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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

Thomas Few,
Plaintiff

v.

United Teachers of Los Angeles; Austin Beutner, in his official capacity as Superintendent of Los Angeles Unified School District; Xavier Becerra, in his official capacity as Attorney General of California,
Defendants.

Case No. 2:18-cv-09531-JLS-DFM

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Hearing Date: December 13, 2019
Time: 10:30 am[1]
Location: Courtroom 10A
Judge: Hon. Josephine L. Staton

[1] The Parties waived oral argument. *See* Dkt. 75.

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INTRODUCTION

Plaintiff, Thomas Few, submits this Opposition to the Motion for Summary Judgment filed by Defendant United Teachers of Los Angeles ("UTLA" or the "Union") (Dkt. 72-1) ("UTLA MSJ"). In his own Memorandum in Support of Plaintiff's Motion for Summary Judgment (Dkt. 73-1) ("Plaintiff MSJ"), Few anticipated and addressed many of the arguments UTLA makes in its motion; therefore, Few incorporates the previous memorandum and here focuses on those additional issues which require elaboration, in order to minimize duplicative argumentation for the Court.

Few's First Amended Complaint (Dkt. 38) ("FAC") asserts two claims. Count I states that UTLA's taking of union dues from Few without his affirmative consent violated his rights to free speech and freedom of association. *See* FAC ¶¶ 2, 46. Count II, challenging exclusive representation, has been dismissed by this Court. *See* Dkt 63. Few and UTLA agree that there are no genuine issues of material fact as to Count I and that it is appropriate for the Court to resolve this case as a matter of law. UTLA MSJ at 1; Plaintiff MSJ at 9.

ARGUMENT

I. UTLA cannot evade the jurisdiction of this court by ending its unconstitutional actions after being sued.

First, UTLA asserts that its decision to voluntarily cease deducting union dues from Few after being sued is sufficient to avoid judicial review of its unlawful conduct. Few concedes that UTLA's actions have made the issuance of an injunction as to Few moot. However, the voluntary cessation of challenged conduct does not render declaratory relief moot.

Few anticipated this argument and addressed it at length in his own motion. Plaintiff MSJ at 11-13. When a defendant attempts to evade judicial review of its actions by enforcing them against all parties except for those who file suit and then changing its actions after the filing of a lawsuit, the court retains jurisdiction to consider the merits: "[A] defendant cannot automatically moot a case simply by ending its unlawful conduct

once sued." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U. S. 283, 289 (1982)).

Recently, the Ninth Circuit, when faced with the same argument regarding the same underlying claim, held that the case was not moot because these "are the sort of inherently transitory claims for which continued litigation is permissible." *Fisk v. Inslee*, 17-35957, 2018 U.S. App. LEXIS 35317, at *2 (9th Cir. Dec. 17, 2018). While UTLA restates the general concept that a case can become moot when there's no ongoing injury, its analysis fails to refute the well-established exception that the Ninth Circuit, in *Fisk*, recognized applies to this case. UTLA MSJ at 8-9. In *Fisk*, union members also filed suit to end their dues deductions prior to the opening of their annual window to withdraw from the union. The conclusion of the Ninth Circuit is reasoned and plain: "claims regarding the dues irrevocability provision would last for at most a year," and the Ninth Circuit recognized that "even three years is 'too short to allow for full judicial review.'" *Id.* (quoting *Johnson v. Rancho Santiago Cmty. Coll. Dist*., 623 F.3d 1011, 1019 (9th Cir. 2010)). This holding of the Ninth Circuit is directly on point and resolves the argument in Plaintiff's favor.

Next, UTLA argues that there must be a "reasonable possibility the conduct Plaintiff challenges could recur." UTLA MSJ at 9. But UTLA's argument is not consistent with how the Supreme Court has addressed the doctrine of mootness. For example, Jane Roe was not required to submit an affidavit asserting that she would experience a future unwanted pregnancy in *Roe v. Wade*, 410 U.S. 113, 125 (1973). Similarly, union members in *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012) could not say they would be subject to a future special assessment by the union, but the case was determined to be justiciable even after the union had sent notice of a full refund of the assessment.

For these reasons, the Court should find that Few's claims constitute an ongoing case or controversy.

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II. UTLA is not entitled to summary judgment on Plaintiff's claim for damages.

UTLA mistakenly asserts that Few "voluntarily" entered into an agreement to pay union dues. UTLA MSJ at 11. Quite the contrary, Few was mandated by a state law that has now been ruled unconstitutional to either pay union dues or pay their virtual equivalent in agency fees. *See* Plaintiff MSJ at 9-13.

A. UTLA cannot rely on an unconstitutional contract to support its exaction of dues.

i. The union agreement does not represent a sufficient waiver of constitutional rights.

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).

