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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
ROCK ISLAND DIVISION

SUSAN BENNETT, Plaintiff, v. AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, AFL-CIO, et al., Defendants.	)	No. 19 CV 4087 Judge Darrow

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

INTRODUCTION

Government employees have a First Amendment right not to be compelled by their employer to pay money to a union unless the employee affirmatively consents to waive that right. Such a waiver must be freely given and shown by clear and compelling evidence. In this case, Plaintiff did not provide the affirmative consent to waive her First Amendment right to not pay money to a union. Plaintiff is an employee of Defendant Moline-Coal Valley School District No. 40 ("the School District") and was previously a member of Defendants AFSCME Council 31 ("Council 31") and AFSCME Local 672 ("Local 672") (collectively "the Union"). The union dues authorization cards that Plaintiff signed cannot constitute affirmative consent because it does not meet the Supreme Court's standard for waiving constitutional rights: First, Plaintiff's waiver was not freely given or voluntary because when she signed the union card she was given the unconstitutional choice between paying the Union as a member or paying it as a non-member. And second, the union card Plaintiff signed could not waive a known right or privilege because

at the time Plaintiff signed it, the right to not pay a union at all was not yet established and the School District and the Union did not provide Plaintiff with notice that she had a right to not pay the union. Thus, Plaintiff's First Amendment right to not pay money to a union was violated when union dues were withheld from her paychecks without her affirmative consent.

In addition, citizens enjoy a First Amendment right not to be forced by government to associate with organizations or causes with which they do not wish to associate. Yet Illinois law grants public sector unions the power to speak on behalf of employees as their exclusive representative. 115 ILCS 5/8. The Illinois Educational Labor Relations Board ("IELRB") has certified Defendant Council 31 as the exclusive representative, pursuant to 115 ILCS 5/8, for the bargaining unit consisting of certain employees of the School District, including custodial and maintenance employees. Joint Stipulated Record, ¶ 8. Defendant Kwame Raoul, in his official capacity as Attorney General of Illinois, is charged with enforcing the Illinois law referenced above. Plaintiff's rights of speech and association are violated by a government-compelled arrangement whereby Council 31 lobbies her government employer on her behalf without her permission and in ways that Plaintiff does not support.

Plaintiff brought this case under 42 U.S.C § 1983 and 28 U.S.C. § 2201(a), seeking declaratory and injunctive relief, as well as damages in the amount of the dues previously deducted from her paychecks.

Plaintiff, therefore, submits this memorandum in support of her motion for summary judgment. The court should grant the motion because the case primarily presents questions of law appropriate for summary disposition.

UNDISPUTED MATERIAL FACTS

Plaintiff and Defendants Council 31, Local 672, and the School District have stipulated to the relevant, material facts for purposes of cross-motions for summary judgment. *See* Joint Stipulated Record (Doc. 26).

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)). Plaintiff and Defendants stipulate that there are no material facts in dispute and that all the relevant questions are matters of law. For the reasons stated below, Plaintiff is entitled to the relief she seeks as a matter of law.

ARGUMENT

I. The Union and the School District violated Plaintiff's First Amendment rights by collecting dues from her without her affirmative consent. (Count I).

The Supreme Court in *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018), explained that payments to a union could be deducted from a public employee's wages only if that employee "affirmatively consents" to waive his or her right to not pay a union:

> 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).

Plaintiff did not provide affirmative consent to waive her First Amendment right to not pay money to a union. The union dues authorization cards that Plaintiff signed before the *Janus* decision (Joint Stipulated Record, ¶¶ 10-15), cannot constitute affirmative consent because they

did not meet the Court's standard for waiving constitutional rights. Plaintiff's choice was not made freely; when she began employment with the School District, she was forced into an unconstitutional choice: pay an agency fee or pay membership dues. *See* 5 ILCS 315/6(e); Joint Stipulated Record ¶ 27. She never had the option – as she was entitled to under *Janus* – to pay *nothing*. Faced with the choice between paying something for nothing and paying more for benefits she did not consider worth the cost, she decided to take the latter option. Because Plaintiff was not given a free choice, the School District and the Union could not have obtained her affirmative consent to waive her First Amendment right to not join or pay the union. Affirmative consent is required because, as the Supreme Court recognized in *Janus*, an employee who agrees to pay a union is waiving their First Amendment right not to pay a union. 138 S. Ct. at 2486.

The Supreme Court has long held that certain standards must be met in order for a person to properly waive his or her constitutional rights. First, waiver must be of a "known [constitutional] 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).

The union dues authorization cards signed by the Plaintiff fail on all these counts. She did not provide *affirmative* consent when she signed the authorization: her consent was coerced because she was given the unconstitutional choice between paying the Union as a member or paying it as a non-member. She did not waive a *known* right or privilege because *Janus* had not yet been decided. *See Curtis Pub. Co. v. Butts*, 388 U.S. 130, 144-45 (1967) (cannot waive a right before knowing of the relevant law). Nor did any Defendant ever provide notice to Plaintiff that she had a right to not join or pay the Union. Thus, at the time she signed the dues authorization, Plaintiff

did not know that she had a constitutional right to not join or pay the Union. She did not make a *voluntary* waiver because, at the time she signed the union dues authorization, she was forced into an unconstitutional choice between paying the Union as a member or paying it as a non-member.

