IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ERICH MANDEL, Plaintiff, v. SEIU LOCAL 73 and COMMUNITY CONSOLIDATED SCHOOL DISTRICT 15, Defendants	)	No. 18 CV 8385 Hon. Judge John Robert Blakey

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT
OF HIS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Government employees have a First Amendment right not to be compelled by their employer to join a union or to pay any fees to that union unless an employee "affirmatively consents" to waive that right. *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018). Such a waiver must be "freely given and shown by 'clear and compelling' evidence." *Id.* The issue in this case is whether government employees who joined a union before the Supreme Court recognized the right of government employees to be free from a requirement that they pay money to a union as a condition of their employment provided affirmative consent when they joined the union, thus waiving their First Amendment right to not pay a union.

When Plaintiff Erich Mandel, a diesel mechanic for Defendant Community Consolidated School District 15 ("District") joined Defendant SEIU Local 73 ("Local 73") he was required to either become a member of Local 73 and pay membership dues, or pay agency fees as a non-member of Local 73. Joint Statement of Stipulated Facts ("Stip. Facts") ¶¶ 9, 12. At the time, had Plaintiff been given the option to pay no money to Local 73 as a non-member, he would not have the joined Local 73. Stip. Facts ¶ 12. Because Plaintiff was given an unconstitutional choice between paying union dues as a member of Local 73 or paying agency fees to Local 73 as a non-member, Plaintiff could not have provided affirmative consent to waive his First Amendment right to not pay money to a union as articulated by the Supreme Court in *Janus*. Therefore, any union dues withheld from Plaintiff's wages both prior to the date of the *Janus* decision (subject only to the statute of limitations) and subsequent to the date of the *Janus* decision were taken unconstitutionally.

STATEMENT OF FACTS

The parties filed a Joint Statement of Stipulated Facts (Doc. 32) on April 16, 2019 stipulating to the facts in that document as true for purposes of the parties' cross motions for summary judgment.

Plaintiff Mandel has worked as a diesel mechanic for the District since July 31, 2013. Stip. Facts ¶ 1. When he began his employment, Plaintiff joined Local 73 because he did not have the choice of paying the Local 73 nothing; as a non-member, he would still be required to pay agency fees. Stip. Facts ¶ 12. After the Supreme Court issued its decision in *Janus*, Plaintiff attempted to resign from Local 73. He did so by contacting the District via regular mail on August 21, 2018 and September 17, 2018. Stip. Facts ¶¶ 32, 36; Exs. E, I. He contacted Local 73 via telephone on August 24, 2018 and August 28, 2018. Stip. Facts ¶ 33. In these communications, he asked both Defendants to stop deducting dues from his paycheck. Stip. Facts ¶¶ 32, 33, 36; Exs. E, I.

On or about September 5, 2018, Local 73 sent Plaintiff a letter in which it informed him that, per his membership agreement, he would have to continue paying dues until July 12, 2019. Stip. Facts ¶¶ 35; Ex. H. On October 23, 2018, Local 73 sent an email to the District, instructing the District to continue deducting dues for all members, including Plaintiff. Stip. Facts ¶ 38; Ex. K. On October 24, 2018, the District informed Mandel that they would not stop deducting dues without the Local 73's approval. Stip. Facts ¶ 39.

After Plaintiff filed this lawsuit, on January 8, 2019, Local 73 instructed the District to cease deducting dues from Plaintiff and refunded all dues collected after August 21, 2018. Stip. Facts ¶¶ 40, 41. On the same day, Local 73 processed Plaintiff's resignation from the union and Plaintiff became a non-member. Stip. Facts ¶ 52. Later, Local 73 refunded Plaintiff for the dues

withheld before August 21, 2018 back to December 21, 2016, the limit set by the statute of limitations. Stip. Facts ¶¶ 43, 46, 47. Plaintiff now seeks a declaratory judgment that his signing of the union membership/union deduction card before the *Janus* decision does not constitute affirmative consent to waive his First Amendment rights under *Janus*, a declaratory judgment that the union dues withheld from his wages were taken unconstitutionally because he did not provide affirmative consent, and attorneys' fees and costs. Stip. Facts ¶ 53.

SUMMARY JUDGMENT STANDARD

"A party is entitled to summary judgment if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Young v. UPS*, 135 S. Ct. 1338, 1367 (2015) (quoting Fed. Rule Civ. Proc. 56(a)). The parties have agreed to file cross-motions for summary judgment based on the facts stipulated in the Joint Statement of Stipulated Facts (Doc. 32). The moving party has the burden of establishing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Cedillo v. Int'l Asso. of Bridge and Structural Iron Workers*, 603 F.2d 7, 10 (7th Cir. 1979).

