, and the prohibition on the use of fighting words, obscenities, grisly or gruesome displays or highly inflammatory slogans likely to provoke disturbances."[31] Under these standards, Rule 3 is not a constitutional time, place and manner restriction because it regulates content and its prior approval requirement is not limited to objective considerations.[32]

Wal-Mart's California Rule 6 is also an impermissible content based restriction on speech. It prohibits individuals from "urg[ing] or encourag[ing] in any manner, customers not to purchase the goods or services offered by the store." Like the offending regulation in H-CHH, this prohibition on "Do Not Patronize" messages affords Wal-Mart

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[28] 238 Cal.Rptr. 841, 852 (Cal. App. 2 Dist. 1987), cert. denied 485 U.S. 971 (1988).

[29] Id. at 852 (citing Dillon v. Municipal Court, 94 Cal.Rptr. 777, 783 (1971)).

[30] The court in Union of Needletrades, Indus. & Textile Employees v. Superior Court (Taubman Co.), 65 Cal.Rptr.2d 838, 850 (Cal. App. 2 Dist. 1997)("UNITE"), stated with respect to prior submission of materials, "[w]e see no constitutional impediment to that requirement. Implicit in the right of the mall to regulate the content and style of the signs is the ability to review the signs and reject those which do not meet its *objective standards*." (Emphasis supplied).

[31] Id. at 850.

[32] See also Sears, et al., Case 20-CA-29444-1, Advice Memorandum dated August 30, 2000, where we determined that a similar restriction was not a legitimate time, place, and manner restriction.

the power to deny access based solely on the message that the Union wishes to convey; it is not a content-neutral time, place, and manner regulation by which Wal-Mart may validly protect its legitimate interests.[33]

On the other hand, California Rule 4, which requires prior identification of participants, is a valid time, place, and manner restriction. Although the rule is similar to time, place, and manner restrictions that we have found unconstitutional in other Advice Memoranda,[34] in those cases we determined that the restrictions were not "narrowly drawn" as required. The property-owners there did not need to know the identities of the individual union activists in order to protect their legitimate interests, because they could simply hold the unions accountable for any damage resulting from the activity. However, under California Labor Code § 1138, enacted in 2000, unions involved in labor disputes cannot be held liable for the unlawful acts of individual officers, members or agents, absent "clear proof of actual participation in, or actual authorization of those acts." Thus, under current California law, Wal-Mart may have a legitimate need for the identities of individual participants, because the Union could not be held liable for property damage or misconduct

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[33] See also Fashion Valley Shopping Center, case 21-CA-33004, Advice Memorandum dated April 30, 1999, involving a similar restriction on "Do Not Patronize" messages. In Fashion Valley, Advice authorized a complaint allegation that the denial of access was unlawful because it was pursuant to unconstitutional time, place, and manner restrictions. In addition, Advice concluded that the rules were facially unlawful under the Act within the meaning of Riesbeck Food Markets, 315 NLRB 940 (1994), enf. denied 91 F.3d 132 (4th Cir. 1996), because they gave the employer unfettered discretion to prohibit union activity while allowing other solicitations. [*FOIA Exemption* 5

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[34] See Sears, et al., Case 20-CA-29444-1, Advice Memorandum dated August 30, 2000, at p. 7, and Fashion Valley Shopping Center, Case 21-CA-33004, Advice Memorandum dated April 30, 1999, at pp. 10-11.

under apparent authority or ratification theories of agency. For this reason, we conclude that Rule 4 is a reasonably tailored time, place, and manner restriction.

The unpublished decision in Children's Rights 2000 v. Wal-Mart Stores, Inc.[35] does not alter our conclusion that California Rules 3 and 6 are unconstitutional. The Children's Rights 2000 court determined that Wal-Mart's California Rules 1, 2, 4, and 5 were valid time, place, and manner restrictions.[36] The court did not, however, explicitly approve Rule 3 or Rule 6. The court did not even discuss Rule 3. In its general review of California law, the court mentioned UNITE's validation of a shopping mall's rule requiring prior approval of signs and literature, so long as the mall based its decision on objective criteria.[37] However, as discussed above, Rule 3 is not based on objective criteria, and nothing in the Children's Rights 2000 opinion suggests otherwise. The court's only discussion of Rule 6 involved an allegation that Wal-Mart had used impermissible unwritten time, place, and manner rules.[38] The court determined that the alleged unwritten rules were lawful because they were actually implementations of Rule 6.[39] Although the court thereby implicitly found Rule 6 valid, the court's limited discussion of the rule does not address the question of whether it was content-based, and it appears that the parties did not raise that issue. Further, the court did not analyze whether Rule 6 was "narrowly drawn," as it did with Rules 1, 2, 4 and 5. Therefore, contrary to the Employer, we conclude that Children's Rights 2000 did not

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[35] Children's Rights 2000 v. Wal-Mart Stores, Inc., Super. Ct. No. GC020660 (Cal. App. 2 Dist. 2000)(unpublished opinion).

