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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ISAAC WOLF,

Plaintiff,

v.

UNIVERSITY PROFESSIONAL & TECHNICAL EMPLOYEES, COMMUNICATIONS WORKERS OF AMERICA LOCAL 9119; MICHAEL V. DRAKE, in his official capacity as President of the University of California; JOSHUA GOLKA, in his official capacity as Executive Director of the California Public Employment Relations Board; and XAVIER BECERRA, in his official capacity as Attorney General of California,

Defendants.

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

DEFENDANT UPTE'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Date: September 17, 2020
Time: 8:00am
Courtroom: 12
Judge: Hon. William Alsup

Action Filed: May 24, 2019

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This brief addresses the Court's questions regarding (1) whether plaintiff Isaac Wolf has adequately pleaded claims based on "mutual mistake," and (2) whether the Court should retain jurisdiction over any such claim after it grants summary judgment in light of *Belgau v. Inslee*, No. 19-35137, 2020 WL 5541390 (9th Cir. Sept. 16, 2020). Wolf nowhere pleaded a claim based on mutual mistake, and it is far too late—after the parties have completed discovery and filed cross-motions for summary judgment—for him to do so now.[1] Additionally, even if the Court found that a claim based on mutual mistake existed, that claim would be subject to the jurisdiction of the California Public Employment Relations Board, and the Court should dismiss on those grounds.

I. Wolf never pleaded facts alleging mistake, let alone met the heightened pleading standard of Federal Rule of Civil Procedure 9(b)

Wolf pleads three claims in his First Amended Complaint, none of which allege mutual mistake or seek a remedy based on a claim of mistake. Rather, Wolf raised the concept of mutual mistake for the first time in his motion for summary judgment, arguing that the membership agreement is not enforceable against him because it was based on mistaken understandings about whether agency fees were constitutional. Pl.'s Mem. in Supp. of Mot. For Summ. J. ("Pl.'s MSJ Brief"), ECF No. 78-1, 13-15.

Federal Rule of Civil Procedure 9(b) requires that a party claiming mistake must plead with particularity the circumstances constituting the mistake.

> General allegations of mistake are not sufficient. *N.Y., New Haven, & Hartford R.R. Co. v. New England Forwarding Co.*, 119 F.Supp. 380, 382 (D.R.I. 1953). The pleading must set forth enough facts to apprise the adversary of the particular "circumstances constituting" the claimed mistake. Fed. R. Civ. P. 9(b). Particulars such as the precise nature of the misunderstanding, when the mistake occurred, and which individual(s) made the mistake, have been required. *See, e.g.*, *Mills v. Everest Reinsurance Co.*, 410 F.Supp.2d 243, 248 (S.D.N.Y. 2006).

Hartford Cas. Ins. Co. v. Am. Dairy & Food Consulting Labs., Inc., No. 09-CV-00914-OWW-DLB, 2009 WL 4269603, at *12 (E.D. Cal. Nov. 25, 2009); *see also ArcelorMittal Cleveland, Inc. v. Jewell Coke Co.*, 750 F. Supp. 2d 839, 845 (N.D. Ohio 2010) (plaintiffs met heightened pleading

[1] Wolf amended his complaint once before but did not add any allegations regarding mistake, and the Court's case management order entered on September 27, 2019 set the deadline for requesting to amend pleadings as December 5, 2019. Case Management Order, ECF No. 59, 1. At no time did Wolf seek or ever raise the possibility of amending to add allegations of mistake.

requirements for mutual mistake by presenting narrative describing why purchase price was incorrect); *Thrifty Payless, Inc. v. The Americana at Brand, LLC*, 160 Cal. Rptr. 3d 718, 729 (Ct. App. 2013) (mistake must be pleaded with particularity, with a clear recitation of facts showing how, when, and why the mistake occurred). Wolf has failed to meet these heightened pleading requirements, let alone plead any facts alleging mistake.

