16-3638

United States Court of Appeals for the Seventh Circuit

MARK JANUS and BRIAN TRYGG,

Plaintiffs-Appellants,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31; GENERAL TEAMSTERS/PROFESSIONAL & TECHNICAL EMPLOYEES LOCAL UNION NO. 916; and MICHAEL HOFFMAN, in his official capacity as Director of Illinois Department of Central Management Services,

Defendants-Appellees,

LISA MADIGAN, Attorney General of the State of Illinois,

Intervenor-Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Illinois
Case No. 15-CV-01235
Honorable Robert Gettleman

APPELLANTS' REPLY

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 7

CERTIFICATE OF COMPLIANCE 9

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

CASES PAGE

Abner v. Ill. Dep't of Transp., 674 F.3d 716 (7th Cir. 2012) 6

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) 1

Bd. of Educ. of Peoria Sch. Dist. 150 v. Peoria Fed'n of Support Staff, Security/Policeman's Benevolent & Protective Ass'n Unit No. 114, 998 N.E.2d 36 (Ill. 2013) 3

Bd. of Educ. v. Brown, 724 N.E.2d 956 (Ill. App. Ct. 1999) 4, 5

Byrd v. Hamer, 943 N.E.2d 115 (Ill. App. Ct. 2011) 5

Chicago Bar Ass'n v. Dep't of Revenue, 644 N.E.2d 1166 (Ill. 1994)............................ 5

Chowaniec v. Arlington Park Race Track, Ltd., 934 F.2d 128 (7th Cir. 1991) 2

Cinkus v. Vill. of Stickney Mun. Officers Electoral Bd., 886 N.E.2d 1011 (Ill. 2008) . 5

Dookeran v. Cty. of Cook, 719 F.3d 570 (7th Cir. 2013) 4

*Greenlaw v. United Stat*es, 554 U.S. 237 (2008) 2

Head-On Collision Line, Inc. v. Kirk, 343 N.E.2d 534 (Ill. App. Ct. 1976).................. 5

Holstein v. City of Chicago, 29 F.3d 1145 (7th Cir. 1994) 5

Howard v. Lawton, 175 N.E.2d 556 (Ill. 1961) 5

Little v. Ill. Dep't of Revenue, 626 F. App'x 160 (7th Cir. 2015) 4

Marrese v. Am. Acad. of Orthopedic Surgeons, 470 U.S. 373 (1985) 3

McElwain v. Office of Illinois Sec'y of State, 39 N.E.3d 550 (Ill. 2015) 5

NLRB v. Quality C.A.T.V., 824 F.2d 542 (7th Cir. 1987) 6

Reich v. City of Freeport, 527 F.2d 666 (7th Cir. 1975) 5

River Park, Inc. v. City of Highland Park, 703 N.E.2d 883 (Ill. 1998) 3

TABLE OF AUTHORITIES (CONT'D)

PAGE

Statutes

28 U.S.C. § 1331 6

28 U.S.C. § 1343 7

42 U.S.C. § 1983 7

5 ILCS 315/11 3

5 ILCS 315/11(e) 4

Constitutional Provisions

ILL. CONST. art. VI, §§ 6, 9 4

ARGUMENT

1. The parties agree that *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977) requires that this Court affirm the district court's dismissal of Appellants Mark Janus and Bryan Tryggs' Second Amended Complaint. Consequently, there is no need for Janus and Trygg to rebut the State and Unions'[1] argument that *Abood* was correctly decided. *See* Resp. Br., 10-20. Whether correctly decided or not, *Abood* is controlling in this forum and requires affirmance of the decision below.

2. The case cannot be remanded for fact-finding, as State and Unions suggest, *see* Resp. Br., 20-21, given that *Abood* requires the dismissal of Janus and Trygg's Complaint. Fact finding by the district court would not change that result, and therefore would serve no purpose.

The State and Unions cannot demand fact finding at this point of the proceedings in any event because they moved the district court, under Federal Rule of Civil Procedure 12(b)(6), to dismiss the Second Amended Complaint. R2988-90. Their motions were granted. S.A. 1-3. The State and Unions cannot now assert, in this appeal, that the district court must adjudicate Janus and Trygg's claims through a procedural mechanism different from the one they requested.[2]

[1] The phrase "State and Unions" will be used to refer jointly to the Appellees.

[2] There is no merit to the State and Unions' assertion that Janus and Trygg raised new arguments on appeal. *See* Resp. Br., 21. They merely cited to portions of their Second Amended Complaint, such as the Unions notices that are incorporated therein, *see* Compl., ¶¶ 21-22 (S.A. 8-9), to support the one argument they have consistently made: that the Supreme Court should overrule *Abood* and hold agency fees unconstitutional. *See* Appellants' Br., 9-11.