ARGUMENT

I. Under *Janus*, a government employee must provide affirmative consent in order for any payment to a union be deducted from that employee's wages.

In *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), the Supreme Court held that it was unconstitutional for government employers to compel employees to pay union agency fees as a condition of their employment. The Court held that government employees have a First Amendment right not to be compelled by their government employer to join a union or pay any fees to that union. The Court in *Janus* explained that payments to a union could be deducted from a non-member's wages only if that employee "affirmatively consents" to pay:

> Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

Janus, 138 S. Ct. at 2486 (citations omitted).

Supreme Court precedent provides that certain standards be met in order for a person to properly waive his or her constitutional rights. First, waiver of a constitutional right must be of a "known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Second, the waiver must be freely given; it must be voluntary, knowing, and intelligently made. *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972). Finally, the Court has long held that it will "not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937).

Any assertion that *Janus* applies only to non-members, not members of the union, simply begs the question of whether a membership card and/or dues deduction authorization signed by a government employee before the Court's decision in *Janus* constitutes affirmative consent under *Janus*. For the reasons explained here, because the membership card/dues deduction authorizations signed by Plaintiff before *Janus* does not meet the Court's standard for waiving constitutional rights, it cannot constitute affirmative consent. Therefore, any dues withheld from Plaintiff's wages pursuant to such authorization was unconstitutional.

Under standard civil retroactivity doctrine, Supreme Court decisions state the true law as it has always been, rather than changing the law. *Janus* does not say that it applies only prospectively. In *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993), the Supreme Court explained that "[w]hen this Court applies a rule of federal law to the parties before it, that rule is

the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." Retroactivity applies even to cases not yet filed when the decision is rendered. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 542-43 (1991). Further, a court may not refuse to apply a prior decision retroactively. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 759, 752-754 (1995).

Monies or property taken from individuals under statutes later found unconstitutional must be returned to their rightful owner. In *Harper*, taxes collected from individuals under a statute later declared unconstitutional were returned. *Id.* at 98-99. Fines collected from individuals pursuant to statutes later declared unconstitutional also must be returned. *See Pasha v. United States*, 484 F.2d 630, 632-33 (7th Cir. 1973); *United States v. Lewis*, 478 F.2d 835, 846 (5th Cir. 1973); *Neely v. United States*, 546 F.2d 1059, 1061 (3d Cir. 1976). "Fairness and equity compel [the return of the unconstitutional fine], and a citizen has the right to expect as much from his government, notwithstanding the fact that the government and the court were proceeding in good faith[.]" *United States v. Lewis*, 342 F. Supp. 833, 836 (E.D. La. 1972). Thus, the requirement set forth in *Janus* that an employee must provide affirmative consent in order for union dues or fees to be deducted from his or her wages applies to conduct that took place prior the Court's decision and any dues deducted from an employee's wages that does not meet the affirmative consent standard set in *Janus*, must be returned.

II. Defendants violated Plaintiff's First Amendment rights by deducting union dues from his wages without affirmative consent.

In this case, Plaintiff could not have waived his First Amendment right to not pay a union. First, neither Local 73 nor the District informed him that he had a right not to pay a union as a non-member. Indeed, at the time he signed his union card, the District and Local 73 required him

to either become a member of Local 73 and pay membership dues, or pay agency fees as a non-member of Local 73. Stip. Facts ¶ 12. Indeed, Plaintiff could not have waived his First Amendment right to not pay a union by signing the membership/dues deduction card because at the time he signed it, the Supreme Court had not yet recognized that right. Therefore, Plaintiff could not have waived his First Amendment right recognized by *Janus* because at the time he signed the membership/dues deduction cards, that right was not yet a "known right or privilege." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143 (1967) (plurality opinion).

Second, the Court in *Janus* stated that the waiver of an employee's First Amendment right to not pay a union must be "freely given." 138 S. Ct. at 2486. At the time Plaintiff signed the membership/dues deduction card, the collective bargaining agreement required Plaintiff to either pay union dues as a member or pay agency fees to the union as a non-member. Stip. Facts ¶ 17. The membership/dues deduction card Plaintiff signed was based on what the Court in *Janus* recognized as an unconstitutional choice: pay dues to the union as a member, or pay fees to the union as a nonmember. Thus, Plaintiff could not have freely or voluntarily waived his right to not pay the union because when he signed the membership/dues deduction card, he was compelled to pay Local 73 as a condition of his employment.

