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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

Isaac Wolf,

Plaintiff,

v.

University Professional & Technical Employees, Communications Workers of America Local 9119 et al.,

Defendants.

Case No. 3:19-cv-02881-WHA

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Hearing date: September 3, 2020
Time: 8:00 A.M.
Courtroom: 12
Judge: Hon. William Alsup

Action Filed: May 24, 2019

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INTRODUCTION

Government employees have a First Amendment right not to join or pay any fees to a union "unless the employee affirmatively consents" to do so. *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018). Plaintiff, Isaac Wolf, notified Defendant University Professional and Technical Employees, Communications Workers of America Local 9119 ("UPTE" or the "Union") that it did not have his affirmative consent to withdraw union dues from his paychecks. He likewise requested that his employer, the University of California, represented in this case by University President Janet Napolitano, cease taking dues from his paycheck.[1] These requests were denied. Instead, the Union and University insisted that Wolf would have to wait to exercise his First Amendment right not to pay union dues until an opt-out period determined by the Union.

Wolf brought this case under 42 U.S.C § 1983 and 28 U.S.C. § 2201(a), seeking damages in the amount of the dues previously deducted from his paychecks and declaratory relief.[2] Wolf now submits this Memorandum in support of his Motion for Summary Judgment, asking the Court to award him damages in the amount of union dues previously deducted from his paychecks and to declare that the withdrawal policies to

[1] During the pendency of this action, Wolf recently left his employment at the University of California and is not currently a member of the bargaining unit represented by UPTE. His claim for damages has never been satisfied; therefore, he retains standing to pursue this action.

[2] Because Wolf's claim in this case necessarily call into question the constitutionality of the statutes of the State of California pursuant to which his money was taken, including Cal. Gov't Code §§ 1157.12, 3513(i), 3515, 3515.5, and 3583, Wolf also joined the Attorney General in this action as a necessary party. UPTE relied on these statutes, and the state action of his employer Defendant Napolitano, to take Wolf's money from his paycheck renders that joint action reasonably attributable to the state, since a "procedural scheme created by . . . statute obviously is the product of state action" and "properly may be addressed in a [S]ection 1983 action." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982). "[W]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988).

which he was subject constituted a violation of his First Amendment Rights. The Court should grant the Motion because the case primarily presents questions of law appropriate for summary disposition, and Wolf can demonstrate that he is entitled to judgment as a matter of law.

STATEMENT OF FACTS

Pursuant to Local Rule 56-2, Plaintiff submits the following statement of material facts.

1. In 2017, Defendant UPTE added new language to its membership agreements that limited employees' ability to resign their membership. Deposition of Jamie McDole at 22, attached as Exhibit A.

2. The addition of the resignation window language was made in express contemplation of the Supreme Court's pending decision in *Janus v. AFSMCE*. *Id.*

3. Wolf was employed as a process engineer at the University of California's Lawrence Berkeley National Laboratory beginning in March 2018. Deposition of Isaac Wolf at 12-13, attached as Exhibit B.

4. On April 10, 2018, Wolf signed a form authorizing the Union to withhold union dues from his paycheck. *See* Membership Application, attached as Exhibit C.

5. The Membership Application provides that "If I [Wolf] resign or have resigned my union membership and the law no longer requires nonmembers to pay a fair share fee, I nevertheless agree voluntarily to contribute my fair share by paying a service fee in an amount equal to dues. I direct UC to deduct this service fee from my monthly pay and to transfer that money to UPTE. I understand that this voluntary service fee authorization shall renew each year on the anniversary of the date I sign below, unless I mail a signed revocation letter to UPTE's central office, postmarked between 75 days and 45 days before such annual renewal date." *Id.*

6. At the time he signed a union dues deduction authorization, Wolf was not informed that he had the constitutional right to pay nothing to the Union. *See* Wolf Depo. at 17, attached as Exhibit B.

