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

JOHN R. KABLER, JR., Plaintiff, v. UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1776 KEYSTONE STATE, *et al.*, Defendants.	**Case No. 1:19-CV-0395** (Hon. Sylvia H. Rambo) --ELECTRONICALLY FILED--

PLAINTIFF'S BRIEF IN OPPOSITION TO COMMONWEALTH DEFENDANTS' CONVERTED MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Commonwealth Defendants' motion for summary judgment fails on its face. The facts material to their motion are disputed, and there is no entitlement to judgment as a matter of law. Furthermore, Commonwealth Defendants have not carried their heavy burden to show that any prospective relief is moot, so they cannot escape on an invocation of sovereign immunity. Their motion must be denied.

COUNTER STATEMENT OF THE CASE

I. COUNTER STATEMENT OF FACTS

Since on or about April 10, 2017, Mr. Kabler has been a Commonwealth of Pennsylvania employee working as a liquor store clerk for the Pennsylvania Liquor Control Board ("PLCB"). Compl. ¶ 27, ECF No. 1; *see also* Defs.' Joint Statement of Material Facts Not In Dispute ¶¶ 1, 21, ECF No. 36 ("Defs.' Joint Statement"). Defendants United Food and Commercial Workers Union, Local 1776 Keystone State ("Local 1776") and United Food and Commercial Workers Union, Pennsylvania Wine and Spirits Council ("UFCW Council") are employee organizations representing PLCB employees under Pennsylvania's Public Employe Relations Act ("PERA"), Defs.' Joint Statement ¶¶ 4, 11, 14, and the Commonwealth has recognized them as the exclusive representative for Mr. Kabler's bargaining unit for purposes of collective bargaining, Compl. Ex. A, art. 2, at 3, 4, ECF No. 1-1. As a public employer, the PLCB is also subject to PERA. Defs.' Joint Statement ¶ 3.

Pursuant to PERA, the Commonwealth and Local 1776, through the UFCW Council, entered into a collective bargaining agreement ("CBA"), the terms of which extended from July 1, 2016, through June 30, 2019. Defs.' Joint Statement ¶¶ 11–16; Compl. Ex. A. Article 4 of the CBA contains a maintenance of membership provision, whereby employees subject to the terms of the CBA could not resign their union membership except for a 15-day window period immediately preceding the expiration of the CBA. Defs.' Joint Statement ¶¶ 17–20; Compl. Ex. A at 5. Article 4 of the CBA also contains a dues deduction provision, whereby the Commonwealth of Pennsylvania deducts union dues from employees' wages in order to transmit them to Local 1776 and/or the UFCW Council. *Id.*

When Mr. Kabler began his employment with the Commonwealth, the PLCB required him to attend two days of mandatory employee orientation, during which Defendant Rhodes gave a presentation. Second Declaration of Plaintiff John R. Kabler, Jr. ¶¶ 3–4 ("Second Kabler Decl."), ECF No. 50-3. Defendant Rhodes's presentation indicated that membership in Local 1776 was required as a condition of employment. *See id.* ¶ 4. After her presentation, Mr. Kabler then brought his unsigned union membership form back to her and told her that he was unhappy that he had to be a union member and did not want to be a member. *Id.* ¶ 5. Defendant Rhodes told Mr. Kabler that he could either be a union member or not have a job. *Id.* ¶ 5. Mr. Kabler was never told that he had the option not to be a union member and still keep

his job. *Id.* ¶ 5. He ultimately signed the membership agreement only because he believed it was required as a condition of his employment with the PLCB. *Id.* ¶ 8.

The Commonwealth withheld union dues for Union Defendants from Mr. Kabler's wages for the next two years. Declaration of Plaintiff John R. Kabler, Jr., in Support of Plaintiff's Cross Motion for Partial Summary Judgment ¶ 11 ("First Kabler Decl."), ECF No. 39-2. After the first year, Mr. Kabler learned that he had the right not to be a member of Local 1776 and, in July 2018, sent a letter to Local 1776 with a copy to the Commonwealth of Pennsylvania resigning his Local 1776 union membership. Compl. Ex. C; *see also* Defs.' Joint Statement ¶¶ 47–48. In response, the Commonwealth rejected Mr. Kabler's attempt to end his union membership and dues deductions, pointing Mr. Kabler specifically to the maintenance of membership article in the CBA and informing Mr. Kabler that due to the CBA language, he could not end his membership or dues deductions without an "exception" from Local 1776. *See* First Kabler Decl. ¶¶ 7–8; Compl. Ex. D.

