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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA
HARRISBURG DIVISION

FRANCISCO MOLINA, Plaintiff, v. PENNSYLVANIA SOCIAL SERVICE UNION, SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 668; *et al.*, Defendants.	CASE NO.: 1:19-CV-00019-YK **DEFENDANT LOCAL 668'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** Complaint Filed: Jan. 7, 2019 Trial Date: Not set. Judge: Hon. Yvette Kane

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INTRODUCTION

Francisco Molina ("Molina") brought suit against his former union, SEIU Local 668 ("Local 668"), in an effort to claw back membership dues that he agreed to and paid voluntarily and in exchange for which he received membership rights and benefits, and to invalidate certain provisions of state law and of Local 668's collective bargaining agreement with Lehigh County. This Court has already concluded that it lacks jurisdiction over Molina's claims for injunctive and declaratory relief with respect to the collective bargaining agreement and state law (because Molina is no longer a union member or public employee), and over Molina's refund claim for those deductions made after his resignation (because those deductions had already been refunded). All that remains of Molina's First Amended Complaint are his claims for recovery of the dues he paid *before* his resignation from union membership, which Molina alleges were deducted in violation of his First Amendment rights (Count II) and due process of law (Count III).

These claims for pre-resignation retrospective monetary relief are meritless. Molina chose to join Local 668 when he was free not to do so, and he voluntarily and explicitly authorized the deduction of dues that were a condition of that membership. Molina's First Amendment rights were not violated by his own voluntary decision to join Local 668 and contractual agreement to pay membership dues; nor did the government deprive Molina of a "protected interest" without due process by making deductions Molina himself authorized. Accordingly, Local 668 is entitled to summary judgment on Molina's remaining claims.

FACTUAL BACKGROUND

Under Pennsylvania law, public employees may democratically choose a union to represent them in collective bargaining with their public employers about terms and conditions of employment. 43 Pa.Stat.Ann. §§1101.601, 1101.606. Public employees represented by a union have the right to choose whether to join

the union as members, and Pennsylvania law makes it unlawful for a union or a public employer to coerce an employee into union membership. *See* 43 Pa.Stat.Ann. §1101.401.

Molina was a County employee and member of a bargaining unit represented by Local 668 and subject to the terms and conditions established by a collective bargaining agreement between the County and Local 668 ("CBA"). *See* First Amended Complaint ("FAC"), ECF No. 20, ¶¶8, 13, 23 & ECF No. 20-1, Exh. A. Molina became a member of Local 668 in 2006, when he signed a membership card and completed a form authorizing the deduction of union membership dues from his paycheck. Declaration of Claudia Lukert, ECF No. 29-2 ("Lukert Decl."), Exhs. A & B; *see also* ECF No. 49, at 4-5. The dues deduction authorization form provided that Molina would pay dues "for a period of one year or until the termination of the applicable collective bargaining agreement, whichever occurs sooner, irrespective of [his] membership status in the Union." Lukert Decl. Exh. B. The form also provided instructions for revoking his dues deduction authorization. *Id.* As a member of Local 668, Molina was entitled to the rights and benefits of union membership, including the right to attend union meetings, to nominate himself or others for elected office, and to vote on internal union matters. Declaration of Kieran Kenny ("Kenny Decl.") ¶6.

After joining Local 668 in October 2006, Molina paid his membership dues via deductions from his paycheck pursuant to the written authorization he had provided. He was a very active member of Local 668. Molina was elected, served as, and nominated himself for re-election to the position of shop steward. Kenny Decl. ¶¶7, 9. He served in this role until the end of 2016. *Id.* ¶¶7-8. As a shop steward, Molina was responsible for processing grievances on behalf of his fellow employees, encouraging new employees and non-members who were employed within the bargaining unit to join the union, explaining the terms and benefits of

membership to other employees, and keeping his fellow members up to date on the union's activities. *Id*. ¶7.

