UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
Harrisburg Division

GREGORY J. HARTNETT, et al.,

Plaintiffs,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION, et al.,

Defendants.

Case No. 1:17-cv-00100-YK

(Hon. Yvette Kane)

--ELECTRONICALLY FILED--

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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AND NOW COME plaintiffs, by and through their undersigned attorneys, pursuant to Fed. R. Civ. P. 56, Local Rule 7.5, and this Court Order, ECF No. 60, and present the following brief of their statements and arguments in support of their motion for summary judgment.

I. PROCEDURAL HISTORY

Plaintiffs, public school teachers and professionals, filed this 42 U.S.C.A. § 1983 action, ECF No. 1, on January 18, 2017, to challenge the constitutionality (First and Fourteenth Amendment violations) of nonmember forced fees that are automatically extracted from public employees who are not union members and the Pennsylvania statutes and nonmember forced fees provisions in collective bargaining agreements (CBA) negotiated between unions and public school districts that authorized the involuntary union deductions from plaintiffs' wages. Plaintiffs sought to have the United States Supreme Court reconsider its holding in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977), *overruled by Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018), which allowed unions to require nonmember public employees to pay forced fees to a union.

Originally, defendants included plaintiffs' respective school districts and superintendents and the state-wide and various local union associations respectively representing the plaintiffs' bargaining units.

Plaintiffs filed their First Amended Complaint on March 21, 2017, ECF No. 23, and contemporaneously dismissed the superintendents. The union defendants filed their answer on April 4, 2017, ECF No. 29. On the same day, the school district defendants filed motions to dismiss, ECF Nos. 26 & 28, which were granted on June 26, 2017, ECF No. 51, and all claims asserted against the three school district defendants were dismissed with prejudice.

On October 2, 2017, the parties jointly requested the Court to stay proceedings until after the Supreme Court decided *Janus v. Am. Fed'n of State, City, & Mun. Employees, Council 31*, No. 16-1466, which it had just been granted *certiorari*. Parties Jt. Mot. to Stay Proceedings ("Jt. Mot."), ECF No. 55. As the parties acknowledged: *Janus* "presents the exact same issue as this matter: 'should *Abood* be overruled and public-sector [forced] fee arrangements declared unconstitutional under the First Amendment?'" and "[t]he Supreme Court's ruling in the *Janus* matter is nearly certain to impact and *control* the disposition of this matter." (Emphasis added). Jt. Mot., ¶¶ 5, 7. Two days later, the Court granted the stay. Order, ECF No. 56.

On June 27, 2018, the Supreme Court: a) overruled *Abood*; b) held that automatic forced fee deductions violate the First Amendment rights of union nonmembers; and c) held "States and public-sector unions may no longer extract [forced] fees from nonconsenting employees." *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2486 (2018). *See also* Joint Notice and Request for Status Conference, ECF No. 57.

Following a status telephone conference between the Court and the parties on August 9, 2018, the Court ordered the parties to file and brief their respective dispositive motions beginning with the filing of their initial motions and supporting briefs on or before September 14, 2018. Order, ECF No. 60.

Pursuant to that Order, Plaintiffs filed a Motion for Summary Judgment, Statement of Material Facts in Support of Their Motion for Summary Judgment and this brief in support of their motion on September 14, 2018.

II. STATEMENT OF RELEVANT FACTS

Plaintiffs filed this 42 U.S.C.A. § 1983 action on January 18, 2017, ECF No. 1, to challenge the constitutionality of title 71, section 575, of the Pennsylvania Statutes ("section 575"), 71 P.S. § 575; *see also* 43 P.S. §§ 1102.1–1102.9; and those portions of the Public Employe Relations Act, 43 P.S. §§ 1101.101–1101.2301; and the Public School Code of 1949, 24 P.S. §§ 1-101–27-2702, that authorize nonmember forced fees, and the actual forced fee provisions in the respective collective bargaining agreements ("CBA") governing plaintiffs' bargaining units that required plaintiffs to pay defendants[1] and their affiliates a nonmember fee as a condition of employment which was automatically deducted from plaintiffs' wages by their respective public employers, without their consent, *see* Hartnett, Galaska, Brough & Cress Decls., ¶ 3.