II. COUNTER STATEMENT OF PROCEDURAL HISTORY

Mr. Kabler filed this action on March 6, 2019, against Union Defendants, as well as PLCB, Thomas W. Wolf, in his official capacity as the governor of the Commonwealth of Pennsylvania, Timothy Holden, in his official capacity as Chairman of the PLCB, Michael Newsome, in his official capacity as Secretary of the Pennsylvania Office of Administration, and Anna Maria Kiehl, in her official capacities as Chief Accounting Officer and Deputy Secretary for the Office of

Comptroller Operations (collectively, "Commonwealth Defendants"). Compl. ¶¶ 11–20, ECF No. 1.

After the complaint was filed, Union Defendants moved to dismiss only in part, ECF No. 15, and filed a brief in support thereof, ECF No. 21. Commonwealth Defendants also filed a motion to dismiss, ECF No. 16, an amended motion, ECF No. 17, and a brief in support thereof, ECF No. 20.

This Court converted Union and Commonwealth Defendants' respective motions to dismiss, ECF Nos. 15, 17, into motions for summary judgment and denied Mr. Kabler's request for discovery following conversion of the motions. Order, ECF No. 31. This Court also ordered Union and Commonwealth Defendants to file briefs and statements of material facts in support of their converted motions for summary judgment and ordered Mr. Kabler to file his motion for summary judgment, a brief in support thereof, and a statement of facts. *Id.*

Commonwealth Defendants filed a memorandum of law and supplemental authority. *See* Comm. Defs.' Mem. of Law in Supp. of Converted Mot. for Summ. J. and Supp'l Auth. in Supp. Thereof, ECF No. 37 ("Comm. Defs.' Mem. of Law"). Union and Commonwealth Defendants also filed a Joint Statement of Material Facts Not In Dispute, ECF No. 36. On the same day, pursuant to this Court's order, Mr. Kabler filed his cross motion for partial summary judgment requesting judgment in his favor as to Count Two of his complaint, a brief with declaration in support, and a statement of facts. *See* ECF Nos. 39–41.

On August 23, Commonwealth Defendants filed a letter correcting an error in their Memorandum of Law and made clear that, contrary to their previous representations, Mr. Kabler had never received a refund of dues deducted from his wages after his resignation letter was received. Letter from Caleb C. Enerson, DAG, ECF No. 48.

COUNTER STATEMENT OF QUESTIONS INVOLVED

1. Whether Commonwealth Defendants have carried their heavy burden to establish that this case is moot, where Mr. Kabler has received no refund of the wages Commonwealth Defendants withheld, where Defendants ceased their unconstitutional conduct only after this case was filed, and where Defendants continue to defend the challenged conduct.

2. Whether Commonwealth Defendants' motion for summary judgment should be granted where it repeatedly relies on disputed facts.

ARGUMENT

A defendant in the Third Circuit carries a "heavy, even formidable" burden to establish that a case is moot. Because Commonwealth Defendants cannot meet that burden, they cannot establish that this case is moot. Nor can Commonwealth Defendants obtain judgment as a matter of law that there were no constitutional violations in this matter; their argument relies on disputed facts, and they offer no record evidence to support their interpretation of the facts. Ultimately, the relevant law confirms the constitutional violations for which Mr. Kabler seeks relief.

I. LEGAL STANDARD

To prevail on a motion for summary judgment, the moving party must demonstrate "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). The reviewing court is to examine the record "in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Shelton v. Bledsoe*, 775 F.3d 554, 559 (3d Cir. 2015). A grant of summary judgment that is premature, done before an opportunity for discovery or without addressing a Rule 56(d) declaration, is an abuse of discretion. *See Shelton*, 775 F.3d at 559; *Doe v. Abington Friends Sch.*, 480 F.3d 252, 256 (3d Cir. 2007).