7. On July 2, 2018, Wolf sent an email to his employer resigning his membership and requesting that union dues cease being deducted from his paycheck immediately. Email of July 2, 2018, attached as Exhibit D.

8. On November 3, 2018, Wolf sent a letter to the Union resigning his membership and requesting that union dues cease being deducted from his paycheck immediately. Letter of Isaac Wolf, dated November 3, 2018, attached as Exhibit E.

9. On November 9, 2018, the Union sent a letter to Wolf stating that he could only cancel his membership and payroll deduction during the "annual cancellation period" prior to his renewal date. Letter from UPTE to Isaac Wolf dated November 9, 2018, Attached as Exhibit F.

10. On December 14, 2018, Wolf's attorneys sent the Berkeley Lab an email with a letter informing them that, per the *Janus* decision, workers must opt into union membership, and membership and dues deduction agreements signed before the *Janus* decision are unenforceable. The letter further stated that the Berkeley Lab was no longer authorized to enforce any such agreements, nor could it defer to the Union to determine whether to stop withholding dues or fees. Letter of Liberty Justice Center dated December 14, 2018, attached as Exhibit G.

11. On December 14, 2018, the Berkeley Lab responded that it was no longer permitted to correspond directly with employees regarding union membership due to California law. Email from Berkley Lab dated December 14, 2018, attached as Exhibit H.

12. On January 30, 2019, during the "annual cancellation period", Wolf sent an email with a letter to the Union resigning his membership and requesting that union dues cease being deducted from his paycheck immediately. Isaac Wolf email of January 30, 2019, attached as Exhibit I.

13. On February 14, 2019, UPTE sent an email to Wolf confirming that his dues deduction had ceased. Email of UPTE dated February 14, 2019, attached as Exhibit J.

14. From April 2018 until February 2019, Napolitano withheld union dues from Wolf's paycheck, and on information and belief, remitted those dues to the Union. The union dues withheld from Wolf were approximately sixty-five dollars ($65) per month. Wolf Depo. at 58, attached as Exhibit B.

ARGUMENT

"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)). "When deciding whether an asserted evidentiary dispute is genuine, [the court] inquire[s] whether a jury could reasonably find in the nonmovant's favor from the evidence presented." *Emeldi v. Univ. of Or.,* 698 F.3d 715, 730 (9th Cir. 2012). In this case, the parties agree that there are not significant disputes of material fact and that summary disposition is appropriate. *See* Joint Motion to Set Summary Judgment Briefing Schedule (Dkt. 73) at 3, ¶ 2.

I. Forcing Wolf to pay union fees after he withdrew his consent violated his right not to pay them under *Janus*, and UPTE admitted its intention to violation this right.

A. UPTE admitted in its deposition that it trapped employees into paying union fees for up to a year to prevent them from exercising their right to pay nothing under *Janus*.

The key fact in this case is straightforward. Prior to *Janus*, UPTE had never attempted to lock employees into membership against their will. But once the Supreme Court granted the petition for certiorari in *Janus* in September 2017, UPTE panicked. Faced with the potential recognition of public employees' First Amendment rights and the

accompanying loss of revenue, UPTE devised a scheme by which they could prevent employees from exercising their rights under *Janus*. This scheme may have protected UPTE's membership revenue, but it did so by violating the First Amendment rights of the employees they represent, such as Wolf.

UPTE President Jamie McDole admitted in her deposition in this case that *Janus* motivated the change to union membership policies. Prior to 2017, UPTE had no window policy or any other restrictions on withdrawal of union membership. McDole Depo. at 18, line 19, attached as Exhibit A. The *Janus* petition was granted on September 28, 2017. *See Janus v. AFSCME Council 31*, Supreme Court Docket No. 16-1466. McDole testified that the withdrawal restriction was added to the membership agreement in "either [the] fall or winter" of 2017, or very soon after that petition was granted. McDole Depo. at 18, line 9. When asked whether that addition was motivated by the pending *Janus* case, McDole admitted that it was, elaborating that "the Janus case we knew would potentially allow people to not pay into the union. Not having any sort of control of when there was a drop would put the -- the functioning of the union in jeopardy." *Id.* at 22, lines 20-24.

