



1988

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Andrea White Steele

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Recommended Citation

Steele, Andrea White (1988) "Recent Developments: DeBartolo Corp. v. Fla. Gulf Coast Trades Council: Supreme Court Clarifies the Proviso to §8(6)(4) Which Allows Unions to Conduct Informational Activity," *University of Baltimore Law Forum*: Vol. 19 : No. 1 , Article 14.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol19/iss1/14>

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DeBartolo Corp. v. Fla. Gulf Coast Trades Council: SUPREME COURT CLARIFIES THE PROVISIO TO §8(b)(4) WHICH ALLOWS UNIONS TO CONDUCT INFORMATIONAL ACTIVITY.

In *DeBartolo Corp. v. Fla. Gulf Coast Trades Council*, ___ U.S. ___, 108 S. Ct. 1392 (1988), the United States Supreme Court, on a petition for certiorari, ruled that peaceful handbilling, unaccompanied by picketing, urging a consumer boycott of a neutral employer was not coercive and therefore not a violation of § 8(b)(4) of the National Labor Relations Act.

The Florida Gulf Coast Building and Construction Trades Council (union) peacefully handbilled the customers of a shopping mall asking them not to shop at any of the mall's stores. The union's dispute was with a construction company, for one of the mall's tenants, whom they alleged paid substandard wages and fringe benefits to workers. The union hoped to influence the merchants, through a consumer boycott, to put pressure on the construction company.

The owner of the mall, the Edward J. DeBartolo Corporation (DeBartolo), filed a petition with the National Labor Relations Board (NLRB) charging an unfair labor practice pursuant to § 8(b)(4) of the National Labor Relations Act (NLRA). The NLRB ruled that the union did not violate the act because handbilling was under the proviso for consumer publicity used to inform a distributor's customers that the manufacturer or producer of merchandise was involved in a labor dispute. The ruling was affirmed by the Court of Appeals for the Fourth Circuit. However, the Supreme Court of the United States reversed and remanded the case because the proviso to § 8(b)(4) did not cover the situation where the mall merchants do not distribute the construction company's products. The Court asked for a determination of whether the handbilling fell within the prohibition of § 8(b)(4), and, if so, whether it was protected by the first amendment. *Id.* at ___, 108 S. Ct. 1392.

The NLRB reversed itself on remand and decided that there was a violation of § 8(b)(4) because "handbilling and other activity urging a consumer boycott constituted coercion." *Id.* However, the Court of Appeals for the Eleventh Circuit had serious doubts about whether § 8(b)(4) could constitutionally ban peaceful handbilling not involving nonspeech elements and reversed the NLRB using the Supreme Court's reasoning in *NLRB v. Catholic Bishop of Chicago*, *Id.* Due to important labor and constitutional law issues, the

Court granted certiorari and affirmed.

Although the NLRB's interpretations of the NLRA are normally entitled to deference, under the "Catholic Bishop's Rule", where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. *Id.* at ___, 108 S. Ct. 1397. The NLRB's construction of the statute, as applied in this case, posed serious questions of the validity of § 8(b)(4) under the First Amendment. *Id.*

The handbilling was peaceful, truthfully told customers about an existing labor dispute, and did not involve picketing. Similar acts by the union, such as generally discussing low wages via literature distributed in town or radio advertisements, would not violate the statute and would be protected by the First Amendment. Similarly, handbills discussing a specific wage dispute should be equally protected. To hold otherwise "would require deciding serious constitutional issues." *Id.* at ___, 108 S. Ct. at 1397-98.

Next the Court reviewed whether Congress intended to ban handbilling under § 8(b)(4). The legislative history, however, clearly showed that a "union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity short of ambulatory picketing in front of a secondary site." *Id.* at ___, 108 S. Ct. at 1404.

The decision in *DeBartolo* establishes that the proviso to § 8(b)(4) of the National Labor Relations Act is a clarification which allows unions to conduct informational activity short of picketing. *Id.* The proviso need not be treated as establishing an exception to an otherwise all encompassing NLRA prohibition on publicity. Rather it provides protection from communication, such as picketing, which would be considered coercive.

—Andrea White Steele

Shapero v. Kentucky Bar Ass'n: SUPREME COURT HOLDS THAT A STATE MAY NOT CATEGORICALLY PROHIBIT TARGETED, TRUTHFUL AND NONDECEPTIVE LAWYER ADVERTISING.

In *Shapero v. Kentucky Bar Association*, ___U.S.___, 108 S. Ct. 1916 (1988), the United States Supreme Court held that a state may not, consistent with the first and fourteenth amendments, categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face a particular legal problem.

In 1985 Shapero, a member of the Kentucky Bar, sought the Kentucky Attorneys Advertising Commission's approval of a letter that he proposed to send to potential clients who had pending foreclosure actions. In part the proposed letter stated that "you may be about to lose your home," that "[f]ederal law may allow you to keep your home by ORDERING your creditor [sic] to STOP," that "[y]ou may call my office for FREE information," and that "[i]t may surprise you what I may be able to do for you." The Commission did not find the letter to be false or misleading but found it contrary to the existing Kentucky Supreme Court rule which prohibits direct mailing to specific individuals as distinguished from mailing to the general public. 108 S. Ct. at 1919. The Commission, citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), offered its view that the Kentucky rule violated the first amendment and recommended that it be changed. 108 S. Ct. at 1920.

Shapero then sought an advisory opinion as to the rule's validity from the Kentucky Bar Association's Ethics Committee. The Committee indicated that the rule was consistent with the American Bar Association (ABA) Model Rule 7.3. After reviewing the Committee's opinion, the Kentucky Supreme Court,