II. COMMONWEALTH DEFENDANTS HAVE NOT CARRIED THEIR BURDEN TO SHOW MOOTNESS

Because Mr. Kabler still has a live claim for damages, there is simply no basis in the record (nor do Commonwealth Defendants assert one) for a claim that there is no active case or controversy before this Court. *See Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307–08 (2012) ("A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." (internal quotations omitted)). Moreover, Commonwealth Defendants have not met their "heavy, formidable" burden of establishing that any part of Mr. Kabler's claims, including those seeking prospective relief, is moot.

The burden to demonstrate mootness, according to the Supreme Court, "is a heavy one." *L.A. Cty. v. Davis*, 440 U.S. 625, 631 (1979). Indeed, the Third Circuit has described the burden for the party alleging mootness as "'heavy,' even 'formidable.'" *DeJohn v. Temple Univ.*, 537 F.3d 301, 309 (3d Cir. 2008) (quoting *United States v. Gov't of Virgin Islands*, 363 F.3d 276, 285 (3d Cir. 2004)). "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice" unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citations omitted). In *DeJohn*, the Third Circuit concluded that a policy change made only while litigation was ongoing and a continuing defense of the constitutionality of the policy are "two factors significant" in establishing a "reasonable expectation" that the allegedly unconstitutional conduct will recur. *See DeJohn*, 537 F.3d at 309.

Here, initially, Commonwealth Defendants relied on their mistaken assertion that Mr. Kabler "has been refunded all dues from the date of his resignation" in arguing that this entire case is moot. *See* Comm. Defs.' Mem. of Law in Supp. of Converted Mot. for Summ. J. and Supp'l Auth. in Supp. Thereof 2, ECF No. 37 ("Comm. Defs.' Mem. of Law"). The truth is that Mr. Kabler has received no refund whatsoever. Decl. of John R. Kabler, Jr., In Support of Pl.'s Cross Mot. for Partial Summ. J. ¶ 12, ECF No. 39-2 ("First Kabler Decl."). Commonwealth Defendants

withheld Mr. Kabler's wages for Union Defendants from the date deductions started after he was wrongfully forced into Local 1776 membership until over a month after this lawsuit was filed. First Kabler Decl. ¶¶ 11–12. As the Commonwealth now appears to recognize, there is no basis for asserting that there is not a live controversy in this case as to damages relief. *See* Letter from Caleb C. Enerson, DAG, ECF No. 48. Accordingly, this argument fails.

As to the prospective relief in the Complaint, Commonwealth Defendants cannot sustain the "heavy, even formidable" burden of establishing that there is no reasonable expectation they will return to enforcing the maintenance of membership provision and violating Mr. Kabler's First Amendment rights. *DeJohn*, 537 F.3d at 309 (quotations omitted). Even "more important[ ]" to the mootness evaluation is the Commonwealth's ongoing defense of the constitutionality of the wrongful actions. *See id.*; Br. of Comm. Defs. in Support of Am. Mot. to Dismiss Pl.'s Compl. Pursuant to Fed. R. Civ. P. 12(b)(1) and (6) 16–17, ECF No. 20 ("Comm. Defs.' Br.").[1] Commonwealth Defendants' mootness arguments relied on assertion of a false fact they have now abandoned—that Mr. Kabler has received a refund of dues. Comm.

[1] If this is the point for which the Commonwealth Defendants cite the *Diamond* case—Plaintiff is unsure as the Commonwealth did not cite to any particular part of the case or explain its relevance—it is inapposite, as it involved challenged conduct on which the Supreme Court had ruled; here, there is no controlling Supreme Court decision and the Commonwealth Defendants continue to defend the constitutionality of the challenged statutory provisions. *See Diamond v. Pennsylvania State Educ. Ass'n*, No. 3:18-CV-128, 2019 WL 2929875, at *15–16 (W.D. Pa. July 8, 2019), ECF No. 37-2.

Defs.' Mem. of Law 2. Moreover, the fact that Commonwealth Defendants stopped participating in the unconstitutional action only after this case was filed, along with their ongoing defense of the challenged conduct, only confirms that this is a classic case of voluntary cessation and the case is not moot.

