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About With Equal Right

With Equal Right (WER) is the official online quarterly journal of Minnesota Women Lawyers (MWL) and the only statewide publication

The First Amendment Comes Back to Life in Labor Law

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Brendan Cummins

The First Amendment has lain dormant for decades when it comes to labor relations. Two recent cases are poised to change that. On one hand, the General Counsel of the National Labor Relations Board ("NLRB") has mapped a course toward reinvigorating free speech protections for labor picketing in the private sector. On the other hand, the Supreme Court has held that public employees have a First Amendment right not to pay dues or agency fees to unions. In short, the First Amendment is coming back to life in labor law.

Together, these cases portend a potential return to the early days of federal labor law when the Supreme Court emphatically declared in Thornhill v. Alabama in 1940 that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."[1] The Supreme Court recognized that "[f]ree discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society."[2] In other words, the Supreme Court

focusing on women in the legal profession. Unless otherwise stated, journal articles do not represent the formal positions, opinions or viewpoints of MWL as an organization, or any person other than the author(s).

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Alex Bollman

reasoned that labor speech—articulating the voices of workers—is essential to democracy.

In subsequent decades, courts have come to see labor speech as being mere economic activity rather than speech that is essential to democracy. In particular, courts have characterized labor picketing as coercive "conduct" rather than protected speech.[3] But the NLRB's current General Counsel, Jennifer Abruzzo, has recently set her sights on revitalizing the forgotten principle that labor speech is core protected speech under the First Amendment in Preferred Building Services, Inc.[4] Under her leadership, the General Counsel's office is seeking to challenge the sweeping restrictions on secondary picketing by unions under the National Labor Relations Act ("NLRA"). Secondary picketing occurs when a union pickets a neutral employer, known as a "secondary" employer, who is not involved in a labor dispute in order to exert pressure on the primary employer with whom the union has a dispute. Secondary picketing is currently strictly prohibited by the NLRA as interpreted by the NLRB.[5]

In Preferred Building Services, a group of janitorial employees represented by a union protested their wages and working conditions by picketing at the entrance of a multi-tenant commercial office building where they worked. As a result, their employer – Preferred Building Services – fired four of the employees who participated in the picketing, and the union filed an unfair labor practice charge alleging that the employer fired the four employees in retaliation for their protected picketing activity. In response, the employer argued that the picketing was unprotected because it was unlawful secondary picketing.

The Administrative Law Judge found in the union's favor but was overruled by the NLRB on appeal.[6] The United States Court of Appeals for the Ninth Circuit reversed, finding that the employees had not engaged in unlawful secondary picketing because they specifically identified Preferred as the primary employer and did not target any neutral employers.[7] On this basis, the Ninth Circuit ordered the NLRB to reconsider its original decision.

On remand, General Counsel Abruzzo submitted a brief to the NLRB arguing, among other things, that the current broad ban on secondary picketing violates the First Amendment.[8] Under the current legal standard, the NLRB and the courts presume that secondary picketing is "per se" coercive in violation of the NLRA. General Counsel Abruzzo argues for reversing this presumption. Based on "constitutional concerns inherent in protecting public speech," she argues that the NLRB should presume that labor picketing is lawful unless rebutted by clear and explicit evidence to the contrary.

As General Counsel Abruzzo points out, the presumption that labor picketing is lawful is consistent with the approach the Supreme Court applies to other types of peaceful public picketing. Indeed, the Supreme Court has protected picketing by civil rights activists, picketing near a military funeral, and protests on public property outside of clinics that provide abortions – all of which "is regularly considered to be public speech and protected by the First Amendment, regardless of any coercive element."[9] According to General Counsel Abruzzo, elimination of the presumption that secondary picketing is a "per se" violation of the NLRA would fulfill Congress's intended purpose by only prohibiting secondary picketing where there is the "clearest indication" that the purpose is to "cut off the business of a secondary employer as a means of forcing [the secondary employer] to stop doing business with the primary employer."

The expansion of First Amendment rights in the labor law context has not just been a boon for unions. In Janus v. AFSCME, Council 31, the Supreme Court ruled that an Illinois law requiring non-union members to pay agency fees for the union to engage in collective bargaining and related activities amounts to unconstitutional compelled speech.[10] The Court's reasoning resurrects the view articulated in Thornhill in 1940 that unions take "many positions during collective bargaining that have powerful political and civic consequences."[11]

Janus represents a return to the view that labor speech is core protected political speech —at least in the public sector. The NLRB General Counsel's argument in Preferred Building Services seeks to reinvigorate the Thornhill doctrine that labor speech is core protected free speech in the private sector. Together, these cases pave the way toward re-making labor law based on constitutional considerations.

The cases discussed herein may be evidence of a broader shift in constitutional protections for labor speech based on changing societal attitudes. Union organizing campaigns and collective bargaining in recent times have focused not just on "bread and butter" issues like wages and benefits but also on broader social and political issues like gender equity, racial justice, the gig economy, and environmental concerns. Both organized and unrepresented workers have recognized that many of their concerns can be addressed through collective action and the active exercise of their free speech rights. By the same token, conservative organizations have relied on the First Amendment as a tool to try to aid individual employees in opting out of collective action. Either way, the First Amendment seems likely to reclaim its place at the center of labor law developments for years to come.

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[1] 310 U.S. 88, 102 (1940); *see generally* Brendan D. Cummins, *The Thorny Path to Thornhill: The Origins at Equity of the Free Speech Overbreadth Doctrine*, 105 Yale L.J. 1671 (1996).

[2] *Id*. at 103.

[3] *NLRB v. Retail Store Employees Union Local 1001 ("Safeco")*, 447 U.S. 607, 616 (1980), *see id*. at 619 (Stevens, J., concurring).

[4] 366 NLRB No. 159 (2018).

[5] 29 U.S.C. § 158(b)(4)(ii)(B).

[6] 366 NLRB No. 159 (2018).

[7] *SEIU Local 87 v. NLRB*, 995 F.3d 1032 (9th Cir. 2021).

[8] *See* General Counsel's Position Statement to the Board, https://www.nlrb.gov/case/20-CA-149353

[9] *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982); *Snyder v. Phelps*, 562 U.S. 443, 452, 458 (2011); *McCullen v. Coakley*, 573 U.S. 464, 477 (2014).

[10] 138 S. Ct. 2448 (2018).

[11] *Id.* at 2464.

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