In Few's case, he could not have waived his First Amendment right to not join or pay a union. First, Few could not have voluntarily, knowingly, and intelligently waived his rights not to join or pay a union because neither the Union nor Superintendent Beutner informed him he had a right not to join the union. Second, at the time Few signed his union membership application, he did not know about his rights not to pay a union because the Supreme Court had not yet issued its decision in *Janus*. Therefore, Few had no choice but to pay the Union, and did not voluntarily waive his First Amendment rights.

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. 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)).

The union application Few signed did not provide a clear and compelling waiver of his First Amendment right not to join or pay a union because it did not expressly state that he had a constitutional right to pay nothing to the Union and because it did not expressly state that he was waiving that right.

After the decision in *Janus*, the Union maintains that Few could only withdraw his dues deduction during an arbitrary time period of the Union's choice, despite Few's repeated requests to be removed from the union rolls and to stop the dues deduction from his paychecks.

The invalid union dues authorization application signed by Few before the Supreme Court's decision in *Janus* cannot meet the standards set forth for waiving a constitutional right, as required by the Supreme Court in *Janus*; therefore, the Union cannot hold Few to the time window to withdraw his union membership set forth in the union application.

Since the time he was apprised of his constitutional rights by the *Janus* decision, Few has not signed any additional union authorization applications. Therefore, Few has never been given his constitutional right to pay nothing to the Union, and has never given the Union the "affirmative consent" required by the *Janus* decision.

ii. The union agreement was based on a mutual mistake of law.

In addition to not representing a sufficient waiver under *Janus*, the union agreement was likewise based on a mutual mistake of law. Few has already addressed this point in his own motion. *See* Plaintiff MSJ at 13-15. He here reiterates the key points.

California expressly recognizes the doctrine of mutual, or "bilateral," mistake by statute. Cal. Civ. Code § 1578. "A mistake of law arises from '[a] misapprehension of the law by all parties, all supposing that they knew and understood it, and all making

substantially the same mistake as to the law.'" *Harris v. Rudin*, 95 Cal. App. 4th 1332, 1339, 116 Cal. Rptr. 2d 552, 557 (2002) (quoting § 1578); *see also Kurwa v. Kislinger*, 4 Cal. 5th 109, 117, 226 Cal. Rptr. 3d 328, 334, 407 P.3d 12, 17 (2017) (citing *Harris* for the proposition that "the parties' lack of knowledge that a crucial statute had been amended could constitute a mistake of law that would justify rescinding a settlement agreement"). "As a general rule, a mistake of this sort constitutes grounds for unwinding the transaction and giving the parties the chance to make a new run at the problem." *Kurwa*, 4 Cal. 5th at 117.

Likewise, the Ninth Circuit has explained that "[t]he law has long recognized that it is unjust to permit either party to a transaction, in which both are laboring under the same mistake, to take advantage of the other when the truth is known. To the extent feasible, the law seeks to return the parties to their original positions." *Gayle Mfg. Co. v. Fed. Sav. & Loan Ins. Corp.*, 910 F.2d 574, 582 (9th Cir. 1990) (citing *Hannah v. Steinman*, 159 Cal. 142, 146-47, 112 P. 1094, 1096 (1911) (*en banc*); *Benson v. Bunting*, 127 Cal. 532, 537, 59 P. 991, 992 (1900); *Guthrie v. Times-Mirror, Co.*, 51 Cal. App. 3d 879, 884, 124 Cal. Rptr. 577, 580 (Ct. App. 1975). Restatement (Second) of Contracts § 152 (1979); 3 Corbin on Contracts § 616 (1960); 13 Williston on Contracts § 1549 at 135 (3d ed. 1970)). It is for this reason that § 1578 "allows for rescission of a contract where consent to the contract was obtained through mutual mistake of law." *Gayle Mfg. Co.*, 910 F.2d at 582 n.5.

The "mutual mistake of law" doctrine applies to the circumstances of this case. Both Few and UTLA were laboring under the same mistake at the time the contract was ostensibly formed—that they were permitted to take money from him whether he signed the application or not. This misapprehension of law by all parties was an assumption all the parties thought they knew, and they assumed that it would continue to govern their actions. Yet the Supreme Court's clarification in *Janus* now frustrates the purposes toward which the parties all made the same mistake. As the Ninth Circuit held in *Gayle Mfg. Co.*, "it is unjust to permit" UTLA "to take advantage of" Few, now that "the truth is known." *Id*. at 582. Instead, "the law [should] return the parties to their original positions" prior to Few

signing the union application. *Id*. This Court should find that the mutual mistake that agency fees were permissible renders the claimed contract unenforceable.

B. UTLA's actions in concert with the public school district constitute state action.

UTLA asserts that actions taken by government officials pursuant to a state statute do not constitute state action. UTLA MSJ at 16-18. When government officials use the government payroll system to deduct dues from government-issued paychecks of government employees, that is the very definition of state action required for a suit brought under 42 U.S.C. § 1983. Moreover, the time window limitations that UTLA is enforcing are asserted pursuant to state statutes that expressly grant UTLA this special privilege. *See* Cal. Gov't Code § 3543.1 and Cal. Educ. Code § 45060 and § 45168.