The claims identified by Wolf are: (1) a declaratory relief claim alleging that it is a violation of his First Amendment rights if payroll deductions are not cancelled immediately upon his request; (2) a declaratory relief claim that California Government Code section 3583 is unconstitutional because it violates Wolf's First Amendment rights; and (3) a claim under 42 U.S.C. § 1983 for a refund of union dues on the grounds that the deductions violated his First Amendment rights. First Amended Complaint, ECF No. 39 ("FAC") ¶¶ 25-41. Wolf's claims rest entirely on an argument that *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), established a new standard, requiring public employees to be explicitly informed of their First Amendment rights before they could validly consent to pay dues as union members. FAC ¶¶ 1, 3, 27-28, 39-40. Under this theory, because he was required to pay agency fees if he decided not to become a union member—*Janus* had not yet overruled *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which held that mandatory agency fees were constitutional—and because he was not explicitly informed that he was waiving his First Amendment rights by committing to the terms of membership, he did not validly consent to payroll deductions and any restriction on his ability to cancel deductions immediately violated his First Amendment rights.

Wolf's complaint thus focuses on allegations (1) that he was not informed that he would be waiving his First Amendment rights by becoming an UPTE member and voluntarily agreeing to pay dues, and (2) that he was not permitted to cancel deductions immediately upon his request, but instead was only permitted to cancel his deductions during the window period specified in his membership agreement. FAC ¶¶ 2, 15-24.

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To the extent Wolf pleads any facts surrounding his decision to sign the UPTE membership agreement, they are that:

> 13. On April 10, 2018, Wolf signed a form authorizing the Union to withhold union dues from his paycheck.
>
> 14. 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.

FAC ¶¶ 13-14. Nowhere does he describe his or UPTE's state of mind at the time he signed the membership agreement, let alone say that either side was mistaken about any fact or issue of law relating to the agreement or how they were mistaken.[2] Nor does Wolf seek rescission or any other remedy normally associated with mutual mistake. *See* FAC at 7-8 (prayer for relief seeking (a) a declaration that public employees have a First Amendment right to stop dues deductions at any time, (b) a declaration that California Government Code section 3583 violates Wolf's First Amendment rights, (c) monetary damages, and (d) attorneys' fees and costs); Cal. Civ. Code § 1689 (West 2020) (identifying reasons for rescission of contract, including mistake); *Nmsbpcsldhb v. Cty. of Fresno*, 61 Cal. Rptr. 3d 425, 428 (2007) ("A party to a contract cannot rescind at his pleasure, but only for some one or more of the causes enumerated in section 1689 of the Civil Code," citations and alterations omitted.)

This is insufficient to establish the necessary elements for a claim based in mistake, with specific allegations regarding who was mistaken, what the mistake was, when the mistake developed, and why the mistake induced the parties to enter into an agreement. *See Thrifty Payless, Inc.*, 160 Cal. Rptr. 3d at 729; *Hartford Cas. Ins. Co.*, 2009 WL 4269603, at *12, *15-*16. Wolf's complaint never gave UPTE or any of the other defendants notice of the supposed mistake at issue,

[2] To the extent Wolf argues that he was mistaken about whether agency fees were constitutional, he does not plead what his state of mind was with regard to agency fees, only that "he was not informed" by UPTE that he had a constitutional right to pay nothing. FAC ¶ 14. As UPTE argued in its response to Wolf's motion for summary judgment, there was no mistake because agency fees were, in fact, constitutional at the time Wolf became a member, and the possibility that *Abood* would be overturned does not create a mistake that can void the membership terms. Def. UPTE's Resp. to Pl.'s Mot. for Summ. J., ECF No. 80, 12-14. "[T]he kind of mistake which renders a contract voidable does not include 'mistakes as to matters which the contracting parties had in mind as possibilities and as to the existence of which they took the risk.'" *Guthrie v. Times-Mirror Co.*, 124 Cal. Rptr. 577, 581 (Ct. App. 1975) (quoting Williston, Contracts (3d ed.) § 1543).

and he should not be permitted to raise it now.

II. Even if a state-law claim based on mutual mistake did exist, the Court should not exercise supplemental jurisdiction because the claim is preempted by the exclusive jurisdiction of the California Public Employment Relations Board

Even if Wolf had pleaded a claim based on mutual mistake, the Court should not exercise supplemental jurisdiction over what would be a state-law claim preempted by the exclusive jurisdiction of the California Public Employment Relations Board (PERB). While the Court's continued exercise of supplemental jurisdiction over a state law claim is generally discretionary after dismissal of the federal claims, 28 U.S.C. § 1367(c)(3), here the preemptive reach of PERB's statutes counsels in favor of dismissal.

First, before even considering PERB's jurisdiction, the Court can dismiss state-law claims that clearly would fail in state court, as Wolf's arguments regarding mutual mistake would. *Coe v. County of Cook*, 162 F.3d 491, 496 (7th Cir. 1998) (dismissing unmeritorious state-law claim invades no state interest and instead avoids "a further, and futile, round of litigation in the state courts"); Def. UPTE's Resp. to Pl.'s Mot. for Summ. J., ECF No. 80, 12-14.

