

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO**

BRETT HENDRICKSON,

Plaintiff,

v.

NO. 1:18-CV-01119-RB

**AFSCME COUNCIL 18; MICHELLE LUJAN
GRISHAM, in her official capacity as
Governor of New Mexico; and HECTOR
BALDERAS, in his official capacity as Attorney
General of New Mexico,
Defendants.**

JOINT STATUS REPORT AND PROVISIONAL DISCOVERY PLAN

Pursuant to FED. R. CIV. P. 26(f), a meeting was held on April 16, 2019, at 2:30 p.m.

and was attended by:

Patrick J. Rogers, Brian K. Kelsey, and Reilly Stephens for
Plaintiffs

Lawrence M. Marcus, Attorney for prospective Defendants
Michelle Lujan Grisham and Hector Balderas Department (“State
Defendants”)

Eileen B. Goldsmith, Stephen Curtice, and Stefanie Wilson,
Attorneys for AFSCME Council 18

Defendants Michelle Lujan Grisham and Hector Balderas (in their
official capacities) will accept service or will be served shortly,
with the First Amended Complaint.

NATURE OF THE CASE

This action was brought pursuant to 42 U.S.C. § 1983 alleging an abridgement of First Amendment rights. Plaintiff Brett Hendrickson asserts two claims. Count I of the First Amended Complaint (“FAC”) alleges that Defendant AFSCME Council 18’s membership dues collection practices abridged Plaintiff’s rights of speech and association. Count II alleges that AFSCME

Council 18's status as the exclusive representative of Plaintiff's bargaining unit likewise abridges his rights to speech and association. Defendants deny all claims and liability. At this stage of the proceedings, the parties believe that there are no material facts in dispute, that all the relevant questions are matters of law, and propose to postpone discovery, including initial disclosures, until after the resolution of dispositive motions each party intends to submit no later than May 31, 2019.

AMENDMENTS TO PLEADINGS AND JOINDER OF PARTIES

If the case is not fully resolved on the parties' proposed dispositive motions (*see infra* at 8); plaintiffs should be allowed until 60 days after the Court's ruling on motions to dismiss/summary judgment (which will be filed no later than May 31, 2019) to amend the pleadings or to join additional parties in compliance with the requirements of Fed. R. Civ. P. 15(a), provided the Court grants him leave to amend and/or all parties stipulate to amending the Complaint.

Defendants(s) should be allowed until 90 days after the Court's ruling on the motions to dismiss/summary judgments to move to amend the pleadings or to join additional parties in compliance with the requirements of Fed. R. Civ. P. 15(a).

STIPULATIONS

The parties hereto stipulate and agree that venue is properly laid in this District; that the United States District Court for the District of New Mexico has personal jurisdiction over the parties and the case presents federal questions because this case is brought under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution, except that Defendants deny Plaintiff's claims present justiciable controversies.

The parties are willing to further stipulate to the following facts:

1. Hendrickson is an employee of the New Mexico Department of Human Services, and has been since 2001.
2. AFSCME Council 18 is the certified exclusive bargaining representative for Hendrickson's bargaining unit pursuant to NMSA 1978, § 10-7E -15(A).
3. Michelle Lujan Grisham took office as Governor of New Mexico on January 1, 2019.
4. Hector Balderas is the Attorney General of New Mexico.

PLAINTIFF'S CONTENTIONS:

Plaintiff Brett Hendrickson is an employee of the New Mexico Department of Human Services (“DHS”) who signed a union membership card in 2007 for the Defendant AFSCME Council 18, prior to the U.S. Supreme Court decision in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018). From 2007 through 2018, AFSCME deducted dues of approximately \$32 per month from Hendrickson's paycheck. These dues were deducted before and after the United States Supreme Court decision in *Janus v AFSCME*, 138 S. Ct. 2448 (2018). From 2008 to 2018 “fair share” payers were charged approximately 85 percent of union membership dues.

On August 9, 2019, Hendrickson submitted a request to withdraw from the union that was denied. He was only allowed to withdraw his union membership in January after the filing of this lawsuit. AFSCME Council 18 obtains dues from employees of the State of New Mexico by using the State's payroll system to collect money directly from employees' pay. Employees who are not members of AFSCME Council 18 but are in bargaining units it represents are subject to the terms of the contracts it negotiates with the State. Employees who are not members of AFSCME Council 18 may not vote in union leadership elections, or vote on other matters that affect the bargaining unit, such as whether to approve a collective bargaining agreement. Subjects of negotiation

between AFSCME Council 18 and the State of New Mexico include wages, hours, working conditions, and other terms and conditions of employment. Michelle Lujan Grisham took office as Governor of New Mexico on January 1, 2019, and currently serves as the chief executive overseeing the operations of the New Mexico Human Services Department.

