

PROPERTY LAW

Victory for Labor: Union Members May Protest at the Mall

by Jacob M. Slania
Column Editor

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Etched into the foundation of our Constitution is each and every citizen's right to free speech. Yet throughout our nation's history, this most fundamental American right has proven to be a consistent source of conflict and controversy. This is especially true when the First Amendment is at issue in an open court of law, exposed to untiring dissection by lawyers and the courts in which they practice. As a result, freedom of speech in the United States is hardly written in stone.

In California, the state's Constitution takes a citizen's right to freedom of speech a step further than the First Amendment. California's Constitutional protections reach out to private realms, a place where federal protections do not tread (in that, federal free speech protections apply only to the government).

With their holding in *Fashion Valley Mall v. National Labor Relations Board* (2007) 69 Cal.Rptr.3d 288, the California Supreme Court recently reaffirmed these further-reaching free speech protections. The case involved access to the large Fashion Valley Shopping Mall in San Diego. More specifically, the debate was over a rule prohibiting any expressive activity that encouraged a boycott or protest affecting any of the shopping mall's tenants.

In October of 1998, members of the Graphic Communications International Union Local 432-M ("Union") started distributing leaflets to customers outside the Robinson-May store in Fashion Valley Mall. The Union represented employees in a labor dispute with the San Diego Union-Tribune. The leaflets claimed that Robinson-May advertised with the newspaper and stated how unfairly the paper treated its employees. Fashion Valley officials informed the Union members they were trespassing, stating the Union had failed to obtain a permit from the mall to engage in the activity. The mall regulations for requiring a permit included a rule which prohibited the urging or encouraging of a boycott or protest of any mall stores. Instead of applying for such a permit, the Union filed an unfair labor practice charge against Fashion Valley with the National Labor Relations Board ("NLRB").

The NLRB ruled Fashion Valley's permit requirement violated Section 8(a)(1) of the National Labor Relations Act (29 U.S.C. §§ 157, 158 (a)(1)). The permit rule was held to be a content-based restriction, the purpose and effect of which was to protect the mall's tenants from lawful consumer boycott by hand billing.

The mall appealed the NLRB's decision to the U.S. Court of Appeals for the District of Columbia Circuit. The D.C. Circuit observed that "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 v. National Labor Relations Board*, *supra*, 69 Cal.Rptr.3d at 292. Accordingly, they turned to the California Supreme Court.

The California Supreme Court held that such protected expressive activity commonly involves a boycott, and that boycotts are part and parcel of the American tradition protected by the California Constitution article I, section 2.

To better understand the *Fashion Valley* decision, we should first consider the landmark California Supreme Court case upon which it was built: *Robins v. Pruneyard Shopping Center* (Cal. 1979) 23 Cal.3d 899. In 1979, a group of high school students set out to protest a United Nations resolution. They collected signatures on a petition at the courtyard of the privately owned Pruneyard Shopping Center near San Jose. As in *Fashion Valley*, the mall authorities demanded that the protestors immediately exit the premises. Despite the students' compliance, they later proceeded with a suit, alleging that the shopping center owners had violated their state constitutional rights of free speech. The 1979 California Supreme Court sided in favor of the students, ruling that the California Constitution protects speech and petitioning when "reasonably exercised in shopping centers, even when they are privately owned." *Robins v. Pruneyard*, *supra*, 23 Cal. 3d at 910.

The U.S. Supreme Court later affirmed the *Pruneyard* decision to the extent that federal law did not prevent California from providing greater speech rights than those protected under the federal Constitution. Even though shopping malls were private property, the Court felt that historically malls are the types of places where members of the public come together. And because private property owners desire the public to gather on their property, in turn they've created a uniquely public environment on private property.

The *Fashion Valley* Court had two major considerations. On the one hand, there were the business interests of the property owners whose chief and obvious concern was to increase profits. On the other hand, there was the Union whose citizens were merely trying to enact their free speech rights under the California Constitution and the First Amendment. In the end, the *Fashion Valley* Court decided to take *Pruneyard* a step further, granting even greater rights to public protestors. The Court's decision called into question many of the rules which shopping malls currently use to restrict individual rights of expression. Some enacted rules, for instance, prohibit picketing and limit expressive activity to handing out leaflets. With the *Fashion Valley v. NLRB* holding, such "time, place, and manner" rules may now be invalid.

It is important to point out, however, that a shopping mall property owner in California is not completely without rights because of this decision. Owners can still levy various restrictions, whether keeping boycotts and protests from taking place on certain blackout dates, prohibiting bullhorns or megaphones, or limiting the size and nature of picketing signs. Even the Court in *Pruneyard* pointed out that shopping centers may adopt "reasonable regulations . . . to assure that these activities do not interfere with normal business operations." *Robins v. Pruneyard*, *supra*, at 911. Yet if citizens, unions, or mere individual groups pass out fliers that protest any given establishment, despite that private owner paying the shopping mall owner rent, there is no stopping them as of the *Fashion Valley* decision.

The sharply divided decision came down 4-3, with the dissent claiming the facts of *Fashion Valley* were distinct from those in *Pruneyard*. The dissent argued there is a substantial difference between signatures on a petition destined for the government versus the open and outright boycotting of a tenant. Justice Chin took such sentiments even further, "the time has come for us to forthrightly overrule *Pruneyard* and rejoin the rest of the nation in this important area of the law: private property should be treated as a private property, not as a public free speech zone." *Fashion Valley Mall v. National Labor Relations Board, supra*, 69 Cal.Rptr.3d at 303.

For attorneys representing store owners who could face such a situation, the focus should be on time, place, or manner. As the decision in *Fashion Valley* shows, any restrictions that can be categorized as content based can get you in trouble.