On July 20, 2018, Local 668 received a letter from Molina "directing SEIU and [his] Lehigh County Employer…to cease and desist the collection and recovery process of any and all payments relating to SEIU agency fees, activity feeds, and dues." *See* Lukert Decl. ¶6; Exhibits to FAC, ECF No. 20-1, Exh. C. In response, on August 10, 2018, Local 668 sent a letter to Lehigh County stating that Molina had resigned and directing Lehigh County to stop dues deductions from Molina. Lukert Decl. ¶6 & Exh. C. On August 14, 2018, Molina was dismissed from his position with Lehigh County, and he was no longer a public employee after that date. Declaration of Judy Johnston, ECF No. 34-1 ("Johnston Decl.") at ¶4. Local 668 subsequently sent Molina a check for $120.37, the total amount in dues received from paychecks corresponding to the period between June 23, 2018 (four days before Molina told his employer, but not Local 668, he wished to resign from the union), and his termination. Lukert Decl. ¶13 & Exh. D.

PROCEDURAL BACKGROUND

Five months after the County dismissed Molina from employment, Molina filed suit against Local 668 and its President, Stephen Catanese, seeking injunctive and declaratory relief and a refund of his membership dues dating back as far as the statute of limitations would allow. Molina's First Amended Complaint included three claims for relief against Local 668 and its President. Molina alleged, first, that his First Amendment rights were violated by a union security provision in the collective bargaining agreement between Local 668 and Lehigh County (Count I); second, that "[s]ince at least January 7, 2017," funds had been seized from Molina's wages in the form of membership dues deductions without his affirmative consent, in violation of *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018) (Count II), FAC ¶¶53-54; and third, that Local 668 violated Molina's due process rights by failing "to provide Mr. Molina any meaningful opportunity to

object to [the] continued seizure of his funds or a clearly defined process for asserting such an objection" (Count III), FAC ¶63.

Local 668 moved to dismiss Molina's claims for injunctive and declaratory relief and Molina's claim for retrospective monetary relief as to any post-resignation dues deductions for lack of subject matter jurisdiction pursuant to Fed. R. Civ. Proc. 12(b)(1). Defendants Local 668's and Catanese's Motion to Dismiss, ECF No. 29-1 ("Motion to Dismiss"), at 1-2. Catanese moved to dismiss the claims against him in their entirety pursuant to Fed. R. Civ. Proc. 12(b)(6). *Id*. at 15-16. This court granted Catanese's Motion to Dismiss in its entirety and with prejudice; dismissed the entirety of Count I as to Local 668 for lack of standing; and dismissed Molina's request for recovery of post-resignation dues in Count II on mootness grounds. Order, ECF No. 41; *see also* Memorandum, ECF No. 40, at 18 ("The Court, therefore, will grant Defendants' motions to dismiss as to Plaintiff's claims for prospective declaratory and injunctive relief….").

In its Memorandum decision and accompanying Order, the Court invited Local 668 to submit additional briefing to clarify which claims it sought to dismiss pursuant to Fed. R. Civ. Proc. 12(b). ECF No. 41. In that additional briefing, Local 668 clarified that it had not moved to dismiss Molina's claims for *pre*-resignation relief under Fed. R. Civ. Proc. 12(b)(1) or (b)(6), and that it had moved to dismiss Count III on jurisdictional grounds as to *prospective* relief. Supplemental Brief, ECF No. 42, at 1. Following this clarification, the Court ordered Defendants to file an Answer to Molina's FAC, ECF No. 45, and Local 668 timely did so, *see* Local 668's Answer, ECF No. 47.

Pursuant to Fed. R. Civ. Proc. 56 Local 668 now moves for summary judgment on Molina's remaining claims—i.e., his First Amendment and due process claims based on his payment of union membership dues *before* his resignation from union membership.

ARGUMENT

A moving party is entitled to summary judgment if it can show "there is no genuine dispute as to any material fact and is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(a). Although Local 668 and Molina dispute certain facts that are irrelevant to Molina's claims for relief, *see* ECF No. 49, at 4, the facts material to the resolution of this motion are undisputed: Molina voluntarily joined Local 668 in 2006, voluntarily authorized the deduction of union dues from his paychecks at that time, received the full benefits of union membership (including the right to serve as a union shop steward) while he remained a member, and did not resign his union membership until July 2018. *See* ECF No. 49, at 4-5; FAC ¶30; Lukert Decl. ¶¶5-6; Kenny Decl. ¶¶6-7, 10-11.

