

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
Harrisburg Division**

JOHN R. KABLER, JR.,

Plaintiff,

v.

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 1776 KEYSTONE
STATE, *et al.*,

Defendants.

Case No. 1:19-CV-0395

(Hon. Sylvia H. Rambo)

--ELECTRONICALLY FILED--

**PLAINTIFF'S CROSS MOTION
FOR PARTIAL SUMMARY
JUDGMENT**

AND NOW COMES Plaintiff John R. Kabler, Jr., by and through his undersigned attorneys, pursuant to Federal Rule of Civil Procedure 56, Local Rule 56.1, and this Court's Order, ECF No. 31, and respectfully moves this Honorable Court for partial summary judgment because, for the reasons stated below and in the Plaintiff's Statement of Material Facts and Brief in Support of Plaintiff's Cross Motion for Partial Summary Judgment, there is no genuine dispute as to any material fact pertinent to Count Two of Plaintiff's Complaint and he is entitled to judgment thereon as a matter of law. In support thereof, Plaintiff further avers:

1. Plaintiff filed this 42 U.S.C. § 1983 action on March 6, 2019, against Defendants United Food and Commercial Workers Union, Local 1776 Keystone State ("Local 1776"), United Food and Commercial Workers Union, Pennsylvania

Wine and Spirits Council (“UFCW Council”), Wendell W. Young, IV, in his individual and official capacity as president of Local 1776, Peg Rhodes in her individual and official capacity as vice president of Local 1776, and Michele L. Kessler in her individual and official capacity as Secretary-Treasurer of Local 1776 (collectively “Union Defendants”); and the Commonwealth of Pennsylvania, Pennsylvania Liquor Control Board (“PLCB”), Thomas W. Wolf, in his official capacity as the governor of the Commonwealth of Pennsylvania, Timothy Holden, in his official capacity as Chairman of the PLCB, Michael Newsome, in his official capacity as Secretary of the Pennsylvania Office of Administration, and Anna Maria Kiehl, in her official capacities as Chief Accounting Officer and Deputy Secretary for the Office of Comptroller Operations (collectively “Commonwealth Defendants”). Compl. ¶¶ 11–20, ECF No. 1; *see also* Union Defs.’ Br. in Supp. of Their Mot. to Dismiss Pl.’s Compl. Pursuant to Fed. R. Civ. P. 12(b)(1) & 12(b)(6) (“Union Br.”) 1, ECF No. 21; Br. of Commonwealth Defs. in Supp. of Am. Mot. to Dismiss Pl.’s Compl. Pursuant to Fed. R. Civ. P. 12(b)(1) & (6) (“Commonwealth Br.”) 1, ECF No. 20.

2. Relevant to Count Two of Plaintiff’s Complaint, Plaintiff filed this action to protect his First and Fourteenth Amendment rights under the Constitution of the United States and to challenge the constitutionality of title 43, sections 1101.301(18), 1101.401, 1101.705, of the Public Employe Relations Act (“PERA”) and article 4 of the collective bargaining agreement between the Commonwealth of Pennsylvania and Local 1776 through UFCW Council, *see* Compl. ¶¶ 1, 22–24; Union Br. 1–4;

Commonwealth Br. 1, 4–5, to the extent said provisions permit Defendants to force Plaintiff to remain a union member and/or to continue union dues and/or fees deductions from Plaintiff's wages once he became a nonmember. Compl. ¶¶ 48–57.

3. Commonwealth Defendants and Union Defendants, acting in concert under color of state law, have deprived Plaintiff of his First and Fourteenth Amendment rights under the Constitution of the United States.

4. The material facts in this matter as they relate to Count Two of Plaintiff's Complaint are not in dispute. *See* Plaintiff's Statement of Material Facts filed herewith.

5. Since on or about April 10, 2017, Plaintiff has been a Commonwealth of Pennsylvania employee working as a liquor store clerk for the PLCB. Compl. ¶ 27; *see also* Union Br. 1, 5; Commonwealth Br. 3, 5.

6. Local 1776 and the UFCW Council are employee organizations under PERA and Local 1776 is Plaintiff's exclusive representative for purposes of collective bargaining. Compl. Ex. A, art. 2, at 3, 4, ECF No. 1-1. The PLCB is also subject to PERA. Commonwealth Br. 3.

7. PERA allows employee organizations and public employers to enter into collective bargaining agreements that force union members to maintain their union memberships and limit public employees' right to resign their union membership to a 15-day window period immediately preceding the expiration of a collective bargaining agreement, and also to allow the public employer to deduct union dues and fees from

public employees' wages and forward said deductions to the employee organizations.

See Compl. ¶¶ 24–26; *see also* Union Br. 3–5; Commonwealth Br. 4.

8. Pursuant to PERA, the Commonwealth of Pennsylvania and Local 1776, through the UFCW Council, entered into a collective bargaining agreement (“CBA”), the terms of which extended from July 1, 2016, through June 30, 2019. Union Br. 2–3; Commonwealth Br. 1, 4; *see also* Compl. ¶ 22; Compl. Ex. A.

9. Article 4 of the CBA contains a maintenance of membership provision, whereby employees subject to the terms of the CBA could not resign their union membership except for a 15-day window period immediately preceding the expiration of the CBA. Union Br. 3–4; Commonwealth Br. 4–5.

10. Article 4 of the CBA also contains a dues deduction provision, whereby the Commonwealth of Pennsylvania deducts union dues from employees' wages in order to transmit them to Local 1776 and/or the UFCW Council. Union Br. 2–5; Commonwealth Br. 5.

11. Plaintiff's employment with the Commonwealth as a liquor store clerk for the PLCB is subject to the terms and conditions of employment set forth in the CBA. Union Br. 3; *see* Commonwealth Br. 3–5.