Another opinion from this same district, upon which UTLA otherwise relies, expressly disagreed with the same argument UTLA is now making. *See O'Callaghan v. Regents of Univ. of Cal.*, 2019 WL 2635585, at *9 (C.D. Cal. June 10, 2019). In *O'Callaghan,* Plaintiffs were also government workers seeking to end their union dues deductions prior to the union's withdrawal time window. Judge Selna found "that this qualifies as joint action because the state is facilitating the allegedly unconstitutional conduct Plaintiffs complain of through the state's involvement with a private party." *Id.* (quoting *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 995 (9th Cir. 2013)) (internal quotation marks omitted). Moreover, the Seventh Circuit, likewise, disagreed with UTLA's argument, finding state action in the ongoing post-Supreme Court litigation in the *Janus* case itself. *Janus v. ASFCME Council 31*, No. 19-1553, ECF No. 31, at *15 (7th Cir. Nov. 5, 2019). In that case, Janus is seeking a return of the union fees that the Supreme Court held to be unconstitutional. The Seventh Circuit found that the union deductions constituted state action.

In fact, the Supreme Court has gone much further to impart state action to unions in cases of unconstitutional dues deductions. This Court need look no further than the Supreme Court's *Janus* decision, in which the union's deduction of agency fees constituted state

action. An even more extreme example is the case of *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), which held that a private debt collector's actions constituted state action under § 1983. In that case, the Court also struck down an unconstitutional state statute because the private parties "invok[ed] the aid of state officials to take advantage of state-created attachment procedures." *Id.* at 934. In the present case, UTLA has also invoked the aid of government officials to take advantage of a state labor statutory scheme to withdraw these dues. Local government officials followed and state officials continue to enforce Cal. Gov't Code § 3543.1 and Cal. Educ. Code § 45060 and § 45168, which permitted UTLA to keep Few stuck as a member of the union. Government officials carrying out these state statutes constitutes state action under § 1983, and the question of whether such action is constitutional is properly before this Court.

Among the tests for state action, "'Joint action' exists where the government affirms, authorizes, encourages, or facilitates unconstitutional conduct through its involvement with a private party." *Ohno v. Yasuma*, 723 F.3d 984, 996 (9th Cir. 2013). In this case, the government has affirmed, authorized, and facilitated the deduction of dues from Few's paychecks. Superintendent Beutner and the Union negotiated the contractual terms by which they would take members' dues, and Beutner carried out the Union's instructions.

Adopting UTLA's position on state action would require this Court to overturn a host of Supreme Court decisions on the subject. In *Knox v. SEIU*, union exactions were held to be a First Amendment violation with requisite state action. 567 U.S. 298, 315 (2012). Likewise, union accounting of chargeable and non-chargeable expenses from state employees amounted to state action in *Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 (1986). UTLA's argument would even mean that *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977), which *Janus* overturned, was likewise a mistake, because there could have been no First Amendment question presented to the Court if the union exaction had not constituted state action. Few humbly submits that the Court should find that decades of Supreme Court cases applying First Amendment standards to public sector unions were not in error.

C. Plaintiffs claim for pre-June 4, 2018 dues remains a live controversy.

Finally, UTLA argues that Few's claim for dues for the period after June 4, 2018 do not represent a live controversy. Plaintiff concedes that those particular damages are no longer at issue. Plaintiff's claim for pre-June 4, 2018 damages remains a live controversy. UTLA does not seem to claim otherwise. In fact, UTLA seems to admit these dues represent a live controversy elsewhere in their motion. *See* UTLA MSJ at 10 ("Further, the First Amendment issues will not evade review because Plaintiff is also seeking retrospective relief").

In his First Amended Complaint, Plaintiff seeks a return of the union dues unconstitutionally taken from him since the commencement of his employment by the school district in August 2016. FAC (Dkt. 38) at 12, ¶ f. The 21 months from August 2016 until June 2018 resulted in approximately $1,806 in union dues unconstitutionally taken from Few. According to the Joint Statement of Undisputed Facts, "LAUSD deducted union dues of approximately eighty-six dollars ($86) per month from Few's paychecks and remitted them to UTLA." JSUF (Dkt. 71) at ¶ 13.[2] This $1,806 claim for damages constitutes an ongoing case or controversy for which Few is entitled to Summary Judgment.

CONCLUSION

For the forgoing reasons, this Court should deny UTLA's Motion for Summary Judgment and grant Few's Motion for Summary Judgment.

Dated: November 8, 2019

Respectfully submitted,

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[2] Even if the Court were to find applicable the California statute of limitations on § 1983 claims, *Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir. 2001), the amount in controversy would still constitute $602.

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