Molina's voluntary decision to join and pay dues to Local 668 does not infringe upon either his First Amendment or due process rights. His effort to renege on this contractual agreement and obtain a refund of dues he chose to pay—and for which he received the benefits of union membership—is without legal merit, and judgment should enter in favor of Local 668.

1. Molina voluntarily entered into a membership agreement with Local 668 and chose to pay union membership dues.

Molina seeks a refund of the union membership dues he paid through payroll deductions. FAC ¶55. As this court has already held, Molina's claims for "relief in the form of post-resignation due payments … has been rendered moot by the refund provided by Defendants." Memorandum, ECF No. 40, at 19. All that remains of Molina's claim for retrospective monetary relief, therefore, is his claim for a refund of those dues deducted prior to his resignation. But Molina affirmatively consented to join Local 668 and pay those corresponding membership dues. Molina's payments of the membership dues he voluntarily agreed to pay did not violate his First Amendment rights.

The First Amendment prohibits the government from *compelling* an individual to subsidize another private party's expressive activities. *See, e.g.*, *Janus*, 138 S.Ct. at 2464 (explaining that "*compelled* subsidization of private speech seriously impinges on First Amendment rights") (emphasis added). Molina's choice to join Local 668 and authorize union dues deductions was not compelled by the government; it was voluntary, expressive activity that is protected, not proscribed, by the First Amendment. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 16 (1976); *contra* FAC ¶¶26-27 (characterizing choice to join the union as a "violation of his First Amendment rights").

The Supreme Court has emphasized that any pressure that union-represented employees may feel to join the union that represents their bargaining units is "no different from the pressure to join a majority party that persons in the minority always feel" and "does not create an unconstitutional inhibition on associational freedom." *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 290 (1984); *see also Bain v. Cal. Teachers Ass'n*, 891 F.3d 1206, 1219-20 (9th Cir. 2018); *Clark v. City of Seattle*, 2017 WL 3641908, at *3-4 (W.D. Wash. Aug. 24, 2017). "Where the employee has a choice of union membership and the employee chooses to join, the union membership money is not coerced. The employee is a union member voluntarily." *Kidwell v. Transp. Communications Int'l Union*, 946 F.2d 283, 292-93 (4th Cir. 1991); *cf. Masters v. Screen Actors Guild*, 2004 WL 3203950, at *5 n.6 (C.D. Cal. Dec. 8, 2004) (citing *Kidwell* to find that "a union is entitled to require, as a condition of membership, that members pay a fee that covers the costs of both the union's non-representational and representational activities[]"); *Farrell v. IAFF*, 781 F.Supp. 647, 649 (N.D. Cal. 1992) (following *Kidwell* and rejecting First Amendment claims brought by public sector union members).

Janus did not change the law governing the formation and enforcement of voluntary contracts between unions and their members. Nor did *Janus* alter the

longstanding principle that "the First Amendment does not confer … a constitutional right to disregard promises that would otherwise be enforced under state law." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991). The plaintiff in *Janus* was a *non*-member required to pay fair-share fees by state statute, not a *member* who had affirmatively chosen to enter into a contract to secure member benefits in exchange for paying dues. 138 S.Ct. at 2460. Because *Janus* "says nothing about people [who] join a Union, agree to pay dues, and then later change their mind about paying union dues," *Belgau v. Inslee*, 2018 WL 4931602, at *5 (W.D. Wash. Oct. 11, 2018) ("*Belgau I*"), it provides no support for Molina's request to get back the voluntary membership dues payments he made in exchange for already-received benefits of membership. For that reason, all of the federal courts that have considered indistinguishable post-*Janus* claims by former union members seeking to recover dues they paid before *Janus* have rejected the claim that public employers violated the First Amendment by deducting those dues; as the District of Oregon recently held in summarizing this unanimous authority, "because [such employees] were voluntary union members, *Janus* does not apply." *Anderson v. SEIU Local* 503, __ F.Supp.3d ___, 2019 WL 4246688, at *3 (D. Or. Sept. 4, 2019).[1]