[1] The union defendants act under color of state law in exercising authority under the listed Pennsylvania statutes. *See e.g., Otto v. Pennsylvania State Educ. Ass'n-NEA*, 107 F. Supp. 2d 615, 619 (M.D. Pa. 2000), *aff'd in part, rev'd in part on other grounds*, 330 F.3d 125 (3d Cir. 2003).

Plaintiffs filed their First Amended Complaint on March 21, 2017, ECF No. 23. At the time the original and amended complaints were filed, the United States Supreme Court in *Abood* had allowed such seizures of nonmember fees. Plaintiffs allege good faith reasons in their First Amended Complaint ¶¶ 37–38, 48–64, ECF No. 23, as to why they believe *Abood* was wrongly decided by the Supreme Court and why, were it to look at the issue again; the Court would determine that seizures of nonmember fees by defendants violate plaintiffs' First and Fourteenth Amendment rights.

On June 27, 2018, in a case the parties admitted was "nearly certain to . . . control the disposition of this matter," Jt. Mot., ¶ 7, ECF No. 55, the United States Supreme Court overruled *Abood* and held: a) *Abood* was wrongly decided; and b) States, public-sector employers and unions may no longer extract or deduct forced fees from nonmembers' wages, unless nonmembers affirmatively consent to pay and knowingly waive their First Amendment rights. *Janus*, 138 S. Ct. at 2460, 2478, 2486.

Under section 575, *see also* 43 P.S. § 1102.4(a), as under "the Illinois law [at issue in *Janus*], if a public-sector collective-bargaining agreement includes a [forced]-fee provision and the union certifies to the employer the amount of the fee, that amount is automatically deducted from the nonmember's wages. [Ill. Comp. Stat., ch. 5] § 315/6(e). No form of employee consent is required." 138 S. Ct. at 2486.

The material facts in this matter are not in dispute. *See* Plaintiffs' Statement of Material Facts filed herewith. Defendants admit, as they must, that they were seizing

nonmember fees from plaintiffs pursuant to the forced fee statutes and CBA provisions. Defs.' Answer ¶¶ 13–36, 66, 71, 76, ECF No. 29. The CBA forced fee provisions relevant to this matter are in the record.[2] They speak for themselves.

Although the deductions of forced fees have ceased, the statutes and CBA provisions requiring forced fees as a condition of employment still exist, more than two and a half months after *Janus*, and could be enforced and included in subsequent CBAs. Hartnett, Galaska, Brough & Cress Decls., ¶¶ 4 & 5.

III. STATEMENT OF QUESTION INVOLVED

Whether this Court should grant Plaintiffs' Motion for Summary Judgment in light of the United States Supreme Court's decision in *Janus*, 138 S. Ct. 2448?

IV. ARGUMENTS

Summary judgment is appropriate when the moving party establishes "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A dispute is "genuine" only if there is a sufficient evidentiary basis for a reasonable jury to find for the non-moving party, and a fact is "material" only if it might affect the outcome of the action under the governing law. *See Sovereign Bank v.*

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[2] Plaintiffs' respective forced fee provisions are found in the 2014-2017 Homer-Center School District and Homer-Center Education Association CBA, Article II, Section 2; 2017-2020 Homer-Center School District and Home-Center Education Association CBA, Article II, Section 2; 2016-2020 Twin Valley School District and Twin Valley Education Association CBA, Article III, Section 4; and the 2015-2020 Ellwood City Area School District and Ellwood Area Education Association CBA, Appendix E, Section 7. *See* Amended Complaint, Exhibits 1, 2, 3, ECF Nos. 23-1, 23-2, 23-3, respectively; *Hartnett* Decl., ¶ 6 & Attachment. They are true and correct copies of the CBAs at issue. Answer, ¶ 29.