Commonwealth Defendants' contention that a new collective bargaining agreement will be stripped of all the unconstitutional provisions does not moot this case. In fact, Commonwealth Defendants simply attach a loose page that appears to be from a draft redline document, rather than a fully executed, effective collective bargaining agreement. *See* Second Decl. of Andrew Gold, Ex. F, ECF No. 35-1. This does not meet the Defendants' heavy burden to show that this case is moot due to their claim that all challenged provisions have been removed from a new collective bargaining agreement, a claim that Mr. Kabler has had no opportunity to verify. *See* Defendants' Joint Statement ¶ 65; Decl. of Nathan J. McGrath, Esq., ECF No. 50-5.

III. SOVEREIGN IMMUNITY DOES NOT APPLY TO THE CLAIMS MADE AGAINST COMMONWEALTH DEFENDANTS

Mr. Kabler does not seek damages against Commonwealth Defendants; his claims for relief against Commonwealth Defendants are only declaratory and injunctive claims, Compl., Prayer for Relief, Sections A & B, ECF No. 1. Accordingly, this Court need not dismiss Commonwealth Defendants as parties to this matter.

As Commonwealth Defendants acknowledge, sovereign immunity does not bar Mr. Kabler's claims for prospective relief against them. *See* Comm. Defs.' Br. 21.

Unless and until the prospective claims in this case are resolved, Commonwealth Defendants remain proper parties. Because a sufficient connection exists between Commonwealth Defendants and their duty to enforce maintenance of membership under the collective bargaining agreement—and because of Union and Commonwealth Defendants' decision to belatedly "confirm" Mr. Kabler's resignation from Local 1776—Commonwealth Defendants have no claim to sovereign immunity.

IV. COMMONWEALTH DEFENDANTS' THEORY HINGES ON DISPUTED FACTS

Under the Federal Rules of Civil Procedure, summary judgment is warranted only if the moving party demonstrates "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). Because Commonwealth Defendants' motion relies on disputed facts that they believe to be material to their claims and fails to apply the relevant law, it must be denied.

Counts One and Four of Mr. Kabler's complaint allege violations of his constitutional rights when he was forced into union membership upon threat of losing his employment and denied due process by the seizure of his wages following this unconstitutional coercion. It is undisputed that Mr. Kabler became a member of Local 1776 and became subject to Union and Commonwealth Defendants' maintenance of membership and dues deduction requirements. As such, it is hard to conceive of a fact more material to Count One of this case than the voluntariness of Mr. Kabler's becoming a member. Yet Commonwealth Defendants insist it is

undisputed that Mr. Kabler willingly joined Local 1776 as a member. *See, e.g.*, Comm. Defs.' Br. 10–11 (relying on statement that "Plaintiff voluntarily joined the union" in mootness argument); *id.* at 16 (asserting that Plaintiff "chang[ed] his mind regarding his union membership"). Commonwealth Defendants also claim that Mr. Kabler's wages were withheld at his "request," *id.* at 16–17, ignoring the fact that his signing of any membership agreement or dues deduction authorization would have been against his will. First Kabler Decl. ¶¶ 3, 5–11. Further, Commonwealth Defendants cite nothing in the record to support their supposedly "undisputed" material facts, *see* Comm. Defs.' Br. at 10–11, 16–17, as the Federal Rules require. *See* Fed. R. Civ. P. 56(c)(1). Because there is nothing in the record to justify Commonwealth Defendants' portrayal of these facts as undisputed or material, Commonwealth Defendants' motion for judgment on the pleadings as to any and all counts must be denied.

Commonwealth Defendants also rely on *incorrect* facts. *See* Comm. Defs.' Mem. of Law 2 (relying on the Second Declaration of Andrew Gold, ECF No. 35-1; Defendants' Joint Statement of Material Facts, ECF No. 36); Second Kabler Decl. ¶¶ 13–20. Accordingly, to the extent that this Court declines to immediately deny Commonwealth Defendants' motion, it should grant Mr. Kabler the opportunity for discovery, an opportunity all the more important here where Defendants control much of the relevant evidence and have demonstrated a cavalier approach to the truth by relying on apparent false and disputed facts. Plaintiff's counsel therefore attaches a declaration explaining the types of discovery that are necessary in order for Mr.