[1] *See also Seager v. United Teachers Los Angeles*, 2019 WL 3822001, at *2 (C.D. Cal. Aug. 14, 2019) (following the "growing consensus of authority on the issue" in rejecting "First Amendment claim for return of dues paid pursuant to [plaintiff's] voluntary union membership agreement"); *Babb v. Cal. Teachers Ass'n*, 378 F.Supp.3d 857, 877 (C.D. Cal. 2019) ("Plaintiffs voluntarily chose to pay membership dues in exchange for certain benefits, and '[t]he fact that plaintiffs would not have opted to pay union membership fees if *Janus* had been the law at the time of their decision does not mean their decision was therefore coerced.'") (quoting *Crockett v. NEA-Alaska*, 367 F.Supp.3d 996, 1008 (D. Alaska 2019)); *Bermudez v. SEIU Local 521*, 2019 WL 1615414, at *2 (N.D. Cal. Apr. 16, 2019) (plaintiffs' pre-*Janus* "decision to pay dues was not coerced and payment was a valid contractual term"). Indeed, courts have repeatedly held that public employees may be required to continue paying dues *after* their resignation from membership

Molina alleges "on information and belief" that Local 668 or its officers represent that membership in Local 668 is mandatory and that Local 668 does not provide representation to employees who resign their membership. FAC ¶¶19-20. But Molina does not allege that these representations were made to him, that he joined Local 668 as a result of these or any other misrepresentations, or that he was otherwise subject to duress or fraud in relation to *his* decision to join Local 668. Molina also alleges that Local 668 or its officials represent to members that if they resign their membership, they will no longer be entitled to the CBA's terms and conditions. *Id.* ¶21. Again, Molina does not allege that such representations were

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pursuant to their pre-*Janus* agreement to do so—an issue not presented here. *See Anderson*, 2019 WL 4246688 at *3 ("Plaintiffs chose to become dues-paying members of their respective unions, rather than agency fee paying non-members. In doing so, they acknowledged restrictions on when they could withdraw from membership."); *Smith v. Superior Court, Cty. of Contra Costa*, 2018 WL 6072806, at *1 (N.D. Cal. Nov. 16, 2018) ("*Smith I*"), *subsequent order*, *Smith v. Bieker*, 2019 WL 2476679, at *2 (N.D. Cal. June 13, 2019) ("*Smith II*") ("*Janus* did not concern the relationship of unions and members; it concerned the relationship of unions and non-members."); *Cooley v. Cal. Statewide Law Enforcement Ass'n*, 2019 WL 331170, at *3 (E.D. Cal. Jan. 25, 2019) ("*Cooley I*") ("Mr. Cooley knowingly agreed to become a dues-paying member of the Union, rather than an agency fee-paying nonmember…. That decision was a freely-made choice. The notion that Mr. Cooley may have made a different choice … if he knew the Supreme Court would later invalidate public employee agency fee arrangements does not void his previous, knowing agreement."), *subsequent order*, 385 F.Supp.3d 1077, 1079 (E.D. Cal. 2019) ("*Cooley II*") ("The relationship between unions and their members was not at issue in *Janus*."); *O'Callaghan v. Regents of Univ. of Cal.*, 2019 WL 2635585, at *3 (C.D. Cal. June 10, 2019) ("[N]othing in *Janus*'s holding requires unions to cease deductions for individuals who have affirmatively chosen to become union members and accept the terms of a contract …."); *Belgau I*, 2018 WL 4931602 at *5 ("*Janus* says nothing about people [who] join a Union, agree to pay dues, and then later change their mind about paying union dues."), *subsequent order*, 359 F.Supp.3d 1000, 1016 (W.D. Wash. 2019) ("*Belgau II*") ("*Janus* does not apply here—Janus was not a union member, unlike the Plaintiffs here, and Janus did not agree to a dues deduction, unlike the Plaintiffs here.").

made *to him.* Moreover, the CBA on its face applies to "all employees" in the bargaining unit, regardless of union membership. ECF No. 20-1, Exh. A.

In any event, under Pennsylvania's Public Employe Relations Act, employees have the right to decline union membership, 43 Pa.Stat.Ann. §1101.401, and unions have a duty to represent all employees in a bargaining unit regardless of union membership status, *Penn. Labor Relations Bd. v. Eastern Lancaster County Ed. Ass'n.*, 427 A.2d 305, 307-08 (Pa. Cmwlth. 1981). While alleged misrepresentations by a private party like Local 668 might state a claim under Pennsylvania law, they do not state a claim under the First Amendment or §1983, because such violations of state law by a private party do not amount to state action or conduct under color of state law.[2] A plaintiff "does not state a cause of action under §1983" when the conduct at issue is "contrary to the relevant policy articulated by the State." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 940 (1982).

