Alert

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COZEN O'CONNOR

Access to Public Space on an Employer's Property by Non-Employee Union Organizers: A New Rule

In *University of Pittsburgh Medical Center* (UPMC), a 3 to 1 majority of the National Labor Relations Board overturned nearly four decades of precedent that held that non-employee union organizers cannot be denied access to cafeterias and restaurants open to the public if the organizers use the facility in a manner consistent with its intended use and are not disruptive. Under this long-standing rule, it was unlawful for an employer to restrict non-employee union organizers access to such space who were engaging in solicitation and other promotional activities as long as they were not disruptive.

UPMC, at its subsidiary hospital Presbyterian Shadyside, operated a cafeteria that was available to employees and the public. During an organizing campaign at the hospital, two non-employee union organizers sat at tables with six employees eating lunch and discussing union organizational campaign matters. Union flyers and pins were displayed on the tables at which the union representatives were sitting. On at least one occasion, this material was passed to others in the cafeteria. Upon receiving complaints that non-employees were soliciting in the cafeteria and that union flyers were being distributed, the hospital's security manager investigated, which led to the union representatives being escorted from the cafeteria.

In concluding that the hospital's actions were lawful, the majority began their analysis with the Supreme Court's 1956 decision in *Babcock Wilcox* that held that an employer may deny access to its property by non-employee union organizers except in situations where the employees are otherwise inaccessible to the organizers (the inaccessibility exception), or where the employer discriminates against the union by allowing other access and distribution (the discrimination exception). The majority then observed that in a 1984 case, *Montgomery Ward*, the Board created a third exception (the public space exception) that permitted solicitation by union organizers in cafeterias and restaurants open to the public as long as the union organizers used the facility in a manner consistent with its intended use and were not disruptive. The majority noted that this "approach has been soundly rejected by multiple circuit courts" (i.e., the Fourth, Sixth, and Eighth Circuits) all of them finding that the Board erred in applying this additional exception by ignoring these principals of *Babcock*.

In overruling *Montgomery Ward* and its progeny, the majority agreed with this judicial criticism of extant Board precedent permitting non-employee union representatives to gain access to public areas on private property in contravention of *Babcock*'s principles. The Board majority held that those "principles apply to non-employee union access regardless of whether the area on the employer's private property is closed or open to the public."

Applying these principles to the facts of *UPMC*, the Board held that absent discrimination between non-employee union representatives and other non-employees ("i.e. disparate treatment where by rule or practice a property owner bars access by non-employee union representatives seeking to engage in certain activity while permitting similar activity in similar relevant circumstances"), the employer can ban non-employee union representatives from its property. Finding that there was no evidence that *UPMC* permitted **any** solicitation or promotional activity in the hospital's cafeteria, the Board concluded that its removal of the union organizers from the cafeteria was lawful.

This decision not only impacts non-employee union organizers' access to a hospital cafeteria, but will impact access to all public spaces on an employer's private property including such facilities as restaurants, casinos, and hotels. Finally the Board was careful to note that they were not addressing whether Board precedent had properly applied the *Babcock* "discrimination exception" in any other context. Thus the Board may be signaling an intention to revisit additional Board precedent concerning what constitutes discrimination, which also has been criticized by circuit

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