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--

BRIEF IN SUPPORT OF PLAINTIFF'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

This 42 U.S.C. § 1983 civil rights action arises, in part, because Defendants refused to accept and recognize Plaintiff John R. Kabler, Jr.'s, July 17, 2018 resignation from Defendant United Food and Commercial Workers Union, Local 1776 Keystone State ("Local 1776") and its affiliates. Instead, Defendants continued to consider Plaintiff a union member and to seize union dues from his wages for nearly nine months after he resigned.

As Chief Judge Conner has already held in a case with nearly identical facts, a plaintiff who, as here, challenges a "maintenance of membership" provision is likely to demonstrate that his constitutional rights have been violated. *See McCahon v. Pennsylvania Tpk. Comm'n*, 491 F. Supp. 2d 522, 526–28 (M.D. Pa. 2007). Indeed, Plaintiff has so demonstrated. As shown in Plaintiff's cross motion for partial summary judgment and this accompanying brief, Defendants violated Plaintiff's First and Fourteenth Amendment rights by refusing to honor his resignation and by continuing to seize full union dues from his wages pursuant to a "maintenance of membership" provision for which Defendants collectively bargained with the blessing of state law.

Because there are no disputed facts relevant to this claim and Plaintiff is entitled to judgment as a matter of law, this Court should grant partial summary judgment in Plaintiff's favor as to Count Two of his Complaint and award compensatory and nominal damages as well as reasonable attorneys' fees and costs.

STATEMENT OF THE CASE

I. RELEVANT PROCEDURAL HISTORY

Plaintiff filed this action on March 6, 2019, against Defendants Local 1776, United Food and Commercial Workers Union, Pennsylvania Wine and Spirits Council ("UFCW Council"), Wendell W. Young, IV, in his individual and official capacity as president of Local 1776, Peg Rhodes in her individual and official capacity as vice president of Local 1776, and Michele L. Kessler in her individual and official capacity as Secretary-Treasurer of Local 1776 (collectively "Union Defendants"); and the Commonwealth of Pennsylvania, Pennsylvania Liquor Control Board ("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; *see also* Union Defs.' Br. in Supp. of Their Mot. to Dismiss Pl.'s Compl. Pursuant to Fed. R. Civ. P. 12(b)(1) & 12(b)(6) ("Union Br.") 1, ECF No. 21; Br. of Commonwealth Defs. in Supp. of Am. Mot. to Dismiss Pl.'s Compl. Pursuant to Fed. R. Civ. P. 12(b)(1) & (6) ("Commonwealth Br.") 1, ECF No. 20. All Defendants were served via process server on March 7, 2019. Affs. of Serv. of Summons, ECF No. 3.

After two extensions of time were granted by this Court for Defendants to file their responses to Plaintiff's Complaint, *see* ECF Nos. 9, 14, Union Defendants filed their Motion to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) on May 6, 2019, ECF No. 15 ("Union Mot."), and their brief in support thereof on May 20, 2019, ECF No. 21. Commonwealth Defendants also filed a Motion to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12(b) on May 6, 2019, ECF No. 16, an Amended Motion to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12(b) on May 7, 2019, ECF No. 17 ("Commonwealth Am. Mot."), and their brief in support thereof on May 17, 2019, ECF No. 20.

On May 22, 2019, this Court entered a show cause order, in which it ordered all parties to show cause "as to why Defendants' motions to dismiss . . . should not be converted . . . into motions for summary judgment." Order, ECF No. 22. All parties timely filed responses to this Court's show cause order. ECF Nos. 26, 27, 28.

On June 27, 2019, this Court converted Defendants' motions to dismiss, ECF Nos. 15, 17, into motions for summary judgment, denied Plaintiff's request for limited discovery after the conversion of said motions, ordered Defendants to file briefs and statements of material facts in support of their converted motions for summary judgment by July 19, 2019, and ordered Plaintiff to file his motion for summary judgment, a brief in support thereof, and a statement of facts, also by July 19, 2019. Order, ECF No. 31.

II. STATEMENT OF RELEVANT FACTS

Since on or about April 10, 2017, Plaintiff has been a Commonwealth of Pennsylvania employee working as a liquor store clerk for the PLCB. Compl. ¶ 27; *see also* Union Br. 1, 5; Commonwealth Br. 3, 5.