[36] The Children's Rights 2000 court did not address whether Wal-Mart was a quasi-public forum under Pruneyard, because the issue was not raised before the trial court. See Children's Rights 2000 v. Wal-Mart Stores, Inc., supra, at n. 1.

[37] Id., at 7.

[38] See H-CHH Associates v. Citizens for Representative Government, 238 Cal.Rptr. at 858 (time, place, and manner rules regulating expressive activity should be in writing).

[39] See Children's Rights 2000 v. Wal-Mart Stores, Inc., supra, at 18.

hold that Rules 3 and 6 were valid time, place, and manner restrictions.[40]

B. Union access under California labor policy.

In addition to providing enhanced constitutional "free speech" protection, California courts prohibit the exclusion of peaceful union handbillers as a matter of state labor law and policy. In Sears v. San Diego District Council of Carpenters,[41] the California Supreme Court held that, under the Moscone Act (Cal. Code of Civ. Proc. § 527.3), the employer could not evict pickets protesting Sears' refusal to adhere to a master carpentry agreement from the privately-owned sidewalk surrounding its store. The court first found that, independent of any constitutional right, the State of California could by statute or judicial decision permit union activity on private property as a matter of state labor law.[42] The court then interpreted the Moscone Act as insulating from the court's injunctive power all union activity declared to be lawful under prior California decisions. Because Schwartz-Torrance and In Re Lane had established the legality of peaceful union picketing on private sidewalks outside a store, the court concluded that the State

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[40] Further, unpublished opinions cannot be cited to California courts unless "relevant under the doctrines of...collateral estoppel." Cal. Rules of Court, Rule 977 (a), (b)(1). The Union was not a party in Children's Rights 2000, so the exception does not apply. See Lucido v. Superior Court, 272 Cal.Rptr. 767, 769 (Cal. 1990).

[41] 158 Cal.Rptr. 370, 381 (1979).

[42] The court noted Robins v. Pruneyard, recently decided, and said that:

> The Robins decision rests on provisions of the California Constitution. In the instant case, our decision rests on the terms of Code of Civil Procedure Section 527.3; accordingly, we express no opinion on whether the California Constitution protects the picketing here at issue.

See also Schwartz-Torrance, 40 Cal.Rptr. at 234, where the court had found that the union's strong interest in picketing rested both upon constitutional principles protecting free speech and upon state policy favoring concerted activities of employees.

Legislature had now codified this rule into its labor statutes.[43]

We conclude that California labor law and policy precludes the Employer from evicting the Union handbillers from the exterior premises. Wal-Mart has opened its private sidewalk so that it has been "worn thin by public usage."[44] The Union was rightfully on Wal-Mart's sidewalk because its leafleting is lawful labor activity under Sears. Although the leafleting in this case is arguably not "typical" labor activity, such as organizing or area standards picketing, it is still the type of activity protected by California labor law and policy.[45] Sears held that a store could not evict a union from its exterior property so long as the union's activity was peaceful and for a lawful purpose.[46]

The Employer contends that the Union's leafleting was not "lawful" because, it alleges, the Union solicited clients for an attorney in violation of the California law governing attorney communications regarding potential legal

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[43] 158 Cal.Rptr. at 379. See also In Re Catalano, 171 Cal.Rptr. 667, 670 n. 4 (Cal. 1981). The Sears court also noted that the Moscone Act's "shall be legal" language affirmatively established that the activity described in subdivision (b) was legal, and that California trespass statutes exempt "lawful" union activity from the definition of criminal trespass. 158 Cal.Rptr. at 379, n. 9.

[44] Schwartz-Torrance, 40 Cal.Rptr. at 238.

[45] See Cal. Labor Code § 923 ("it is necessary that the individual workman...shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"). See also Schwartz-Torrance, 40 Cal.Rptr. at 234-35 & n. 2 (California public policy favors concerted activities of employees for the purpose of collective bargaining or other mutual aid or protection); Gelini v. Tishgart, 91 Cal.Rptr.2d 447, 448 (Cal. App. 1 Dist. 1999)(employer that discharged employee for hiring an attorney to negotiate terms and conditions of employment violated the public policy declared in Labor Code § 923).