BJ's Wholesale Club, Inc., 533 F.3d 162, 172 (3d Cir. 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

In advancing their positions, the parties must support their factual assertions by citing to specific parts of the record or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Here, there are no genuine disputes of material facts because all the material facts are based on the facts to which defendants admitted in their Answer to Plaintiffs' First Amended Complaint, ECF No. 29. *See* Plaintiffs' Statement of Material Facts, filed herewith, for the citations to the specific parts of the record that support these undisputed material facts.

Initially, the moving party bears the burden of demonstrating the absence of a genuine dispute of material fact, which we have done, and upon satisfaction of that burden, the nonmovant must go beyond the pleadings, pointing to particular facts that evidence a genuine dispute for trial. *See Celotex Corp.*, 477 U.S. at 324. While a court should not grant summary judgment when there is a disagreement about the material facts or the proper inferences that a factfinder could draw from them, s*ee Reedy v. Evanson*, 615 F.3d 197, 210 (3d Cir. 2010) (citations omitted), "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Layshock ex rel.*

Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 211 (3d Cir. 2011) (quoting *Anderson*, 477 U.S. at 247-48 (internal quotation marks omitted, emphasis in original).

Plaintiffs' undisputed material facts that Pennsylvania statutes and the CBAs governing their bargaining units required them and other nonunion public employees to pay forced fees to their union as a condition of employment, which their school districts automatically and without their consent deducted from their wages, properly support the granting of summary judgment for they are entitled to judgment as a matter of law that those statutes, forced nonmember fee provisions and automatic deductions from their wages violated their First and Fourteenth Amendment rights of association, free speech and free choice, as the United States Supreme Court held in *Janus*, 138 S. Ct. at 2486.

Plaintiffs and Mr. Janus are similarly situated litigants. Pennsylvania forced fee law and the Illinois law before the Supreme Court in *Janus* are extremely similar:

> Under Illinois law, [like Pennsylvania law,] public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.

Id., at 2459-60.

These similarities continued in the employers' automatic deduction of force union fees in both states.

> Under Illinois law, [like Pennsylvania law here,] if a public-sector collective-bargaining agreement includes an agency-fee provision and the union certifies to the employer the amount of the fee, that amount is automatically deducted from the nonmember's wages. No form of employee consent is required.
>
> This procedure violates the First Amendment and cannot continue. 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.

Id. at 2486 (citations omitted).

The challenged Pennsylvania statutes, CBAs and automatic deductions are equally unconstitutional and must be struck down. Although the deductions of forced fees from Plaintiffs have ceased, the statutes and CBA provisions requiring forced fees as a condition of employment still exist, more than two and a half months after *Janus*, and could be enforced and included in subsequent CBAs. These factors alone entitle plaintiffs to summary judgment and declaratory and injunctive relief.

V. CONCLUSION

For the reasons stated above and in their motion for summary judgment, plaintiffs respectfully request that this Honorable Court grant plaintiffs' motion and enter judgment in their favor that section 575; the Public Employee Fair Share Fee Law, 43 P.S. §§ 1102.1–1102.9; and those portions of the Public Employe Relations Act, 43 P.S. §§ 1101.101–1101.2301, and the Public School Code of 1949, 24 P.S. §§

1-101–27-2702, that authorize nonmember forced fees, and the actual forced fee provisions in the respective CBAs governing plaintiffs' bargaining units that required plaintiffs to pay defendants and their affiliates a nonmember fee as a condition of employment violate Plaintiffs' First and Fourteenth Amendment rights of association, free speech, and free choice, are unconstitutional, and are null and void, and a mandatory injunction issued requiring defendants to expunge the forced fee provisions in the existing CBAs governing Plaintiffs' bargaining units and not include such provisions in any subsequent CBAs.

Dated: September 14, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on September 14, 2018, I electronically filed the foregoing *Plaintiffs' Brief in Support of Their Motion for Summary Judgment* with the Clerk of Court using the Court's CM/ECF system, which will send electronic notification of said filing to all counsel of record in this matter, who are ECF participants, and that constitutes service thereon pursuant to Local Rule 5.7.

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