Second, the Higher Education Employment Relations Act (HEERA), Cal. Gov't Code §§ 3560-3599 (West 2020), establishes a comprehensive statutory regime governing labor relations for University of California employees such as Wolf, including his right to become or refuse to become a union member, and his rights to financially support the union or refuse to do so.

There is no dispute that Wolf is an "employee" under HEERA or that UPTE is an "employee organization." Cal. Gov't Code §§ 3562(e), (f)(1) (West 2020). HEERA establishes that higher education employees have the right to join and participate in a union, as well as the right to refuse to join a union or participate in the organization's activities. Cal. Gov't Code § 3565 (West 2020). It is an unfair practice for a union or a public employer to interfere with those rights. Cal. Gov't Code §§ 3571, 3571.1 (West 2020) (making it unlawful for either an employer or union to restrain employees in the exercise of rights guaranteed under HEERA). HEERA also makes it an unfair practice for a union to require employees to pay fees "in an amount which the board finds excessive or discriminatory under all the circumstances." Cal. Gov't § 3571.1(f) (West 2020).

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PERB has exclusive jurisdiction under California law to adjudicate such charges. Cal. Gov't Code § 3563.2 (West 2020); *Anderson v. California Faculty Assn.*, 31 Cal. Rptr. 2d 406, 409 (Ct. App. 1994) ("The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of HEERA, is a matter within the exclusive jurisdiction of PERB."); *accord Paulsen v. Local No. 856 of Internat. Bhd. of Teamsters*, 123 Cal. Rptr. 3d 332 (2011).

The scope of PERB preemption is analogous to that of the National Labor Relations Act, and it reaches any controversy presented in court that could have been presented to PERB. *Glover v. Cal. State Univ. Fresno*, No. 1:15-CV-00152-SAB, 2015 WL 4508714, at *4 (E.D. Cal. July 24, 2015); *El Rancho Unified School Dist. v. National Education Assn.*, 663 P.2d 893, 899 (Cal. 1983). This means any activities "arguably protected or prohibited by the governing labor law statutes" are preempted and must be dismissed by the courts. *City of San Jose v. Operating Eng'rs Local Union No. 3*, 232 P.3d 701, 723 (Cal. 2010); *Glover*, 2015 WL 4508714 at *5; *Gabriele v. Serv. Employees Int'l Union, Local 1000*, No. 2:19-cv-00292 WBS KJN, 2020 WL 3163072, at *5 (E.D. Cal. June 12, 2020).

Even if Wolf had pleaded a claim based on mistake, any such claim would be a state-law claim preempted by PERB's jurisdiction and therefore would have to be dismissed. Wolf's argument is essentially that he should not have been held to the terms of the UPTE membership agreement, because there was no valid consent. *See* Cal. Civ. Code § 1567 (West 2020) (consent not valid when the result of mistake); *Donovan v. RRL Corp.*, 27 P.3d 702, 821 (Cal. 2001) (party may rescind if consent was given by mistake). This means that, according to Wolf, either the University or UPTE, or both, interfered with his right to abstain from participating in UPTE by holding him to an invalid membership agreement. But this claim is subject to PERB's exclusive jurisdiction and could not be brought in court, notwithstanding any effort to couch the claim in contract theory.

For example, in *Glover*, the plaintiff claimed breach of contract but the court dismissed this claim as preempted. 2015 WL 4508714 at *5; *see also Anderson*, 31 Cal. Rptr. 2d at 412-14.

Likewise, in one recent case, the court held that plaintiffs could not evade PERB's jurisdiction with artful pleading when the underlying conduct at issue was really "in its simplest form" a claim alleging "interference with their right to refuse to join employee organizations or to participate in the activities of those organizations." *Marsh v. AFSCME Local 3299*, No. 2:19-cv-02382-JAM-DB, 2020 WL 4339880, at *8-*9 (citations and quotation marks omitted).

So too here the conduct Wolf is seeking to challenge under any state-law theory reaches activity arguably prohibited by HEERA. This claim—to the extent it was pleaded at all—is preempted; neither this Court nor any California court would have jurisdiction over the claim, and it must be dismissed along with the rest of this action.

Respectfully submitted,

DATED: September 24, 2020

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