Local 1776 and the UFCW Council are employee organizations under PERA, Union Br. 2–3, and Local 1776 is Plaintiff's exclusive representative 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. Commonwealth Br. 3. PERA authorizes employee organizations and public employers to enter into collective bargaining agreements that force union members to maintain their union memberships and that limit members' ability to resign to a 15-day window period immediately preceding the expiration of a collective bargaining agreement. PERA also allows collective bargaining agreements to obligate the public employer to deduct union dues and fees from public employees' wages and forward said deductions to the employee organizations. *See* Compl. ¶¶ 24–26; *see also* Union Br. 3–5; Commonwealth Br. 4.

Pursuant to PERA, the Commonwealth of Pennsylvania 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. Union Br. 2–3; Commonwealth Br. 1, 4; 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. Union Br. 3–4; Commonwealth Br. 4–5; 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. Union Br. 2–5; Commonwealth Br. 5; Compl. Ex. A at 5. Plaintiff's employment position with the Commonwealth as a liquor store clerk for the PLCB is subject to the terms and conditions of employment set forth in the CBA. Union Br. 3; *see* Commonwealth Br. 3–5.

On or about July 17, 2018, Plaintiff sent a letter to Local 1776 with a copy to the Commonwealth of Pennsylvania resigning his union membership in Local 1776. Compl. Ex. C; *see also* Union Br. 6; Commonwealth Br. 5–6. A PLCB official responded in writing to Plaintiff's resignation letter on July 25, 2018, and stated that "the [CBA] only allows for employees to withdrawal [sic] membership during the 15 day period prior to the expiration of the [CBA] (June 16-30, **2019**). You can refer to Article 4 of the [CBA] for the specific language. Therefore, we are unable to process your request unless we are informed that UFCW is making an exception to this language." Compl. Ex. D; Declaration of Plaintiff John R. Kabler, Jr., in Support of Plaintiff's Cross Motion for Partial Summary Judgment ¶¶ 7–8 ("Kabler Decl."); *see also* Union Br. 6.

Neither Local 1776, UFCW Council, nor any UFCW union official responded in writing to or honored Plaintiff's union membership resignation letter until nearly a

month after this action was filed—and approximately 259 days after Plaintiff sent his July 17, 2018 resignation letter. On or about April 2, 2019, Local 1776 president, Defendant Young, wrote in a letter to Plaintiff that Plaintiff's resignation would be honored and union dues would cease to be deducted from his wages as of April 10, 2019. *See* Union Br. 6; Commonwealth Br. 5–6. To date, Union Defendants have not refunded to Plaintiff union dues seized from his wages from the date of his resignation to the date Union Defendants chose to honor his resignation. Kabler Decl. ¶ 12.

STATEMENT OF QUESTION INVOLVED

Whether Defendants' maintenance of membership CBA provisions, which mandated Plaintiff's continued union membership and payment of union dues despite his resignation, and the Pennsylvania statutes that authorize those provisions, infringed Plaintiff's constitutional rights in violation of the First and Fourteenth Amendments to the United States Constitution.

ARGUMENT

Summary judgment should be granted as to Count Two of Plaintiff's Complaint. There are no genuine disputes of material facts because all the material facts underlying Plaintiff's claims in Count Two are based on the facts that are beyond dispute and on which Defendants have relied in their pleadings and supporting briefs and other documents. And Plaintiff is clearly entitled to judgment on Count Two as a matter of law. *See McCahon*, 491 F. Supp. 2d at 526–28.

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. 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, by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or by showing that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Initially, the moving party bears the burden of demonstrating the absence of a genuine dispute of material fact, 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, *see Reedy v. Evanson*, 615 F.3d 197, 210 (3d Cir. 2010), "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).