12. Plaintiff sent a letter to Local 1776 and a copy of said letter to the Commonwealth of Pennsylvania resigning his union membership in Local 1776 on or about July 17, 2018. Compl. Ex. C; *see also* Union Br. 6; Commonwealth Br. 5–6.

13. A PLCB official responded in writing to Plaintiff's resignation letter on July 25, 2018, and stated that "the [CBA] only allows for employees to withdrawal [sic] membership during the 15 day period prior to the expiration of the [CBA] (June 16-30, 2019). You can refer to Article 4 of the [CBA] for the specific language. Therefore, we are unable to process your request unless we are informed that UFCW is making an exception to this language." Compl. Ex. D; Declaration of Plaintiff John R. Kabler, Jr., in Support of Plaintiff's Cross Motion for Partial Summary Judgment ¶¶ 7–8 ("Kabler Decl."); *see also* Union Br. 6.

14. No Union Defendant responded in writing to or accepted or honored Plaintiff's union membership resignation letter until on or about April 2, 2019—approximately 27 days after Plaintiff filed this action and approximately 259 days after Plaintiff sent his July 17, 2018 resignation letter. Kabler Decl. ¶¶ 9–10. In the April 2, 2019 letter, Local 1776 president, Defendant Young, wrote that Plaintiff's resignation request would be honored, and union dues would cease to be deducted from his wages as of April 10, 2019. *See* Kabler Decl. ¶¶ 9–10; Union Br. 6; Commonwealth Br. 5–6.

15. The Commonwealth deducted membership dues for Local 1776 from Mr. Kabler's wages from the time of his resignation on July 17, 2018, until deductions ended with his wage statement dated May 3, 2019. Kabler Decl. ¶ 11.

16. To date, Union Defendants have not refunded to Plaintiff union dues seized from his wages from the date of his resignation to the date Union Defendants chose to honor his resignation. Kabler Decl. ¶ 12.

17. Plaintiff alleges in Count Two of his Complaint that any restriction on his right to resign union membership at any time is a violation of his First and Fourteenth Amendment rights pursuant to the Constitution of the United States, Compl. ¶¶ 48–57, as is the continued deduction of union dues and/or fees from his wages as a nonmember after his date of resignation without his affirmative consent and/or waiver of First Amendment rights to pay any monies to the union, Compl. ¶¶ 54–57.

WHEREFORE, Plaintiff respectfully requests that this Court grant this motion for summary judgment and enter judgment in Plaintiff's favor:

a. declaring that certain PERA provisions, 43 P.S. §§ 1101.301(18), 1101.401, 1101.705, on their face and/or as applied, unconstitutionally abridge Plaintiff's rights under the First and Fourteenth Amendments to the Constitution of the United States to the extent that they prevent Plaintiff from resigning his union membership at any time and for any reason;

b. declaring that certain provisions of article 4 of the CBA between the Commonwealth of Pennsylvania and UFCW Council and/or Local 1776, on their face and/or as applied, unconstitutionally abridge Plaintiff's rights under the First and Fourteenth Amendments of the Constitution of the United States to the extent that

they prevent Plaintiff from resigning union membership at any time and for any reason and from preventing the deduction of union dues and/or fees from his wages without his affirmative consent and/or waiver of First Amendment rights after becoming a nonmember;

c. declaring that the First and Fourteenth Amendments to the Constitution of the United States prevent Defendants from restricting Plaintiff's right to resign from union membership at any time;

d. declaring that the First and Fourteenth Amendments to the Constitution of the United States prevent Defendants from deducting union dues and/or fees from Plaintiff's wages without his affirmative consent and/or waiver of First Amendment rights once he is a nonmember;

e. issuing an injunction to Defendants, their officers, employees, agents, attorneys, and all others acting in concert with them:

1. enjoining them from engaging in any activities listed above that this Court declares unconstitutional;
2. enjoining them from enforcing the relevant parts of article 4 of the CBA at issue in this action or any subsequent, substantially similar provision in an agreement between any or all Defendants, which requires Plaintiff to remain a union member for any length of time;

3. requiring them to expunge the relevant provisions of article 4 of the CBA at issue in this action from the CBA to the extent the CBA is still in effect or to expunge any substantially similar provisions from a subsequent agreement between Defendants;
 4. requiring Union Defendants to refund Plaintiff all union dues deducted from his wages from at least July 17, 2018, to the present date, with interest thereon; and
 5. requiring Union Defendants to pay Plaintiff nominal damages and other such amounts as principles of justice and compensation warrant;
- f. awarding Plaintiff compensatory and nominal damages, with interest thereon;
- g. awarding Plaintiff reasonable attorneys' fees and costs as related to Count Two of his Complaint; and
- h. awarding such other further relief as this Court may deem just and proper.

Dated: July 19, 2019

Respectfully Submitted,

THE FAIRNESS CENTER

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CERTIFICATE OF NON-CONCURRENCE

I, the undersigned, hereby certify that the concurrence of counsel of Defendants to this matter was sought by Plaintiff's counsel as to the relief requested in this motion, and said Defendants' counsel has denied concurrence in the motion.

Dated: July 19, 2019

s/ Nathan J. McGrath, Esq.

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on July 19, 2019, I electronically filed the foregoing *Plaintiff's Cross Motion for Summary Judgment* and attached *[Proposed] Order Granting Partial Summary Judgment and Declaration of John R. Kabler, Jr. in Support of Plaintiff's Cross Motion for Partial Summary Judgment* with the Clerk of Court using the Court's CM/ECF system, which will send electronic notification of the filing to all counsel of record in this matter, who are ECF participants, and that constitutes service thereon pursuant to Local Rule 5.7.

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