[46] 158 Cal.Rptr. at 376. See also Moscone Act (it is legal for a union to "[a]ssembl[e] peaceably...to promote lawful interests").

services.[47] Even assuming, arguendo, that the Union violated California law on attorney communications,[48] the Employer would not be able to evict the Union from its sidewalk. Subdivision (e) of the Moscone Act states:

> It is not the intent of this section to permit conduct that is unlawful including 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.[49]

The Sears court interpreted this provision under the doctrine of "ejusdem generis," stating:

> [S]ubdivision (e)'s reference to "conduct that is unlawful" must be limited to conduct which constitutes breach of the peace, disorderly conduct, the blocking of access or egress, or other "similar unlawful activity." Peaceful picketing on private sidewalks, because it does not involve violence or substantially impair the rights of others, is not conduct "similar" to the listed acts.[50]

The Union's alleged violation of California law regarding attorney communications is not conduct similar to the acts listed in subdivision (e). Further, there is no evidence that the Union engaged in violent activity or blocked access or egress to the store. Thus, we conclude that California labor law and policy prohibits the Employer from excluding the Union from its premises.

We further conclude that California labor law and policy prohibits the Employer from requiring the Union to comply with California Rules 3 and 6. As discussed above, Rules 3 and 6 are not narrowly tailored time, place, and

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[47] The Employer cites Cal. Rules of Professional Conduct, Rule 1-400(D)(prohibiting misleading or deceptive attorney communications or solicitations); Cal. Business & Professions Code §§ 6150-6154, 6158.5 (prohibiting any individual from soliciting on behalf of an attorney and applying prohibitions against misleading communications to nonlawyers).

[48] Smith admitted that the Union distributed the leaflets on behalf of a nonprofit organization set up by an attorney.

[49] Cal. Code of Civ. Proc. § 527.3(e).

[50] 158 Cal.Rptr. at 379-80. See also Id. at n. 10, 11.

manner restrictions, but are impermissible content-based restrictions on labor speech.

We would not assert, however, that Wal-Mart's legitimate time, place, and manner restrictions – such as the designated area for distribution – violate California labor law and policy. Those restrictions would appear to be reasonable and not likely to interfere with the Union's ability to convey its message. We are unaware of any Moscone Act cases holding that peaceful labor conduct can be subject to time, place, and manner restrictions.[51] On the other hand, no California court has held that the Moscone Act prohibits even reasonable time, place, and manner restrictions.[52] Although California might give employers less latitude in restricting the time, place, and manner of protected labor speech than other speech, we decline to make such a determination in the absence of California case precedent. Since California does not clearly prohibit reasonable time, place, and manner restrictions on access to private property, the Employer has a sufficient property interest, under Lechmere, to reasonably limit the time, place, and manner of access by Union handbillers.

CONCLUSION

Since California law permits limitations on speech only pursuant to legitimate time, place, and manner restrictions, and Wal-Mart's California Rules 3 and 6 are not those kind of restrictions, California would not permit Wal-Mart to condition the Union's access to the property in

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[51] California courts have, however, upheld injunctions imposing restrictions on labor conduct where the labor activity had involved "fraud, violence or breach of the peace." See, e.g., M Restaurants, Inc. v. San Francisco Local Joint Executive Board of Culinary Workers, etc., 177 Cal.Rptr. 690, 693-94, 700 (Cal. App. 1 Dist. 1982)(injunction limiting number and spacing of pickets upheld where organizational picketline on sidewalk outside restaurant in congested tourist area had been intimidating, violent and obstructed access to restaurant).

[52] It is doubtful that California would give free reign to labor activity on an employer's private property. The Sears court suggested that picketing in selling areas or in the offices of store executives would not be permitted, recognizing that "at some such point even peaceful picketing might represent so intrusive an invasion of Sears' use of its property as to compel judicial intervention." 158 Cal.Rptr. at 375.

this way. Therefore, Wal-Mart does not have a property interest that would permit it to exclude the handbillers for refusing to agree to those conditions, and has not met the threshold requirement of Lechmere. Accordingly, we conclude that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1).[53]

B.J.K.

[53] The Union's conduct clearly was protected by Section 7 of the Act. See, e.g., BE & K Construction Co., 329 NLRB No. 68, slip op. at 7-9 and n. 51 (1999), enfd. 246 F.3d 619 (6th Cir. 2001)(Section 7 protects employee lawsuits, legislative lobbying, etc., concerning employment conditions, and also protects unions that engage in such conduct on behalf of employees). Even assuming that the Union violated California rules regarding "solicitations" on behalf of an attorney (see n. 50, supra), the Union's handbilling did not lose the protection of the Act since it did not involve threats of violence, product disparagement, malicious defamation, or any other "speech" conduct recognized by the Board as forfeiting the Act's protection. See, e.g., Severance Tool Industries, 301 NLRB 1166, 1170 (1991), enfd. mem. 953 F.2d 1384 (6th Cir. 1992).