I. ALL FACTS MATERIAL TO COUNT TWO ARE INDISPUTABLE: PLAINTIFF WAS FORCED TO REMAIN A MEMBER OF LOCAL 1776 AND ITS AFFILIATES AND PAY UNION DUES AGAINST HIS WILL

The undisputed facts underlying Count Two of Plaintiff's Complaint are straightforward and not in dispute. Plaintiff, as a Commonwealth of Pennsylvania employee and his employment position at the PLCB, is subject to the terms and conditions of the CBA entered into between his employer and his union. Compl. ¶ 27; Union Br. 1, 3, 5; Commonwealth Br. 3–5. Article 4 of the CBA contains a maintenance of membership provision, which is authorized by Pennsylvania law and purports to prohibit union members from resigning their union membership except during the final 15 days in the term of the CBA. Union Br. 3–4; Commonwealth Br. 4–5; *see* Compl. ¶¶ 1, 22–24; Compl. Ex. A. Article 4 of the CBA also authorizes Plaintiff's employer, the Commonwealth of Pennsylvania, to deduct union dues from Plaintiff's wages and remit those dues to the union. *See id.*

No longer wanting to be a union member, on July 17, 2018, Plaintiff sent his union membership resignation to Local 1776, with a copy to his employer, and stated that he was resigning his union membership. Compl. Ex. C; *see also* Union Br. 6; Commonwealth Br. 5–6. In response, his employer stated that, because of the CBA, he could only resign during the 15-day window period immediately preceding the expiration of the CBA and that he could not be let out of the union unless UFCW

made an exception for him. Compl. Ex. D; Kabler Decl. ¶¶ 7–8; *see also* Union Br. 6. Neither Local 1776, UFCW Council, nor any other UFCW official accepted and honored Plaintiff's membership resignation until April 2, 2019, when Local 1776 president, Defendant Young, sent a letter to Plaintiff stating that Plaintiff's resignation would be honored and that union dues deductions would cease from Plaintiff's wages effective April 10, 2019. *See* Kabler Decl. ¶¶ 9–10; Union Br. 6; Commonwealth Br. 5–6. From the date of Plaintiff's resignation letter, July 17, 2018, until April 10, 2019, his employer continued to deduct union membership dues from his wages. Kabler Decl. ¶ 11. None of those dues have been refunded. Kabler Decl. ¶ 12.

These undisputed facts properly support the ability of this Court to grant partial summary judgment on Count Two of the Complaint, based on the issue of law discussed below.

II. DEFENDANTS' ACTIONS, IN CONCERT UNDER COLOR OF STATE LAW, VIOLATED PLAINTIFF'S CONSTITUTIONAL RIGHTS BY COMPELLING ONGOING ASSOCIATION AND FINANCIAL SUPPORT OF LOCAL 1776'S AND ITS AFFILIATES' SPEECH

"The First Amendment affords public-sector employees the freedom not to associate with a labor organization." *Otto v. Pennsylvania State Educ. Ass'n*, 330 F.3d 125, 128 (3d Cir. 2003). Two federal courts have already recognized that freedom in the context of maintenance of membership. Chief Judge Conner, in a Middle District of Pennsylvania case involving a claim nearly identical to Plaintiff's Count Two, held that maintenance of membership posed a "real or immediate danger' to [the] First

Amendment right not to associate" and found that the plaintiffs were likely to succeed in establishing a constitutional violation. *McCahon*, 491 F. Supp. 2d at 528. Similarly, in *Debont v. City of Poway*, another federal court found the plaintiff likely to succeed on his First Amendment claim that maintenance of membership was unconstitutional, noting, "I can think of very few provisions that would appear, at least facially, . . . to strike so directly into the heart of the First Amendment." No. 98CV0502-K(LAB), 1998 WL 415844, at *6 (S.D. Cal. Apr. 14, 1998) (opinion attached hereto). As the court there explained, "[t]he refusal to allow [plaintiff] to resign and cease paying dues may well constitute a requirement that he support an ideological cause which he opposes." *Id.* at *5.

The maintenance of membership provision Plaintiff challenges in this action is nearly identical to the resignation restrictions at issue in *McCahon* and *Debont*. Like the plaintiffs in *McCahon* and *Debont*, the "maintenance of membership" provision contained in article 4 of Defendants' CBA and authorized by state law compelled Plaintiff's association and speech in the form of financial support against his will, violating his constitutional rights.

The United States Supreme Court's First Amendment jurisprudence in this area has long recognized that both forced financial support of and affiliation with a union implicate a public-sector employee's First Amendment rights. The Supreme Court addressed both aspects of this First Amendment infringement just recently in *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, noting that

"[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning . . . [and c]ompelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns." 138 S. Ct. 2448, 2464 (2018). *Accord Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 302–03 (2012) ("The First Amendment . . . does not permit a public-sector union to adopt procedures that have the effect of requiring objecting nonmembers to lend the union money to be used for political, ideological, and other purposes not germane to collective bargaining."); *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 301 (1986); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–35 (1977) ("The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights."), *overruled on other grounds by Janus*, 138 S. Ct. 2448.

