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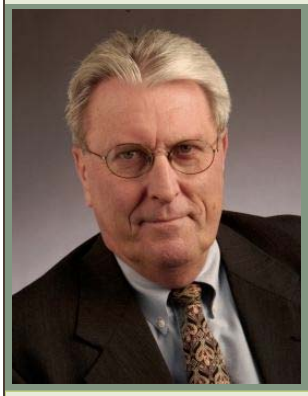

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U.S. SUPREME COURT RULES TO PROTECT EMPLOYER FREE SPEECH

By Charles P. Magyera, Esq.

A very recent decision of the U.S. Supreme Court in *Chamber of Commerce of the United States of America v. Brown*, 2008 WL 2445420 (U.S.), struck down a California statute which prohibited recipients of state grants and private employers who received more than $10,000 in state contracts from using such funds "to assist, promote, or deter union organizing." This prohibition was very broad and encompassed any attempt on the part of an employer to influence the decision of its employees regarding whether to support or oppose a labor organization or whether to become a member of any labor organization.

Not only did the statute impose a restriction on the use of state funds for the aforementioned purposes, it also defined the spending restriction very broadly to include not only legal and consulting fees but also the salaries of an employer's own supervisors and employees who might be engaged in activity to assist, promote or deter union organizing. Accordingly, an employer could lose the ability to utilize its own supervisors in combating union organizational efforts.

The statute also had a very punitive penalty section in which the employer would have to certify that no state funds were used for prohibited expenditures. Also, the employer was burdened with a complex recordkeeping process to show that the funds received from the state were not commingled with its own funds from other sources. A violation of this statute would be subject to a lawsuit by the State Attorney General and the statute also provided that any private taxpayer (read union) could bring a lawsuit for alleged violations. Finally, the party who prevailed in showing that the statute had been violated would be entitled to receive reasonable attorney's fees and costs.

This California statute represents the type of legislation which unions are fond of promoting in an attempt to tie the hands of employers when a union is attempting to organize employees. It is common knowledge that union membership has been seriously declining for decades and that union organizational activity has also been on a serious decline. As a result, rather than address the issues which directly affect the lack of success in union organizing, the unions wage a collateral attack by limiting the free speech rights of employers, as indicated by the California statute.

The National Labor Relations Act protects the free speech of both employers and unions. In particular, Section 8(c) of the National Labor Relations Act provides as follows:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

The critical issue in the *Chamber of Commerce v. Brown* decision was whether Section 8(c) would preclude a state such as California from passing a law which contradicted the free speech rights of the employer under federal law.

California argued that it was not directly contravening the provisions of Section 8(c) but rather was merely engaging its

"regulatory power" to determine how state funds would be used by employers receiving those funds.

Fortunately, the U.S. Supreme Court did not accept California's argument. The Supreme Court held that because the National Labor Relations Act preempts state regulation, it was clear that California could not directly pass a law outlawing free speech about unionization on the part of employers. The Court held that it was equally clear that California may not indirectly regulate such conduct by imposing spending restrictions on the use of state funds and attempting to impose severe penalties for alleged violations.

Employers often feel that the burdens of the National Labor Relations Act place them at an unfair disadvantage vis-a-vis unions. In this instance, however, the National Labor Relations Act, and in particular Section 8(c), provides important protection by reaffirming the preemption of the regulation of labor relations by the federal government and precluding states, such as California, or local governments, such as Milwaukee County, from passing legislation which would, under a thin veil of "regulatory power," really act as a tool of the unions to stamp out the free speech rights of employers.

Were it not for the preemption by the federal government, one could imagine the chaos which would occur across the country with various states and local governments passing legislation similar to the California law, each of which would vary in form, content and penalty. Such laws would literally cause employers to forego their ability to reasonably exercise free speech rights and to advise their employees with regard to union organizational efforts.

The *Chamber of Commerce v. Brown* decision was a 7-2 decision. Accordingly, a substantial majority of the Court saw fit to strike the California legislation. It can be reasonably anticipated that the *Chamber of Commerce v. Brown* decision will have a very significant impact in curtailing such punitive legislative efforts in the future, despite the promotion by powerful labor unions of legislative bodies to do so.

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