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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Cara O'Callaghan and Jenée Misraje,

Plaintiffs,

v.

Janet Napolitano, in her official capacity as President of the University of California; Teamsters Local 2010; and Xavier Becerra, in his official capacity as Attorney General of California,

Defendants.

Case No. 2-19-CV-02289 JVS (DFM)

PLAINTIFF'S OPPOSITION TO DEFENDANT NAPOLITANO'S MOTION TO DISMISS

Hearing Date: September 9, 2019
Time: 1:30 P.M.
Judge: Hon. James V. Selna

INTRODUCTION

Plaintiffs, Cara O'Callaghan and Jenée Misraje ("Plaintiffs"), submit this Opposition to Defendant Janet Napolitano's Motion to Dismiss (Dkt. 55), the Memorandum of Points and Authorities in Support of which was filed as a Notice of Errata (Dkt. 56) ("Napolitano MTD"). Plaintiffs' First Amended Complaint ("FAC") (Dkt. 52) asserts seven causes of action, covering prior and ongoing deduction of union dues and fees and the status of Teamsters Local 2010 ("Teamsters" or the "Union") as Plaintiffs' exclusive representative. Napolitano argues that the FAC should be dismissed because the lawsuit should have been brought before the California Public Employment Relations Board ("PERB" or the "Board") and because *Janus v. AFSCME*, 138 S.Ct. 2448 (2018) does not apply to Plaintiffs. The § 1983 lawsuit is properly before this Court, and *Janus* applies to all public sector workers like Plaintiffs. For the reasons stated below, Plaintiffs have stated a claim on which relief may be granted.

ARGUMENT

To survive this Motion to Dismiss, Plaintiffs need only state in their First Amended Complaint "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). They should prevail provided their First Amended Complaint demonstrates something "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

I. This action for violations of First Amendment rights is properly brought before this Court rather than before a state labor regulator.

Napolitano's first contention is that Plaintiffs' claims "would form the basis for[] unfair practice allegations against the Union . . . within the exclusive jurisdiction of [PERB]." Napolitano MTD at 2. But PERB's role is to interpret and apply California's labor regulations. Plaintiffs' claim is not that the Teamsters or Napolitano are committing

an unfair labor practice under California law—indeed, Plaintiffs injury derives in significant part from the faithful application of California law. Plaintiffs contend, instead, that the application of California's labor regime to them abridges their First Amendment rights of speech and association. Such a suit is properly brought in this Court under 42 U.S.C. § 1983.

Napolitano argues that Plaintiffs "allege that the Union continues to charge them dues in an unfair or excessive manner, and they further allege that the Union has caused the employer (the University) to deliver the payment of union dues for services that Plaintiffs do not want performed –allegations that would sound in unfair practice charges against the Union under HEERA." Napolitano MTD at 4. But Plaintiffs' claim is not that the union has charged dues that would be excessive or unfair under HEERA; Plaintiffs' claim is that being charged dues at all violates the First Amendment. Whether or not the dues are appropriate under California law is of no moment when considering whether they are permissible at all under the U.S. Constitution.

Napolitano quotes several cases where "the controversy presented to the court would require a decision as to whether the district had engaged in unfair labor practices." Napolitano MTD at 5 (citing *El Rancho Unified School Dist. v. Nat'l Educ. Ass'n*, 33 Cal. 3d 946, 952-960 (1983)). But Plaintiffs have not alleged anything that constitutes an unfair labor practice. Rather they allege that *in following* California labor law, Defendants are violating the Constitution.

That PERB has "exclusive jurisdiction" in examining issues of California law is of no moment when the questions asserted are of federal law. "The Civil Rights Act of 1871 . . . guarantees a federal forum for claims of unconstitutional treatment at the hands of state officials, and the settled rule is that exhaustion of state remedies is not a prerequisite to an action under [42 U. S. C.] §1983." *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167 (2019) (quoting *Heck v. Humphrey*, 512 U. S. 477, 480 (1994) (internal quotation marks omitted). In contradiction to settled federal law on the subject, Napolitano asserts that Plaintiffs must exhaust their claims in a state administrative proceeding instead of

invoking their right to a federal forum. This assertion, if accepted, would undermine the very purpose of § 1983 in enforcing constitutional rights.

II. *Janus* establishes a duty not to take money without affirmative consent.

Napolitano next contends that *Janus* doesn't apply to this case because it doesn't prevent the deduction of dues from employees who have provided affirmative consent. Napolitano MTD at 5-7. Napolitano fails to recognize the claim brought by Plaintiffs that they did not provide affirmative consent.

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 Plaintiffs' case, they could not have waived their First Amendment right to not join or pay a union. First, Plaintiffs could not have voluntarily, knowingly, and intelligently waived their rights not to join or pay a union because neither the Teamsters nor Napolitano informed them they had a right not to join the union. Second, at the time Plaintiffs signed their union membership applications, they did not know about their rights not to pay a union because the Supreme Court had not yet issued its decision in *Janus*. Therefore, Plaintiffs had no choice but to pay the union, and they did not voluntarily waive their 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 applications Plaintiffs signed did not provide a clear and compelling waiver of Plaintiffs' First Amendment right not to join or pay a union because they did not expressly state that Plaintiffs have a constitutional right not to pay a union and because they did not expressly state that Plaintiffs were waiving that right.

After the decision in *Janus*, the Union maintains that Plaintiffs may only withdraw their dues deduction during arbitrary time periods of the Union's choice, despite Plaintiffs' repeated requests to be removed from the union rolls and to stop the dues deduction from their paychecks.

The invalid union dues authorization applications signed by Plaintiffs 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 Plaintiffs to the time window to withdraw their union membership set forth in the union applications.

Since the time they were apprised of their constitutional rights by the *Janus* decision, Plaintiffs have not signed any additional union authorization applications. Therefore, Plaintiffs have never been given their constitutional right to pay nothing to the Union, and they have, therefore, never given the Union the "affirmative consent" required by the *Janus* decision.

CONCLUSION

For the above stated reasons, the Motion to Dismiss should be denied.

Dated: August 19, 2019

Respectfully submitted,

/s/ Mark W. Bucher

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