That is particularly true given the State and Unions' demand that "[t]he judgment of the district court should be affirmed" by this Court. Resp. Br., 28. A remand for fact-finding would, of course, require *reversing* the district court's judgment dismissing the Second Amended Complaint. This is not the relief that the State and Unions demand. More importantly, it is not relief that they can be granted because: (1) *Abood* requires affirmance of the district court's judgment; and (2) the State and Unions did not file cross-appeals that request reversal of that judgment, *see Greenlaw v. United States*, 554 U.S. 237, 244–45 (2008) ("it takes a cross-appeal to justify a remedy in favor of an appellee" because "an appellate court may not alter a judgment to benefit a nonappealing party."); *Chowaniec v. Arlington Park Race Track, Ltd.*, 934 F.2d 128, 130 (7th Cir. 1991) (holding "given the defendants' failure to file a cross-appeal, this issue is beyond the permissible scope of our review" because "a party who wishes to seek an alteration of the judgment of the district court is obliged to file a notice of appeal.").

3. There is no need for the Court to resolve the State and Unions' alternative theory that Trygg's claim should be dismissed under the doctrine of res judicata, given that his claim must be dismissed under *Abood*. It is likely for this reason that the district court did not rule on this alternative theory—there is no point in so doing.

The State and Unions sole argument for why the Court should devote time and resources to adjudicating their res judicata theory is a "preference for resolving claims, where possible, on the basis of non-constitutional issues." Resp. Br., 21. This

preference has diminished force where, as here, the proper resolution of the constitutional issue is not in dispute. In any event, adjudicating whether res judicata bars Trygg's claim will not allow the Court to avoid ruling on a constitutional issue because the State and Unions do not allege that Janus's claim is barred by res judicata. Janus's claim must be resolved under the First Amendment. There is no reason why Trygg's claim should not be resolved on the same basis.

4. If the Court were to reach the issue, res judicata would not bar Trygg's claim because he could not have litigated his First Amendment claim against the Teamsters and Illinois' Department of Central Management Services ("CMS") before the Illinois Labor Relations Board ("Board"). Res judicata does not bar a claim if the alternative forum did not have subject matter jurisdiction to adjudicate that claim. *See Marrese v. Am. Acad. of Orthopedic Surgeons*, 470 U.S. 373, 382 (1985); *River Park, Inc. v. City of Highland Park*, 703 N.E.2d 883, 896 (Ill. 1998). While the Board has jurisdiction over claims that a public employer's or union's conduct constitutes an unfair labor practice, *see* 5 ILCS 315/11, it has no jurisdiction to hear First Amendment claims against public employers or unions. *See Bd. of Educ. of Peoria Sch. Dist. 150 v. Peoria Fed'n of Support Staff, Security/Policeman's Benevolent & Protective Ass'n Unit No. 114*, 998 N.E.2d 36, 47 (Ill. 2013) ("[A]dministrative agencies have no authority to declare statutes unconstitutional or even to question their validity.").

Trygg also could not have raised his First Amendment claim against CMS and the Teamsters during judicial review of the Board's decision, because the Board's

decisions are reviewed by the Illinois Appellate Court. *See* 5 ILCS 315/11(e). The Illinois Appellate Court is an appellate tribunal, and not a court of general jurisdiction in which parties can raise new claims. ILL. CONST. art. VI, § 6.

The fact that the Illinois Appellate Court reviews Board decisions distinguishes this case from situations in which administrative actions are reviewed by Illinois *circuit courts*, which are trial courts that have original subject matter jurisdiction to adjudicate constitutional claims, *see* ILL. CONST. art. VI, § 9; *Bd. of Educ. v. Brown*, 724 N.E.2d 956, 964-66 (Ill. App. Ct. 1999). "In reviewing an administrative decision, the trial court exercises a statutory, and not a general appellate jurisdiction." *Id*. at 964. "A trial court is vested with original jurisdiction over pleaded matters which the administrative agency lacks authority to decide . . . as well as constitutional issues raised in a complaint for administrative review." *Id*. at 966. Consequently, "a federal civil-rights claim may be brought in Illinois circuit court along with a related administrative-review action." *Dookeran v. Cty. of Cook,* 719 F.3d 570, 577 (7th Cir. 2013).

But that procedure is not possible where, as here, the administrative review is conducted by the Illinois Appellate Court, which cannot hear an original action raising a First Amendment claim. This distinction renders inapposite the cases cited by the State and Unions, almost all of which concerned whether circuit courts can adjudicate constitutional claims contemporaneously with administrative reviews.[3]

[3] *See Little v. Ill. Dep't of Revenue*, 626 F. App'x 160, 162 (7th Cir. 2015) (finding that individuals could join constitutional claim with administrative review action at circuit court); *Dookeran,* 719 F.3d at 576 (same); *Durgins v. City of E. St. Louis*, 272 F.3d 841, 843 (7th Cir. 2001) (same); *Holstein v. City of Chicago*, 29 F.3d 1145, 1148

The State and Unions, however, assert that the Illinois Appellate Court has "'jurisdiction' to consider a constitutional attack *on an agency's action*." Resp. Br., 27 (emphasis added). That may be so, but it does not help the State and Unions because Trygg's First Amendment claim does not lie against the Board, or attack the constitutionality of that agency's action. Nor could it, as the Board is not compelling Trygg and other employees to pay agency fees. Rather, Trygg's First Amendment claim lies against CMS and the Teamsters, which are the entities that require payment of agency fees. *See* Compl., ¶ 70 (S.A. 17-18).[4] And again, Trygg could not pursue his First Amendment claim against these parties before the Board or before the Illinois Appellate Court during its judicial review of the Board's decision.

