

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

JOHN R. KABLER, JR.,	:	
	:	No. 1:19-CV-0395
Plaintiff,	:	
	:	Judge Rambo
v.	:	
	:	REPLY BRIEF
UNITED FOOD AND COMMERCIAL	:	
WORKERS UNION, LOCAL 1776	:	(Electronically Filed)
KEYSTON STATE, et al.,	:	Complaint Filed 03/06/19
	:	Trial Date: Not set.
Defendants.	:	

**REPLY BRIEF OF COMMONWEALTH DEFENDANTS  
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Defendants, Pennsylvania Liquor Control Board, Thomas W. Wolf, Timothy Holden, Michael Newsome and Anna Marie Kiehl (“Commonwealth Defendants”), file the within Reply Brief in Support of their Motion for Summary Judgment and for any and all of the reasons that follow, respectfully request that this Honorable Court grant that Motion. Because the arguments in response to Commonwealth Defendants’ motion are substantially the same as those advanced in support of Plaintiff’s own Motion, Commonwealth Defendants respectfully refer the Court to its earlier filings and will only briefly address the key issues in Plaintiff’s Response. (See Doc. Nos. 20 (Commonwealth Defendants’ Brief in Support of Motion to Dismiss); 37 (Brief in Support of Converted Motion for Summary Judgment); 39 (Plaintiff’s Cross Motion for Partial Summary Judgment); 40 (Plaintiff’s Brief in

Support); 49 (Commonwealth Defendants' Brief in Opposition); 51 (Plaintiff's Brief in Opposition)).

Plaintiff makes much of the error in an earlier Commonwealth brief stating his dues had been "refunded." That mistake was corrected, and is immaterial to his claims against the Commonwealth. The fact on which Plaintiff seems to stake his case, alleging he was told joining Local 1776 was a condition of employment, is likewise irrelevant to the issue of whether he has set out a valid claim for relief against the Commonwealth.

Indeed, Plaintiff concedes he does not seek damages for alleged past wrongs by the Commonwealth, (Doc. No. 51 at 10-11), as those claims are barred by Eleventh Amendment immunity; instead, he seeks to make use of the narrow exception to immunity allowing for prospective relief to halt ongoing violations of federal law. Regardless of whether there was a violation of federal law at any point by the Commonwealth—which Commonwealth Defendants deny—there is no ongoing violation to enjoin or declare illegal, and thus he cannot evade immunity nor establish standing. Plaintiff removed himself from Union membership, has been released from his dues authorization, and the challenged maintenance of membership provision was not enforced against him, nor is it a provision of the current collective bargaining agreement ("CBA"). Thus, the matter is moot, Plaintiff

lacks standing for the relief he seeks, and the Commonwealth Defendants are immune from suit.

**I. PLAINTIFF FAILS TO IDENTIFY A DISPUTE OF FACT THAT IS “MATERIAL.”**

Plaintiff alleges there is ongoing dispute of fact regarding whether he was told that Union membership was a condition of employment. That fact is immaterial to the issue of whether he is entitled to prospective relief against the Commonwealth Defendants.

The Court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The Supreme Court explained that “substantive law will identify which facts are material.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). That is, “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Id.* “[A] factual issue that is not necessary to the decision is not material within the meaning of Rule 56(a) and a motion for summary judgment may be granted without regard to whether it is in dispute.” 10A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2725.1 (4th ed.) (citing cases).

Plaintiff alleges there is a dispute of fact regarding what he was told when he joined Local 1776. Regardless of the circumstances of Plaintiff’s membership application, he seeks only prospective relief against the Commonwealth Defendants.

Because the Commonwealth has ceased deducting dues from Plaintiff's pay and cannot resume unless he once again joins Local 1776 and authorizes deductions, he cannot seek prospective relief on those grounds. Further, the maintenance of membership provision was not applied to Plaintiff and it cannot ever be applied because: 1) Plaintiff is no longer a member of Local 1776; and 2) it is not a provision of the new CBA. The disputed fact is irrelevant to Plaintiff's claims against the Commonwealth Defendants.

## **II. PLAINTIFF HAS FAILED TO DEMONSTRATE HIS ENTITLEMENT TO THE RELIEF HE SEEKS.**

The related doctrines of standing and mootness bar Plaintiff's claims against the Commonwealth Defendants. First,

[i]t is axiomatic that in order to invoke the powers of a federal court, the plaintiff must show an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing[,] exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation.

*Brown v. Fauver*, 819 F.2d 395, 400 (3d Cir. 1987) (quotation omitted). In that prisoner's suit challenging the constitutionality of a discipline proceeding, the court explained, "the form of relief sought is often critical in determining whether the plaintiff has standing." *Id.* "Thus, . . . a given plaintiff may have standing to sue for damages yet lack standing to seek injunctive relief." *Id.* (citations omitted).