Count I of the First Amended Complaint asserts that Defendants Lujan Grisham and AFCME Council 18 have violated Mr. Hendrickson's First Amended rights to free speech and freedom of association by deducting union dues from his wages both before and after Mr. Hendrickson's request to resign his union membership and by attempting to limit withdrawal from the union to an arbitrary "window" imposed by Defendants. Legal issues presented by Count I include whether Defendants violated Plaintiff's First Amendment rights to free speech and freedom of association both before and after his attempted resignation from union membership; whether Plaintiff is entitled to a refund of past union dues paid to AFSCME Council 18; and whether N.M. Stat. Ann. § 10-7E-17(C) constitutes an unconstitutional violation of Plaintiff's First Amendment rights to free speech and freedom of association because it allowed the withholding of union dues from his paycheck until a two-week period specified in the Union agreement.

Count II asserts that Plaintiff has a constitutional right not to be represented by AFSCME Council 18 as his exclusive representative without his affirmative consent and that neither Lujan Grisham nor AFSCME Council 18 may recognize the union as representing Plaintiff in its collective bargaining negotiations. The legal issue presented by Count II is whether the exclusive representation provision of N.M. Stat. Ann. § 10-7E-15(A) and all related provisions are an unconstitutional abridgement of Plaintiff's right under the First Amendment not to be compelled to associate with speakers and organizations without his consent.

DEFENDANTS' CONTENTIONS

Defendant AFSCME Council 18's Contentions:

AFSCME Council 18 ("the Union") denies all liability to Plaintiff. Plaintiff Brett Hendrickson is an employee of the New Mexico Human Services Department and a former member of AFSCME Council 18. Plaintiff voluntarily joined the union and agreed to pay membership dues. His dues authorization agreement provided that deductions could be cancelled only during an annual window period.

Plaintiff alleges in Count I of his First Amended Complaint ("FAC"; Dkt. 21) that the deduction of union dues from his paycheck violated his First Amendment rights. Count I of the FAC also challenges the New Mexico statute that, until *Janus* issued, permitted a certified public employee union to charge the cost of union representation to non-members who were represented by the union ("fair share fees"), NMSA 1978, § 10-7E-9(G).

Count II of the FAC alleges that New Mexico's statute authorizing exclusive-representation collective bargaining, NMSA 1978, § 10-7E-15(A), violates Plaintiff's First Amendment rights.

Plaintiff's demands for prospective relief regarding the collection of union dues are all moot. The State and the Union have already terminated dues deductions from Plaintiff. Moreover, the Union has already unconditionally refunded to him all union dues deducted from his pay after his window period for cancelling deductions. Further, Plaintiff's claim for reimbursement of dues paid while he was a union member is barred by a valid and enforceable contract. Plaintiff's 42 U.S.C. § 1983 claims against AFSCME Council 18 are barred for the additional reasons that there is no state action, or, in the alternative, by the defense of good faith reliance on the law in effect at the time. Finally, because Plaintiff brings this suit solely on his

own behalf, he lacks standing to seek prospective relief on behalf of “public employees like [him].” FAC at 13 ¶ (e).

Plaintiff’s claim for prospective relief against fair share fees does not present a justiciable controversy because *Janus* already declared such fees unconstitutional and the State and the Union have permanently and unequivocally ceased collection of fair share fees from non-members. There is no reasonable likelihood that such deductions will be resumed. Plaintiff also lacks standing to challenge NMSA 1978, § 10-7E-9(G), which authorized public employers and unions to negotiate fair share fee provisions in their collective bargaining agreements, because Plaintiff was at all times a union member and so never paid fair share fees.

Plaintiff’s challenge to NMSA 1978, § 10-7E-15(A), which provides for exclusive-representation collective bargaining, is foreclosed by *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984). Nothing in *Janus* alters or undermines the analysis in *Knight*. Every court to consider the issue, both before and after *Janus*, has ruled that exclusive-representation collective bargaining does not violate the First Amendment.¹

State Defendant’s Contentions:

State Defendants deny Plaintiff’s Contentions and assert affirmative defenses. First, State Defendants have not been served, and Plaintiff cannot assert a cause of action against them until they are served. State Defendants are entitled to the dismissal of Count I of Plaintiff’s claim, regarding the fair use deductions from Plaintiff’s paycheck. State Defendants note at the outset that Plaintiff never had standing to bring the claim, because he never had forced “fair share” fees