Because the Court 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), 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. In addition, "[c]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights." *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (citing *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)). Especially given these constitutional commands for courts to err on the side of respecting rights and against waiver of rights, this Court should declare the dues deduction authorization invalid.

Defendants can find no safe harbor by claiming they were operating in accordance with pre-*Janus* case law. 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." The rule announced in *Janus* is, therefore, the relevant law when analyzing pre-*Janus* conduct.

Thus, at the time Plaintiff signed her union dues authorization, the Union and the School District needed to secure Plaintiff's *affirmative consent* for the *knowing* and *voluntary* waiver of her rights not to join a union. This the Union and the School District did not do. Because they did

not secure Plaintiff's affirmative consent, the Union could not compel her to be a member of the union or to continue to pay union dues. In other words, Plaintiff's union card is void under *Janus*. Because it is void, any dues withheld from Plaintiff before *Janus* were unconstitutional and therefore need to be returned.

Council 31 and Local 672's liability for dues paid by Plaintiff, therefore, extends backward before *Janus*; limited only, if at all, by a statute of limitations defense. *See* Joint Stipulated Record ¶ 37. Monies or property taken from individuals under statutes later found unconstitutional must be returned to their rightful owner. *Harper*, 509 U.S. at 97. 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).

Under *Harper* and these precedents, the Union has no basis to keep the monies it seized from Plaintiff's wages before the Supreme Court put an end to this unconstitutional practice. Plaintiff is entitled to a refund of her dues, and her claim is not mooted by the fact that she has been released from the union.

II. Forcing Plaintiff to associate with the Union as her exclusive representative violates Plaintiff's First Amendment rights to free speech and freedom of association (Count II).

Recognizing Council 31 as Plaintiff's exclusive representative for bargaining purposes (Joint Stipulated Record, ¶ 8) violates her First Amendment rights of speech and association. Plaintiff cannot be forced to associate with a group that she disagrees with.

Under 115 ILCS 5/8, as a condition of her employment, Plaintiff must allow the union to speak (lobby) on her behalf as her exclusive representative. The exclusive representative can then bargain on wages and hours (115 ILCS 5/10), matters that *Janus* recognizes to be of inherently public concern. 138 S. Ct. at 2473. Illinois law grants the union prerogatives to speak on Plaintiff's behalf on not only wages, but also "other conditions of employment." 115 ILCS 5/10. These are precisely the sort of policy decisions that *Janus* recognized are necessarily matters of public concern. 138 S. Ct. 2467. When IELRB certifies Council 31 to represent the bargaining unit, it forces all employees in that unit to associate with Council 31. 115 ILCS 5/8. This coerced association authorizes the Union to speak on behalf of the employees even if the employees are not members, even if the employees do not contribute fees, even if the employees disagree with the Union's positions and speech.

This arrangement has two constitutional problems: it is both compelled speech (the union speaks on behalf of the employees, as though its speech is the employees' own speech) and compelled association (the union represents everyone in the bargaining unit without any choice or alternative for dissenting employees not to associate).

Legally compelling Plaintiff to associate with Council 31 demeans her First Amendment rights. Although the issue has not been directly before the Supreme Court, it has questioned whether exclusive-representation in the public-sector context imposes a "significant

impingement" on public employees' First Amendment rights. *Janus*, 138 S. Ct. at 2483; *see Harris v. Quinn*, 134 S. Ct. 2618, 2640 (2014); *Knox v. Service Employees*, 567 U. S. 298, 310–11 (2012). Indeed, "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning. . . . [A] law commanding involuntary affirmation of objected-to beliefs would require even more immediate and urgent grounds than a law demanding silence." *Janus*, 138 S. Ct. at 2464 (2018) (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 633 (1943) (internal quotation marks omitted)). Exclusive representation forces the employees "to voice ideas with which they disagree, [which] undermines" First Amendment values. *Janus*, 138 S. Ct. at 2464. Illinois law commands Plaintiff's involuntary affirmation of objected-to beliefs. The fact that she retains the right to speak for herself in certain circumstances does not resolve the fact that Council 31 organizes and negotiates as her representative in her employment relations.

Exclusive representation is also forced association: Plaintiff is forced to associate with Council 31 as her exclusive representative simply by the fact of her employment in this particular bargaining unit. "Freedom of association . . . plainly presupposes a freedom not to associate." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). Yet Plaintiff has no such freedom, no choice about her association with Council 31; it is imposed, coerced, by the State's laws.

Exclusive representation is therefore subject to at least exacting scrutiny, if not strict scrutiny. It must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Knox*, 597 U.S. at 310. This the Defendants cannot show. *Janus* has already dispatched "labor peace" and the so-called "free-rider problem" as sufficiently compelling interests to justify this sort of mandate. 138 S. Ct. at

2465-69. And Plaintiff is not seeking the right to form a rival union or to force the government to listen to her individual speech; she only wishes to disclaim the Union's speech on her behalf. She is guaranteed that right, not to be forced to associate with the union, not to let the union speak on her behalf, by the First Amendment.

CONCLUSION

For the forgoing reasons, the Court should grant summary judgment in favor of Plaintiff.

Dated: October 18, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Jeffrey M. Schwab, an attorney, hereby certify that on October 18, 2019, I served the Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment on all counsel of record by filing it through the Court's electronic case filing system.

/s/ Jeffrey M. Schwab