Indeed, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any

continuing, present adverse effects.” *O’Shea v. Littleton*, 414 U.S. 488, 495-95 (1974). For declaratory relief, “the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy an[d] reality to warrant” such relief. *Golden v. Zwickler*, 394 U.S. 103, 108-09 (1969) (finding it “wholly conjectural that another occasion might arise when Zwickler might be prosecuted for distributing the handbills referred to in the complaint.”). No “further and far broader right to a general adjudication of unconstitutionality” exists; the “constitutional question, First Amendment or otherwise, must be presented in the context of a specific live grievance.” *Id.* at 109-10. In a substantially similar case, *Seager v. United Teachers Los Angeles*, No 2:19-cv-00469, 2019 WL 3822001 (C.D. Cal. Aug. 14, 2019) *appeal docketed*, No. 19-55977 (9th Cir. Aug. 21, 2019) (attached as Ex. D to Doc. No. 49), the court found it significant that the plaintiff “would have to rejoin [the] union for [plaintiff’s] claim to be live, which, given [plaintiff’s] representations in this lawsuit, seems a remote possibility,” and granted defendants’ motions to dismiss claims to enjoin dues authorization and to enjoin enforcement of the statute at issue. *Id.* at \*2 (citation omitted).

When Eleventh Amendment immunity is at issue, the “plaintiff challenging the validity of a state statute may bring suit against the official who is charged with the statute’s enforcement only if the official has either enforced, or threatened to

enforce, the statute against the plaintiffs.” *Ist Westco Corp. v. Sch. Dist. of Phila.*, 6 F.3d 108, 113 (3d Cir. 1993). In *Molina v. Pa. Social Serv. Union*, No. 1:19-cv-0019, 2019 WL 3240170 (M.D. Pa. July 18, 2019) (attached as Ex. A to Doc. No. 49), the court determined the plaintiff lacked standing for prospective relief since the request was based on an “unknown event as some unknown time.” *Id.* at \*8 (citation omitted).<sup>1</sup> In another recent case challenging so-called “fair share” or “agency” fees, the court determined that Attorney General Shapiro and the Pennsylvania Labor Relations Board were inappropriate defendants because they had not enforced or threatened to enforce the challenged provisions against the plaintiff class. *Diamond v. Pa. State Educ. Ass’n*, No. 3:18-cv-128, \_\_\_ F. Supp. 3d \_\_\_, 2019 WL 2929875 at \*10-13 (W.D. Pa. July 8, 2019) (attached as Ex. “A” hereto) (dismissing complaint against Commonwealth and Union Defendants, finding lack of standing, mootness, and immunity barred claims).

Plaintiff does not seek retrospective relief against Commonwealth Defendants, (Doc. No. 51 at 10-11), and admits dues deductions have ceased. (Plaintiff’s Counter Statement to Defendants’ Joint Statement of Material Facts Not in Dispute, Doc. No. 52, ¶ 64). He offers no evidence that the challenged

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<sup>1</sup> The court noted that plaintiff was no longer employed by defendant but could be reinstated. Regardless, the court found no live case or controversy and granted the motion to dismiss, leaving open the possibility that the claims could be renewed if defendants subjected plaintiff to the challenged PERA and CBA provisions in the future. *Molina*, 2019 WL 3240170 at 8 n.13.

maintenance of membership provision was enforced in his case, or that it is incorporated as a provision of the new CBA. (See Doc. No. 36, ¶ 65 (“In the new CBA, Article 4 no longer has any provision regarding maintenance of membership or fair share fees.”) (citing *Gold Second Decl.*, ¶ 24; Ex. F to *Gold Second Decl.*, ¶ 18); Doc. No. 52, ¶ 65 (Plaintiff without sufficient information to admit or deny)).

Because Plaintiff cannot establish an ongoing violation of federal law, and lacks standing to challenge the statutory and CBA provisions at issue as they have not been applied to him, his claims against the Commonwealth Defendants are barred. Plaintiff is no longer a member of the Union, his dues deductions have ceased, and no maintenance of membership provision has been or could be applied to him. Instead, he points to the alleged conduct of one individual at the time he joined Local 1776, which, if believed, establishes no more than a prior wrong that is not attributable to the Commonwealth Defendants. It does nothing to preserve his claims for prospective relief, and summary judgment in favor of Commonwealth Defendants is warranted.

### III. CONCLUSION

For the reasons set forth above, the Commonwealth Defendants respectfully request that this Honorable Court grant their Motion for Summary Judgment.

Dated: September 13, 2019

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I, Nancy A. Walker, hereby certify that the foregoing Reply Brief has been filed electronically on September 13, 2019 and is available for viewing and downloading from the Court's Electronic Case Filing system by all counsel of record.

Dated: September 13, 2019  
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