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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; and Xavier Becerra, in his official capacity as Attorney General of California,
Defendants.

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

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

Hearing Date: December 6, 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 Reply to Defendant UTLA's Opposition ("UTLA Opp.") (Dkt. 77) to Plaintiff's Motion for Summary Judgment (Dkt. 73). Because Plaintiff has already addressed the substance of much of UTLA's argument in his own Memorandum in Support of Plaintiff's Motion for Summary Judgment ("Few MSJ") (Dkt. 73-1) and in his own Opposition to UTLA's Motion for Summary Judgment ("Few Opp.") (Dkt. 76), he here limits himself to those points raised by UTLA that require further elaboration.

UTLA has attached to its Opposition a Statement of Genuine Disputes of Material Fact (Dkt. 77-1), which agrees that all Plaintiffs asserted facts are undisputed for purposes of these cross-motions. UTLA includes additional facts in its statement. Dkt. 77-1 at 3-5. Few agrees that these additional facts are undisputed for purposes of these cross-motions. Plaintiff, therefore, submits that the parties agree that there is no genuine dispute of material fact in this case, and it is appropriate for the Court resolve the controversy on Summary Judgment.

ARGUMENT

I. Few's claims for declaratory relief were not mooted by UTLA's gamesmanship.

First, UTLA reiterates its argument that UTLA's efforts to avoid the jurisdiction of this Court have mooted claims for prospective or declaratory relief. UTLA Opp. at 4-7. Few has already addressed the mootness question in both his own motion and opposition. *See* Few MSJ at 10-13; Few Opp. at 5-6. He here responds to UTLA's assertions.

UTLA attempts to distinguish various cases that undermine its position by arguing that they were putative class actions. UTLA Opp. at 5-6. But that was not the reasoning of these cases, nor could it have been, since "a class lacks independent status until certified." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016). Absent class certification, collective actions only survive the mooting of the named plaintiff's claim if a new named plaintiff joins the case in the named plaintiff's place. *See Genesis HealthCare Corp. v. Symczyk*, 569 U.S. 66, 73 (2013) ("In the absence of any claimant's opting in,

1 respondent's suit became moot when her individual claim became moot, because she
2 lacked any personal interest in representing others in this action").
3 UTLA, therefore, asserts that in *Roe v. Wade*, the class treatment overrode the fact
4 that the Plaintiff had already given birth. UTLA Opp. at 6. But that was not the basis of
5 the Court's ruling, instead it focused on the inherent transience of pregnancy:

6 > [T]he normal 266-day human gestation period is so short that the pregnancy
7 > will come to term before the usual appellate process is complete. If that
> termination makes a case moot, pregnancy litigation seldom will survive
8 > much beyond the trial stage, and appellate review will be effectively denied.

9
Roe v. Wade, 410 U.S. 113, 125 (1973). The Supreme Court ruled that a constitutional
10 violation cannot avoid court scrutiny simply because the relevant time period will run out
11 before the appellate process is complete.
12 It was precisely this concern with the transience of the claim that guided the Ninth
13 Circuit, assessing the same sort of union opt-out claim presented here, to rule that
14 "*although no class has been certified* and SEIU and the State have stopped deducting dues
15 from Appellants, Appellants' non-damages claims are the sort of inherently transitory
16 claims for which continued litigation is permissible." *Fisk v. Inslee*, 759 F.App'x 632, 633
17 (9th Cir. 2019) (emphasis added). The Ninth Circuit cited *Johnson v. Rancho Santiago*
18 *Cmty. Coll. Dist.,* 623 F.3d 1011, 1019 (9th Cir. 2010), which held that even a three-year
19 duration is "too short to allow for full judicial review." Few's declaratory relief claim
20 would, at most, last only one year under UTLA's theory, so it should certainly survive.
21 UTLA attempts to dismiss this ruling from the Ninth Circuit on the grounds that *Fisk* was
22 also a "putative class action." UTLA Opp. at 5. But as the quote above shows, the Ninth
23 Circuit did not base its ruling on the class allegations because "*no class ha[d] been*
24 *certified*."[2] *Fisk*, 759 F.App'x at 633 (emphasis added). The theory that other putative
25 class members saved the case from becoming moot is a misreading of the case's clear
26

27 [2] Few concedes that *Fisk* is an unpublished opinion but submits that a very recent ruling
28 from the Ninth Circuit assessing the exact legal question at issue warrants strong
consideration by this Court.

language.