Faced with the impending reality that UPTE would lose its ability to take money from employees' paychecks against their will, it added the withdrawal restriction to trap workers into paying the union. This may have made sense to a union as a matter of its own interests—McDole testified that the *Janus* decision led to a drop in union revenue equivalent to about thirty percent of UPTE's operating budget. *Id.* at 31, line 14. But this strategy came at the expense of the rights of employees like Wolf. Therefore, he brought this case asking the Court to uphold the First Amendment rights recognized by the *Janus* decision.

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B. Trapping Workers in the Union is incompatible with the affirmative consent called for by *Janus*, which requires clear and convincing evidence of a voluntary, knowing, and intelligent waiver.

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 Wolf's case, he could not have waived his First Amendment right not to join or pay a union. First, at the time Wolf signed his union membership application, he did not know about his right to pay nothing to the Union because the Supreme Court had not yet issued its decision in *Janus.* Second, Wolf could not have voluntarily, knowingly, or intelligently waived his right not to join or pay a union because neither the Union nor Napolitano informed him he had a right not to join the union at all. Third, Wolf affirmatively withheld consent for the Union to withdraw fees from him when he informed it of his withdrawal on July 2, 2018. Therefore, Wolf was forced to pay the Union against his will, and he 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. at 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 Wolf signed did not provide a clear and compelling waiver of

Wolf's First Amendment right not to join or pay a union because it did not expressly state that Wolf had a constitutional right not to pay a union and because it did not expressly state that Wolf was waiving that right. *See* Membership Agreement (Exhibit C). What it did state was that non-members of the Union would be forced to pay fees to the Union against their will, a situation which was ruled unconstitutional by *Janus*. *See* Section D, below.

After the decision in *Janus,* the Union still maintains that Wolf may only withdraw his dues deduction during an arbitrary and narrow window of time of the Union's choice, despite Wolf's requests to be removed from the union rolls and to stop the deduction of dues from his paychecks.

Wolf has a clearly established right not to support the Union, and he has not waived that right. This Court should prohibit the Defendants—the Union, Napolitano, and the Attorney General—from treating him as if he has waived his First Amendment right. Not having signed a knowing waiver, Wolf is entitled to exercise his First Amendment right under *Janus* for 365 days a year, not just during a 30-day period each year. Indeed, in a similar case decided last year in the District of New Jersey, the court expressed skepticism at trapping government workers into paying union dues for even six months. *See Smith v. N.J. Educ. Ass'n*, No. 18-10381 (RMB/KMW), 2019 U.S. Dist. LEXIS 205960, at *19 (D.N.J. Nov. 27, 2019). The *Smith* decision addressed the constitutionality of a New Jersey statute requiring dues deductions to continue for up to one year after union resignation. In that case, the union agreements allowed members to cease dues deductions two times a year: once in January and once in July. *Id*. at *6. While it did not, ultimately, reach the issue of the constitutionality of what it deemed the "draconian" statute, it nonetheless, offered its opinion of such an annual entrapment period:

> If it were enforced as written, the Member Plaintiffs are correct that the [law]'s revocation procedure would, in the absence of a contract providing additional opt-out dates and a more reasonable notice requirement (as is present here), unconstitutionally restrict an employee's First Amendment right to opt-out of a public-sector union.

Id. at *19-*20.

Nor is the opinion in *Smith* an aberration in articulating limits on union revocation periods. Courts have held for decades that onerous windows infringe the rights of employees. *See McCahon v. Pa. Tpk. Comm'n*, 491 F. Supp. 2d 522, 527 (M.D. Pa. 2007) (3-year membership concurrent with CBA violates rights of members who wish to resign after union decides on a strike action they oppose); *Debont v. City of Poway*, No. 98CV0502, 1998 WL 415844 (S.D. Cal. Apr. 14, 1998) (8-year membership concurrent with CBA violates right of member to resign when he changes his mind after several years in the union).