An example illustrates the point. This Court has appellate jurisdiction to review National Labor Relations Board ("NLRB") decisions, *see* 29 U.S.C. § 160(e), just as the Illinois Appellate Court has appellate jurisdiction to review Board decisions. As-

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(7th Cir. 1994) (same); *Reich v. City of Freeport*, 527 F.2d 666, 669-72 (7th Cir. 1975) (same); *McElwain v. Office of Illinois Sec'y of State*, 39 N.E.3d 550, 552-53 (Ill. 2015) (constitutional claim raised in circuit court with administrative review action); *Chicago Bar Ass'n v. Dep't of Revenue*, 644 N.E.2d 1166, 1170 (Ill. 1994) (same); *Howard v. Lawton*, 175 N.E.2d 556 (Ill. 1961) (same); *Byrd v. Hamer*, 943 N.E.2d 115, 128 (Ill. App. Ct. 2011) (same); *Brown*, 724 N.E.2d at 964-66 (same); *see also Head-On Collision Line, Inc. v. Kirk*, 343 N.E.2d 534, 538 (Ill. App. Ct. 1976) (party that did not raise constitutional claim during agency proceedings fails to exhaust administrative remedies and cannot litigate that claim at circuit court); *Cinkus v. Vill. of Stickney Mun. Officers Electoral Bd.*, 886 N.E.2d 1011, 1020-21 (Ill. 2008) (same).

[4] The relief Trygg seeks in this case will not "improperly undermine the rights established in the earlier [Board] proceedings or defeat the reliance interests established in them[,]" as the State and Unions assert, Resp. Br., 25, because the Board's remedy did not provide the Teamsters or CMS with any "rights" or "reliance interests." Rather, the Board held that Trygg's agency fees must be directed to a charity to protect his statutory religious rights. R3016-18. A remedy in this case that ends this agency fee requirement will not diminish Trygg's rights and reliance interests.

sume an employee files unfair labor practice charges with the NLRB against his employer and union. When reviewing the NLRB's decision in that case, this Court could resolve whether *the NLRB* violated that employee's constitutional rights, such as by denying him due process of law. *E.g., NLRB v. Quality C.A.T.V.,* 824 F.2d 542 (7th Cir. 1987). But could this Court adjudicate, during its review of the NLRB decision, a claim by that employee that his employer and union's conduct violates his First Amendment rights? The answer is plainly "no," as neither the NLRB nor this Court have original subject matter jurisdiction to hear First Amendment claims against employers or unions. The same answer governs here.

In short, the Board's proceedings did not provide Trygg with an opportunity to litigate his First Amendment claims against CMS and the Teamsters, much less the "full and fair opportunity" that res judicata requires, *Abner v. Ill. Dep't of Transp*., 674 F.3d 716, 719 (7th Cir. 2012). To the extent that this question is reached, the Court should find Trygg's claim not to be barred by res judicata.

5. Finally, while the State and Unions do not argue that the district court lacked subject matter jurisdiction, they attempt to implicitly suggest as much by twice discussing at length how the district court allowed Janus and Trygg to file a complaint in intervention at the same time that it dismissed Governor Rauner's suit for lack of standing and jurisdiction, Resp. Br., 1-2, 6-8, and by averring that "neither this Court nor the Supreme Court has yet adopted" the district court's approach, *id*. at 2. There is no jurisdictional problem with this case because: (1) it is undisputed that "the district court had federal question jurisdiction under 28 U.S.C. § 1331" over

Janus and Trygg's Second Amended Complaint, Resp. Br., 2; (2) undeniable that 28 U.S.C. § 1343 gave the court jurisdiction over the 42 U.S.C. § 1983 claim alleged in the Second Amended Complaint, *see* Comp., ¶ 4 (S.A. 5); and (3) "[Janus and Trygg] undoubtedly have standing to assert their claims because they are required under the IPLRA to pay fair share fees," R2342. Thus, irrespective of whether the district court's procedural decision was correct—which the State and Unions do not challenge and which was correct for the reasons stated on R2341-42—there is no question that the district court had jurisdiction over the operative pleading in this case, the Second Amended Complaint, and thus had jurisdiction to dismiss that Complaint under Rule 12(b)(6). And that decision should be affirmed by this Court.

CONCLUSION

Janus and Trygg agree with the State and Unions' conclusion that "[t]he judgment of the district court should be affirmed." Resp. Br., 28.

Dated: January 4, 2017

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type limitations provided in Federal Rule of Appellate Procedure 32(a)(7). The foregoing brief was prepared using Microsoft Word 2010 and contains 2007 words in 12-point proportionately-spaced Century Schoolbook font.

/s/ William L. Messenger
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Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2017, I electronically filed the foregoing Appellants' Brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ William L. Messenger
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