UTLA likewise tries to distinguish *Knox v. SEIU* on the theory that in that case "there remained a live dispute about whether the union's notice and refund offer was adequate." UTLA Opp. at 7. But, again, that was not the basis for the Court's ruling. Instead, the Court explained that the union's refund, like the refund provided here to Few, was irrelevant because "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012). Only *after* making this determination did the Court in the next paragraph explain that the case would still survive *if voluntary succession did not apply* because "even if that is so . . . there is still a live controversy as to the adequacy of the SEIU's refund notice." *Id.*

Few's claim is precisely the sort of inherently transitory claim that courts have recognized as an exception to the mootness doctrine, and UTLA cannot avoid that fact by citing to its own voluntary cessation of the challenged conduct.

II. Few's First Amendment rights were violated by the exaction of union dues from his wages.

A. UTLA cannot rely on an invalid waiver to support its exaction of dues.

UTLA argues that Few's dues deductions were proper because they were made pursuant to a valid agreement he signed with the union. UTLA Opp. at 8-15. Few has already addressed these arguments in his Motion and Opposition. *See* Few MSJ at 8-15; Few Opp. at 7-10. [3]

UTLA invokes *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991), in defense of its argument. But in *Cohen*, a newspaper agreed not to reveal a source, and having

[3] As UTLA acknowledges, Few sent a letter to resign his union membership and become an agency fee payer *before* the *Janus* decision in a letter he sent UTLA on or about June 4, 2018. *See* JSUF ¶4 and Exh. C; UTLA Opp. at 2. Therefore, Few was not a "member" even under UTLA's unnecessarily narrow reading of the Janus ruling: "*Janus* concerned only whether the government could require non-members to support a union." UTLA Opp. at 8.

made that agreement, could not rely on the First Amendment to protect its publication of the information it had agreed not to reveal. Cohen amounts to a statement that one can waive a constitutional right, which Few acknowledges is consistent with *Janus*. But the First Amendment rights of newspapers were long established when Cohen was decided in 1991. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713 (1971). There was no intervening change in the law that recognized a new right of newspapers between when the promise was made and when the case was decided. In this case, however, an intervening Supreme Court decision has clarified that Few signed his authorization subject to an unconstitutional choice between paying dues to the Union or paying agency fees to the Union.

UTLA's other citations, such as *D. H. Overmyer Co. Inc. v. Frick Co.*, 405 U.S. 174 (1972), amount to the same point: yes, you can waive a First Amendment right. Few agrees. The question is what is required to do so. A waiver of a constitutional right cannot be can be freely entered into if the parties to the agreement are not provided with the material fact of the very existence of the right. What *D. H. Overmyer Co.* establishes is a waiver must be freely given in a manner that is voluntary, knowing, and intelligently made. 405 U.S. at 185-86. Because Few's agreements were not knowingly entered into, they cannot meet this standard.

UTLA also relies on *United States v. Brady*, 397 U.S. 742 (1970), in which a criminal defendant was held to his plea agreement. In that case, the defendant pled guilty to kidnapping and was sentenced to 50 years' imprisonment. *Id.* at 743-44. He waived his right to trial, in part, he later claimed, because he would have been subject to the death penalty. *Id.* at 744. The Supreme Court later struck down the death penalty as a punishment for his offense. *Id.* at 746. He was, nonetheless, held to his guilty plea because a guilty plea is part of an adjudication: "Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment." *Id.* at 748. The finality of judgments is not something a court undermines lightly, and the Supreme Court determined it could "see no

reason on this record to disturb the judgment of those courts [who entered judgment against the defendant]." *Id.* at 749. There is nothing like that in this case. Few does not ask that this Court find its way around *res judicata*, only that it find the alleged contract between the parties unenforceable.