Indeed, the Federal Labor Relations Authority recently issued an opinion clarifying, in the light of *Janus*, that it will no longer allow Federal Employees to be tied to a union for longer than one year. The FLRA determined that "it would assure employees the fullest freedom in the exercise of their rights under the Statute if, after the expiration of the initial one-year period . . . an employee had the right to initiate the revocation of a previously authorized dues assignment at any time that the employee chooses." *In re Petition of Office of Personnel Management*, 71 FLRA No. 571, 573 (Feb. 14, 2020). As the concurrence from Member Abbott elaborated:

> The Court's decision in *Janus* leads me to one conclusion -- once a Federal employee indicates that the employee wishes to revoke an earlier-elected dues withholding, that employee's consent no longer can be considered to be "freely given" and the earlier election can no longer serve as a waiver of the employee's First Amendment rights. Thus, restricting an employee's option to stop dues withholding -- for whatever reason -- to narrow windows of time of which that employee may, or may not be, aware does not protect the employee's First Amendment rights.

Id. at 575 (Abbott, concurring).

The FLRA decision is consistent with the opinions of at least three State Attorneys General. Texas Attorney General Ken Paxton, in assessing the impact of *Janus,* reaches the conclusion that "a one-time, perpetual authorization is inconsistent with the Court's

conclusion in *Janus* that consent must be knowingly and freely given." Attorney General of Texas Opinion No. KP-0310, May 31, 2020, at 3. As General Paxton explains, "Organizations change over time, and consent to membership should not be presumed to be indefinite," *Id.* (citing *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 315 (2012). Indiana's Attorney General likewise found that "[t]o ensure an employee's consent is up-to-date, as required for it be a valid waiver of the employee's First Amendment rights, an employee must be provided a regular opportunity to opt-in and opt-out." Attorney General of Indiana Opinion 2020-5, June 17, 2020, at 6. This is consistent also with the Opinion of the Attorney General of Alaska, who determined that "In order to secure clear and compelling evidence of a knowing waiver, the State should also provide for a regular "opt-in" period, during which time all employees will be permitted to decide whether or not they want to waive their First Amendment rights by authorizing future deductions from their wages." Attorney General of Alaska Opinion dated August 27, 2019, at 12.

The invalid union dues authorization applications signed by Wolf 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 Wolf to the long time window to withdraw his union membership set forth in the union application. Since he was apprised of his constitutional rights by the *Janus* decision, Wolf has not signed any additional union authorization applications. Therefore, Wolf has never been given his constitutional right to pay nothing to the union, and he has, therefore, never given the Union the "affirmative consent" required by the *Janus* decision.

C. Wolf's union membership application was signed on the basis of a mutual mistake.

When Wolf exercised his First Amendment right to withdraw his affirmative consent to pay union dues, the Union could not rely on a contract that was based on a mutual mistake of what those rights were. The Union argues that Wolf voluntarily entered

into an agreement to pay union dues. Quite the contrary, Wolf was mandated to either pay union dues or pay their virtual equivalent in agency fees by a state law that has now been ruled unconstitutional. *See* Cal Gov Code § 3502.5(a). This mandatory agreement, based on an unconstitutional choice, is not enforceable when Wolf asserts his First Amendment right to withdraw his affirmative consent to pay union dues.

For over 100 years, the Supreme Court has recognized that a contract based upon a mutual mistake is voidable by one of the parties upon discovery of the mistake: "It is well settled that courts of equity will reform a written contract where, owing to mutual mistake, the language used therein did not fully or accurately express the agreement and intention of the parties." *Philippine Sugar Estates Dev. Co. v. Gov't of Philippine Islands*, 247 U.S. 385, 389 (1918). Here, Wolf discovered the mistake that agency fees were constitutional when the Supreme Court ruled otherwise in *Janus*. He then requested to be let out of the contract, but this assertion of his First Amendment right was denied.