¹ See *Mentele v. Inslee*, 916 F.3d 783 (9th Cir. 2019); *Bierman v. Dayton*, 900 F.3d 570 (8th Cir. 2018); *Hill v. Serv. Emp. Int’l Union*, 850 F.3d 861 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 446 (2017); *Jarvis v. Cuomo*, 660 F. App’x 72 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1204 (2017); *D’Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016), *cert. denied*, 136 S. Ct. 2473 (2016); *Akers v. Md. State Educ. Ass’n*, Civil Action No. RDB-18-1797, 2019 WL 1745980 (D. Md. Apr. 18, 2019); *Thompson v. Marietta Educ. Ass’n*, No. 2:18-cv-00628-MHW-CMV, 2019 WL 1650113 (S.D. Ohio Jan. 14, 2019); *Reisman v. Associated Faculties*, No. 1:18-cv-00307-JDL, 2018 WL 6312996 (D. Me. Dec. 3, 2018); *Uradnik v. Inter Faculty Organization*, Civ. No. 18-1895, 2018 WL 4654751 (D. Minn. Sept. 27, 2018), *aff’d*, No. 18-3086 (8th Cir. Dec. 3, 2018).

deducted from his paycheck, because he was a union member. Moreover, even assuming, *arguendo*, that Plaintiff can assert a cause of action on the grounds that he joined the union because he would otherwise have to pay fair share fees, he no longer has standing, because he is no longer a member of the union, and his fees have been refunded to him. Also, because the state is no longer deducting fair share fees from paychecks, Plaintiff will no longer have such an incentive to join a union. Plaintiff does not appear to make a claim for damages from prior to the Janus decision. In any event, such a claim would be barred by the Eleventh Amendment, and by the fact that the State of New Mexico acted in good faith when it allowed for union contracts with fair share deductions. The Janus decision overturned 40 years of valid precedent, allowing for such deductions. Thus, the only relief that Plaintiff can request is prospective relief, and this claim for prospective relief is now moot.

Moreover, neither the Governor nor the Attorney General are proper Defendants. While the Governor generally oversees the State executive branch, she does not assert the day to day control over payroll deductions that would render her a proper Defendant. Further, while the Attorney General is responsible for enforcing various provisions of state law, no such enforcement action is currently underway, so Plaintiff's claims would not be ripe. Even if such an action were currently ongoing, a federal action against the Attorney General would violate the Younger abstention doctrine and/or the Rooker Feldman doctrine. Plaintiff's claims would be more proper as a defense to an enforcement action, rather than as a separate federal claim.

Further, the restrictions on withdrawing from a union to a two week period are not unconstitutional. Unlike the situation in Janus, which concerned a non-union member having fees deducted without prior agreement, the narrow window for withdrawal from the union in this case applies only to union members who chose to join the union, and who agreed to contractual terms. Nothing in Janus or any other Supreme Court decision could be interpreted to bar such a

requirement. In fact, the federal constitution strongly discourages interference with contractual relations.

Finally, Count II of Plaintiff's Complaint, which challenges the fact that AFSCME is the exclusive representative of the bargaining unit that includes Plaintiff, is without merit. The Janus decision cannot be extended to bar such exclusive representation. In fact, the decision clearly states that such exclusive representation is appropriate. Accordingly, Count II of Plaintiff's cause of action should be dismissed.

PROVISIONAL DISCOVERY PLAN

The parties believe the issues presented are legal issues, susceptible to dispositive motions. The parties are proposing a deadline of May 31, 2019 for summary judgment motions/motions for judgment on the pleadings. The parties do not believe that discovery will be necessary. The parties are proposing to submit to the Court that portion of the Provisional Discovery Plan that addresses discovery and trial planning details after the Court's rulings on the proposed dispositive motions, if further proceedings are necessary.

PRETRIAL MOTIONS

Plaintiff intends to file: Plaintiff believes both Claims I and II may be determined by motion for summary judgment/motions on the pleadings.

Defendants intend to file: Defendants believe both Claims I and II may be determined by motion for summary judgment/motions on the pleadings.

ESTIMATED TRIAL TIME

The parties believe the issues presented are legal issues, susceptible to resolution by dispositive motions. Hence, the parties plan to file dispositive motions and are proposing to submit

to the Court that portion of the Provisional Discovery Plan that addresses discovery details and trial planning after the Court has ruled on the dispositive motions.

SETTLEMENT

The parties believe that settlement in this case is unlikely. The parties request a settlement conference on a date to be submitted after the Court has ruled on the dispositive motions, if any claims remain in the case.

EXCEPTIONS

State Defendant's Exceptions

Governor Lujan Grisham and Attorney General Balderas hereby state that they have not yet been served, and are only agreeing to this JSR out of an abundance of caution, due to the Court's Initial Scheduling Order. These Defendants are merely entering a special appearance, do not hereby waive service, and reserve the right to contest any deadlines contained in the report.

Plaintiffs Exception

Plaintiff affirms that the State Defendant's will receive service in time to ensure their opportunity to participate in this case.

APPROVED WITH EXCEPTIONS

/s/ Brian K. Kelsey
For Plaintiff

/s/ Eileen B. Goldsmith
For Defendant AFSCME Council 18

/s/ Lawrence M. Marcus
Special Appearance for Defendants Michelle Lujan
Grisham and Hector Balderas