UTLA asserts that the cases Few cites to support his argument do not apply because "none involved an affirmative agreement made in exchange for consideration." UTLA Opp. at 12 n.6; *See Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999); *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938); *Ohio Bell Tel. Co. v. Pub. Utilities Comm'n of Ohio*, 301 U.S.292, 306-07 (1937). But the sheer existence of a signed agreement, or of consideration, is not enough in order to abrogate a constitutional right. The question is whether the waiver of the right was knowing, voluntary, and intelligently made, which is a standard the agreement in this case cannot meet.

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

UTLA then argues that its tendering of a check in the amount of dues deducted after June 4, 2018 moots those damages. UTLA Opp. at 15-16. Few has already conceded in his own Opposition that this particular category of damages has been satisfied. *See* Few Opp. at 12. However, Few still has a live claim for more than $1,800 in remaining damages, and UTLA does not, and cannot, argue the claim is moot as to those damages. *Id.*

C. There is no good faith defense to UTLA's liability.

Finally, UTLA asserts that it is entitled to a good faith defense because it acted in "good faith reliance on a state statute." UTLA Opp. at 19.[4] Few already addressed this

[4] Earlier in its opposition, UTLA relegates to a footnote its argument that there is not state action in this case. UTLA Opp. at 9, n.4. But this is inconsistent with its argument that it acted in "good faith reliance on a state statute." UTLA Opp. at 19. Either UTLA was acting under the color of a state statute or it was not. The state action argument has already been rejected in another case in this same district. *See O'Callaghan v. Regents of Univ. of Cal.*, 2019 WL 2635585, at *9 (C.D. Cal. June 10, 2019). It has also now been rejected by the Seventh Circuit. *See Janus v. ASFCME Council 31*, No. 19- 1553, 2019 U.S. App. LEXIS 33071, at *15 (7th Cir. Nov. 5, 2019). As Few has already articulated fully, state action exists in this case. *See* Few Opp. at 10-11.

argument at length in his own motion, and incorporates those arguments by reference. Few MSJ at 15-24.

Relying on a state statute is not a defense to Section 1983. Reliance on a statute is an element of Section 1983, which states "every person who, under color of any statute" deprives others of their constitutional rights "shall be liable to the party injured in an action at law . . ." (emphasis added). It would turn Section 1983 on its head to hold that a defendant acting "under color of any statute" renders it not "liable to the party injured in an action at law." Neither the Supreme Court nor Ninth Circuit has construed Section 1983 in such a backward manner. Rather, some circuit courts have found that good faith reliance on a statute could only defeat the malice and probable cause elements of claims for abuses of judicial processes. See *Wyatt v. Cole*, 504 U.S. 158, 167 n.24 (1992); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276–77 (3d Cir. 1994).

Although not binding on this Court, Few acknowledges that since he filed his Motion for Summary Judgment, the Seventh Circuit issued the first appellate opinion recognizing the type of reliance defense UTLA requests here. *Janus v. AFSCME Council 31*, No. 19-1553, 2019 U.S. App. LEXIS 33071, at *27 (7th Cir. Nov. 5, 2019). This decision, part of the ongoing post-Supreme Court litigation in the *Janus* case itself, sides with UTLA. Few submits this decision is in error, for all the reasons described in his motion. *See* Few MSJ at 15-24. Judge Manion's separate opinion, while concurring "with the court's ultimate conclusion," comes closer to the mark, explaining that "[t]he unions received a huge windfall for 41 years," and that "a better way of looking at it would be to say rather than good faith, [the unions] had very 'good luck' in receiving this windfall for so many years." *Id*. at 35-37. Few submits that this Court should not allow UTLA to enjoy this good luck at the expense of Few.

The statutory reliance defense that UTLA seeks conflicts with the text, history, policy, and governing precedent of Section 1983. This Court should decline to recognize such a defense and should grant Few his chance to seek the return of the money unconstitutionally taken from him.

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 22, 2019

Respectfully submitted,

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