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.

The Ninth Circuit likewise explains 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 Cal. Civ. Code § 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 Wolf and the Union were laboring under the same mistake at the time the contract was ostensibly formed—that UPTE was permitted to take money from him whether he signed or not. This misapprehension of law by the parties was something the parties thought they knew, and they assumed that it would continue to govern their actions. Yet the Supreme Court's clarification now frustrates the purposes toward which the parties made the same mistake. *Janus* explicitly states that non-members of the union cannot be forced to pay fees against their will. 138 S. Ct. at 2486. This Court should find, therefore, that the mutual mistake that agency fees were permissible renders the alleged contract unenforceable, and the Union was not permitted to take advantage of Wolf after the truth became known.

D. *Janus* applies to non-union members like Wolf who were forced to pay a "fair share fee."

In addition to its attempt to hold Wolf to the withdrawal restriction, the Union membership agreement, by its terms, is contrary to the direct holding of *Janus*: that unions can continue to extract dues from non-union members. The agreement, attached as Exhibit C, provides that "If I [Wolf] resign or have resigned my union membership and the law no longer requires nonmembers to pay a fair share fee, I nevertheless agree voluntarily to

contribute my fair share by paying a service fee in an amount equal to dues." Therefore, even after Wolf resigned his union membership on July 2, 2018, the agreement forced him, as a non-member, to continue paying the equivalent of union dues. This coercion violated the rights recognized by *Janus*.

The *Janus* Court clearly ended the idea that unions can bifurcate the obligation to pay the union from membership in the union. *Janus,* 138 S. Ct. at 2460. Janus expressly addressed itself to the rights of nonmembers, who it would no longer be required to pay money to the union:

> We recognize that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members. But we must weigh these disadvantages against the considerable windfall that unions have received under *Abood* for the past 41 years. It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely.

Janus, 138 S. Ct. at 2485-86. Under the law as it stands today, membership and dues deduction go hand in hand. If an employee has provided affirmative consent, the union can charge the employee dues. If the employee has withdrawn that consent, as Wolf did, the union is not entitled to a dime. UPTE's membership agreements create an arrangement in which employees continue to be "shanghaied on an unwanted voyage," *Id.* at 2466. At the very least, for a diligent employee like Wolf, the agreement trapped him into paying union fees against his will for several months. For many employees, the hoops to jump through are so onerous that they will be trapped for years. In the letter sent to Wolf in response to his resignation, UPTE did not even tell him the dates during which he was forced to postmark yet another signed letter of resignation. But the letter was clear that this first signed letter from Wolf was not sufficient. Rather it was up to Mr. Wolf to preventing the agreement from "renewing each year on the anniversary of the date" he signed it by "mail[ing] a signed revocation letter to UPTE's central office, postmarked

between 75 days and 45 days before such annual renewal date." Membership Application, Exhibit C. UPTE deliberately made this process as convoluted as possible, forcing employees to count 75 days—not even, say, "two months" or something else readily intelligible. Setting up barriers to nonpayment like these is exactly what Janus prohibited and this Court should not allow. If the *Janus* decision stands for anything at all, surely it stands for the proposition that nonmembers of the union cannot be forced to make payments to the union. *Id*.

CONCLUSION

For the reasons stated above, Wolf is entitled to a refund of union fees taken from him after he withdrew his consent on July 2, 2018.[3] He is also entitled to a declaration that such action was an unconstitutional violation of his First Amendment rights under *Janus*.

Dated: July 30, 2020

Respectfully submitted,

/s/ Brian K. Kelsey

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[3] Wolf reserves his right on appeal to request a return of the Union dues taken from him without his informed consent prior to the Janus decision on June 27, 2018, but he recognizes that a return of those dues are presently foreclosed by the controlling decision of *Danielson v. Inslee*, 945 F.3d 1096, 1105 (9th Cir. 2019).

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