Kabler to have the opportunity to dispute these and other incorrect facts with evidence of record. *See* McGrath Decl.; *see also* Pl.'s Br. in Opp. to Union Defs.' Am. Mot. for Summ. J. Pursuant to Fed. R. Civ. Proc. 56(d), Section IV, ECF No. 50. "[I]t is well established that a court 'is obliged to give a party opposing summary judgment an adequate opportunity to obtain discovery.'" *Abington Friends Sch.*, 480 F.3d at 257 (quoting *Dowling v. City of Philadelphia,* 855 F.2d 136, 139 (3d Cir. 1988)). "This is necessary because, by its very nature, the summary judgment process presupposes the existence of an adequate record." *Id.* (citing Fed. R. Civ. P. 56(c)).

But even if Commonwealth Defendants' motion relied on undisputed issues of material fact, they do not establish any legal entitlement to judgment as a matter of law. Commonwealth Defendants assert their entitlement to judgment as a matter of law on Mr. Kabler's *federal, constitutional* claims by asserting repeatedly that no *state statute* was violated in Mr. Kabler's treatment. *See, e.g.*, Comm. Defs.' Br. at 5, 16–17 ("None of [the challenged] CBA provisions violate PERA or what is permitted under Commonwealth law"; "PERA specifically protects Plaintiff's right"; "PERA provides all process"). Yet that is precisely the point Mr. Kabler makes—that the state statute is unconstitutional. All Commonwealth Defendants establish, then, is that the challenged state statutes did indeed govern and that, evidently, the enforcement of state law led to violations of constitutional rights alleged in the complaint.

There can be no question that, as a matter of law, a violation of Mr. Kabler's First Amendment rights occurred if, as Mr. Kabler has established and

Commonwealth Defendants cite no record evidence to dispute, he was forced into union membership as a condition of his employment with the Commonwealth. Second Kabler Decl. ¶¶ 2–8; Compl. Ex. B; *see Otto v. Pennsylvania State Educ. Ass'n*, 330 F.3d 125, 128 (3d Cir. 2003) ("The First Amendment affords public-sector employees the freedom not to associate with a labor organization."). Similarly, Defendants provided Mr. Kabler with no meaningful notice of his constitutional rights or due process to protect his rights to refrain from joining or continuing as a union member or to prevent the seizure of funds from his wages without his consent.

Additionally, as explained at length in the Brief in Support of Plaintiff's Cross Motion for Partial Summary Judgment 9–13, ECF No. 40, forced union membership and wage withholding, as has occurred here when the Commonwealth rejected Mr. Kabler's resignation, also violates Mr. Kabler's First Amendment rights. Indeed, Chief Judge Conner has already held, in a case with nearly identical facts, that a plaintiff challenging the "maintenance of membership" provision in Pennsylvania law is likely to demonstrate a violation of his constitutional rights. *See McCahon v. Pennsylvania Tpk. Comm'n*, 491 F. Supp. 2d 522, 526–28 (M.D. Pa. 2007) (holding that maintenance of membership posed a "real or immediate danger" to the "First Amendment right not to associate"). Because Commonwealth Defendants thus cannot establish as a matter of law that Mr. Kabler's constitutional rights were not violated, their request for summary judgment fails.

CONCLUSION

Commonwealth Defendants have not carried their burden to demonstrate that this case is moot. Moreover, their motion hinges on disputed facts, and they fail to demonstrate entitlement to judgment on the merits. Accordingly, granting summary judgment in Commonwealth Defendants' favor would be inappropriate at this stage in the proceedings, even more so where Mr. Kabler has not yet had the opportunity for discovery. For the reasons stated above, Commonwealth Defendants' motion should be denied.

Dated: August 30, 2019

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT COMPLIANCE

I, the undersigned, certify that the foregoing brief complies with the word count limit of Local Rule 7.8(b)(2). This brief contains 3,404 words, as calculated by the word processing system used to prepare this brief.

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on August 30, 2019, I electronically filed the foregoing with the Clerk of Court using the Court's CM/ECF system, which will send electronic notification of the 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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