

As Supreme Court Declines Opportunity to Review Closely Watched Union-Friendly Decision, Micro-Units Remain a Threat to Employers-For Now.

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Representing the latest in a series of significant labor law developments in an already busy month of June, the United States Supreme Court declined to review the Fifth Circuit's controversial, pro-union decision in *Macy's v. NLRB* this Monday. The high court's decision not to weigh in on the closely-watched case stands as a decidedly unwelcome development for employers, as Supreme Court review would have presented an opportunity to overturn the National Labor Relation Board's ("NLRB" or "Board") now-infamous 2011 *Specialty Healthcare* decision, which approved union organizing of so-called "micro-units."

Prior to *Specialty Healthcare*, decades of established precedent held that when a union sought to organize a workforce, the bargaining unit to be represented must include those employees sharing a "community of interest." Typically, this resulted in all-inclusive "wall to wall" units of all production and maintenance employees working at an employer's location in a manufacturing environment or all sales/service employees at a particular location in a retail or service business. *Specialty Healthcare* represented a drastic departure from this standard, altering the test so that any "readily identifiable group sharing a community of interest" could serve as an appropriate unit, even if other employees also shared a community of interest with the group targeted by the union. The NLRB would only require the inclusion of such other employees if the employer met a heavy burden of showing the other employees outside of the petitioned-for unit share an "overwhelming community of interest" with the included workers.

In effect, *Specialty Healthcare* enabled the organizing of "micro-units" of employees, allowing a union to gain a foothold into an employer's facility by organizing a small group of workers (undoubtedly, a select group of workers known to be friendly to the union). Naturally, once a foothold into the workforce is established, the union can strategically work to unionize the rest of the workforce from inside the four walls of the employer's facility.

The facts underlying *Macy's* serve as a textbook example of *Specialty Healthcare's* troubling impact on employers and employees who wish to remain union-free. In 2011, a local chapter of the United Food and Commercial Workers' Union ("UFCW") sought to organize all sales people working at a Macy's department store in Saugus, MA. A majority of the traditional unit (consisting of all the store's sales employees) voted against representation, and remained union-free.

Undeterred by the employees' choice against union representation, the UFCW returned in 2014. Now armed with the Board's authorization of micro-units as set forth in *Specialty Healthcare*, the UFCW strategically chose to include only the store's 41 cosmetic and fragrances employees (the "C

& F employees”) in its petitioned-for unit. The UFCW’s cherry-picked unit presented a prime opportunity for the Union to gain access to the store by focusing on an employee base in which it had known support. With the deck stacked against the employer, the UFCW won the 2014 election.

Macy’s challenged the election, arguing that the cherry-picked unit was inappropriate even under *Specialty Healthcare*. Macy’s pointed out that the C & F employees were virtually indistinguishable from the other employees working at the store, and in particular those 79 sales employees working in the store’s other departments. Thus, Macy’s argued that the store’s remaining employees shared an overwhelming community of interest with the C & F employees, and must be included in the unit. The Board disagreed with Macy’s and certified the unit, and further found that Macy’s refusal to bargain with the fractional unit constituted an unfair labor practice.

Macy’s sought review of the Board’s determination in the Fifth Circuit Court of Appeals. In so doing, Macy’s placed *Specialty Healthcare*’s “overwhelming community of interest” test squarely in its sights, advancing a series of arguments as to why the decision runs afoul of the NLRA. The Fifth Circuit’s three-judge panel rejected the employer’s arguments, ultimately finding that the Board did not act in excess of its statutory authority and upheld the Board’s ruling.

After a sharply divided Fifth Circuit denied the store’s request for *en banc* review by a vote of nine to six, Macy’s petitioned the Supreme Court to hear the case in February 2017. The high-profile nature of the case in addition to an arguable split of authority between the Fifth and Second Circuits prompted many observers to believe the Supreme Court would grant review of the case.

Although Monday’s Supreme Court decision means that *Specialty Healthcare* and its endorsement of micro-units remains applicable Board precedent for the time being, the decision’s days may still be numbered. *Specialty Healthcare* was decided by a labor-friendly Board majority appointed by President Barack Obama. The NLRB’s makeup will change shortly, as President Trump nominated Republican Marvin Kaplan to the Board on June 20, and is widely anticipated to name an additional Republican to the Board shortly. It is anticipated that once Kaplan and his soon to be named Republican counterpart are confirmed and seated, the NLRB will act to reconsider *Specialty Healthcare*.

Any such reconsideration will not, however, be immediate. Once named, confirmed, and seated, any new Republican-majority Board will have to wait for the appropriate case to make its way through the system. Accordingly, even with a new Board, *Specialty Healthcare* will not be reversed overnight. As *Specialty Healthcare* remains good law, employers must continue to live with the consequences of micro-units, and be prepared to defend themselves from organizational activity on an uneven playing field. Employers desiring to maintain a union-free environment are reminded of the importance of a well-structured and robust communication plan to deliver the union-free message.

If you have any questions on this topic please contact a member of our [Labor & Employment Practice Group](#).

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