Third, because the Court will "not presume acquiescence in the loss of fundamental rights," *Ohio Bell Tel. Co.,* 301 U.S. at 307, the waiver of constitutional rights requires "clear and compelling evidence" that the employees wish to waive their First Amendment right not to pay union dues or fees. *Janus*, 138 S. Ct. 2484. Importantly, "the burden of proving the validity of a waiver of constitutional rights is always on the government." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). Thus, Defendants must prove, by clear and compelling evidence that Plaintiff

voluntarily, knowingly, and intelligently agreed to waive his First Amendment right to not subsidize the Local 73's speech.

"Courts indulge every reasonable presumption against waiver of fundamental constitutional rights." *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (citing *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)). Therefore, it cannot be presumed that Plaintiff freely, knowingly, or intelligently entered into the union membership/dues deduction card, even if some of the employees might have been willing to agree to pay dues or fees absent the agency fee requirement.

Defendants cannot prove, by clear and compelling evidence that Plaintiff voluntarily, knowingly, and intelligently agreed to waive his First Amendment right to not subsidize the Local 73's speech by signing the membership/dues deduction cards because those cards lack express language stating that the employee has a constitutional right not to pay a union and the employee is waiving that constitutional right. *See* Stip. Facts ¶¶ 11, 13. Without language explaining that an employee has a constitutional right not to pay a union and confirming that the signatory is waiving his or her constitutional rights, the union membership/dues deduction cards signed by Plaintiff cannot be a clear and compelling waiver of a Plaintiff's rights under *Janus*.

Since the *Janus* decision, Plaintiff has not signed any additional union membership or dues authorization cards. See Stip. Facts ¶¶ 12, 14, 48; Exs. A, B. Therefore, he has never provided affirmative consent to the union to withhold union dues or fees. Thus, at all relevant times in this case, Plaintiff has not provided affirmative consent to Local 73 or his employee to withhold dues from his wages. In the absence of affirmative consent, any dues deducted from Plaintiff's wages both since the Court's decision in *Janus* and before the decision in Janus (limited only by the statute of limitations), were taken unconstitutionally. Therefore, Plaintiff is entitled to

declaratory relief that his signing of the union membership/union deduction card before the *Janus* decision does not constitute affirmative consent to waive his First Amendment rights under *Janus*, and a declaratory judgment that the union dues withheld from his wages were taken unconstitutionally because he did not provide affirmative consent

Although, after Plaintiff filed this lawsuit, Local 73 allowed Plaintiff to resign from the union, stopped withholding dues from Plaintiff's wages, and returned all dues that Plaintiff sought in this case, the declaratory relief that Plaintiff seeks in this case is still valid. It is well settled that where a claim is capable of repetition but will evade review, courts are empowered to issue declaratory judgments. In *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125 (1974), the Supreme Court recognized that "[i]t is sufficient…that the litigant show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." The Court pointed to *Roe v. Wade*, 410 U.S. 113 (1973), where the birth of the plaintiff's child did not moot claims regarding a right to abortion. The Court explained that even if the need for an injunction had passed, declaratory relief was still appropriate where there was "governmental action directly affecting, and continuing to affect, the behavior of citizens in our society." *Super Tire*, 416 U.S. at 125. Under the Collective Bargaining Agreement, Defendants continue to withhold union dues from employees' paychecks based on union membership/dues deduction cards signed before *Janus* without affirmative consent. *See* Stip. Facts ¶¶ 11, 13, 17, 18. This continuing direct effect on the behavior of public employees is grounds for this Court's issuance of declaratory relief.

CONCLUSION

For the forgoing reasons, the Court should grant Plaintiff's Motion for Summary Judgment and enter a declaratory judgment that the signing of the union membership/union

deduction card before the *Janus* decision does not constitute affirmative consent to waive Plaintiff's First Amendment rights under *Janus*, a declaratory judgment that the union dues withheld from his wages were taken unconstitutionally because Plaintiff did not provide affirmative consent, and attorneys' fees and costs under 42 U.S.C. § 1988.

Dated: June 11, 2019

Respectfully Submitted,

By: /s/ Jeffrey Schwab

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CERTIFICATE OF SERVICE

I, Jeffrey M. Schwab, an attorney, hereby certify that on June 11, 2019, I served Plaintiff's Memorandum of Law in Support of His Motion for Summary Judgment on Defendants' counsel by filing it through the Court's electronic case filing system.

/s/ Jeffrey M. Schwab