Indeed, "[a] significant impingement on First Amendment rights occurs when public employees are required to provide financial support for a union that takes many positions during collective bargaining that have powerful political and civic consequences." *Janus*, 138 S. Ct. at 2464. And public employees may also object to the union's stance on many topics outside of the collective bargaining context: "In addition to affecting how public money is spent, union speech in collective bargaining addresses many other important matters," with unions expressing views on "education, child welfare, healthcare, and minority rights," among others. *Id.* at 2475. The Third Circuit has likewise recognized that "[t]he First Amendment affords public-

sector employees the freedom not to associate with a labor organization." *Otto*, 330 F.3d at 128.

These First Amendment rights apply to union members and nonmembers alike, as courts addressing challenges to maintenance of membership provisions have recognized. Chief Judge Conner acknowledged in *McCahon* that, "[a]lthough *Otto* and other similar cases involve *non*-members' First Amendment right not to associate, the court finds that plaintiffs are reasonably likely to succeed in extending this right to union members who are unable to resign unilaterally because of a 'maintenance of membership' provision." 491 F. Supp. 2d at 527. In *Debont*, which involved a nearly identical provision, the court similarly found that a plaintiff's First Amendment rights were implicated whether he was a union member or not, concluding that "it is clear that Plaintiff's First Amendment rights are at issue and may be unconstitutionally infringed by the . . . requirement that he remain a member of the union until the expiration of the agreement." *Debont*, 1998 WL 415844, at *3.

The Supreme Court also recognized the possible harm to union members who come to disagree with their union but are forced to remain members in *Pattern Makers' League of North America, AFL-CIO v. NLRB*, 473 U.S. 95 (1985), which both the *McCahon* and *Debont* courts cited. *See McCahon*, 491 F. Supp. 2d at 527; *Debont*, 1998 WL 415844, at *5 (finding the principle in *Pattern Makers'* to be "instructive"). In *Pattern Makers'*, which involved private-sector employees, the Supreme Court observed that "[t]raditionally, union members were free to resign and escape union

discipline," and ultimately held that, under the National Labor Relations Act, "[f]ull union membership" could no longer "be a requirement of employment," as the Act "protects the employee whose views come to diverge from those of his union." 473 U.S. at 102 & n.11, 106.

Here, in essence, Defendants' maintenance of membership article forces Plaintiff and other employees to remain union members against their will for nearly the life of the CBA—up to three years—with Plaintiff's only recourse being to resign his employment. *See McCahon*, 491 F. Supp. 2d at 527 ("[T]he 'maintenance of membership' provision locks plaintiffs into union membership for the duration of the CBA—the only way plaintiffs can resign from the union is to leave their employment."). This resulted in Plaintiff's compelled association with a private organization with which he disagreed, Kabler Decl. ¶ 5, and, adding insult to injury, forced payment of union membership dues during the entire time that Defendants refused to accept and honor his resignation request. Plaintiff's wages forcibly collected from him against his will were able to be used for "*any* purpose," including ideological or political causes with which Plaintiff may disagree. *McCahon*, 491 F. Supp. 2d at 527. Defendants' forced-unionism requirement thus implicates fundamental aspects of Plaintiff's rights; it locked him into membership in a private organization with which he disagreed, forced him to remain affiliated with it, and compelled his financial support of its activities and speech, all under the color of state law.

In sum, state-mandated association with and financial support of a private organization and its speech violates the fundamental constitutional rights of freedom of speech and association. Because article 4 of Defendants' CBA explicitly imposes such a requirement, as authorized by PERA, 43 P.S. §§ 1101.101–1101.2301, it is unconstitutional and unenforceable, as are PERA's provisions authorizing maintenance of membership, and Plaintiff is entitled to partial summary judgment in his favor on Count Two of his Complaint.

CONCLUSION

Because there are no disputed issues of material fact relevant to Count Two, and because Plaintiff's forced membership in Local 1776 violated his constitutional rights, this Court should grant his motion for partial summary judgment as to Count Two of his Complaint and further order all relief he has requested in his motion for partial summary judgment.

Dated: July 19, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on July 19, 2019, I electronically filed the foregoing brief and attachment 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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