In short, Molina chose and affirmatively consented to join Local 668 and pay membership dues in exchange for the benefits of union membership. No First Amendment rights were infringed by the State's deduction of the dues he voluntarily authorized. Local 668 is therefore entitled to summary judgment on what remains of Count II.

2. Molina's due process claim is meritless because his voluntary membership in Local 668 was not state action, did not deprive him of a protected interest, and was duly terminated upon request.

Count III of Molina's FAC claims that his due process rights were infringed by his membership in Local 668, and corresponding dues deductions. Specifically, Molina alleges that he was denied "meaningful notice…of his right to object to

[2] If a union or its officials "interfer[es], restrain[s], or coerc[es] employes in the exercise of" their right to refrain from joining a union, that union commits an "unfair practice" in violation of Pennsylvania state law. *See* 43 Pa.Stat.Ann. §§1101.401, 1101.1201(a)(1).

associating with or subsidizing the speech of PSSU, [and] … any meaningful opportunity to object to continued seizure of his funds or a clearly defined process for asserting such an objection." FAC ¶¶61, 63. To the extent this Court has jurisdiction to hear Molina's claim, that claim is meritless.[3]

"To prevail on a procedural due process claim, a litigant must show (1) that the state deprived him of a protected interest in life, liberty, or property and (2) that the deprivation occurred without due process of law." *Burns v. PA Dep't of Correction*, 544 F.3d 279, 285 (3d Cir. 2008) (internal citation omitted). Molina cannot establish any of the elements of a due process violation: His voluntary membership in Local 668 and payment of dues were not "state action," and his decision to become a member and pay dues did not "deprive[]" him of a protected interest but instead involved his own exercise of First Amendment rights.

First, Molina's claim fails on the "threshold issue" of state action. *See Abbott v. Latshaw*, 164 F.3d 141, 146 (3d Cir. 1998). For an allegedly unlawful act to give rise to a due process claim under §1983, there must be "such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Leshko v. Servis*, 423 F.3d 337, 339 (3d Cir. 2005) (citation omitted). Molina's due process claim is premised upon Local 668's policies and procedures for enrolling new employees in union membership and informing existing union members of their rights with respect to

[3] As Local 668 explained in its Supplemental Brief re: Motion to Dismiss, ECF No. 42, at 2, the Court lacks jurisdiction with respect to any claims for *prospective* relief in Count III. *See Freedom From Religion Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 476 (3d Cir. 2016) (plaintiff must demonstrate standing separately for each for each form of relief sought). Molina lacks standing to challenge Local 668's procedures regarding membership and dues deductions because Molina "is no longer a member of Defendant PSSU and is no longer employed with the County." *See* Memorandum, ECF No. 40, at 18 (dismissing Molina's claims for prospective relief under Counts I and II for lack of subject matter jurisdiction).

resignation or termination of dues payments, but such conduct by a private party is not "fairly treated" as action of the state for due process purposes.[4]

Second, Molina was not deprived of a protected interest by choosing to join Local 668. Molina *affirmatively* elected to join Local 668 by completing and signing a membership application, Lukert Decl. ¶5 & Exh. A, and a Dues Authorization form, *id.* Exh. B. As explained *supra* at 6-9, Molina's choice to join Local 668 was an exercise, not a deprivation, of his First Amendment rights. For the same reason, Molina's voluntary payment of membership dues in exchange for the rights and benefits of membership did not involve any "deprivation" of a protected property interest. Molina was not *compelled* to join Local 668, so no additional procedural protections were required to facilitate Molina's exercise of the right against compelled association. *Cf. Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 307 & n.20 (1986) (due process

[4] The Third Circuit has identified two categories of conduct by private entities that can constitute state action: conduct involving "an *activity* that is significantly encouraged by the state or in which the state acts as a joint participant," and cases in which the "*actor*…is controlled by the state, performs a function delegated by the state, or is entwined with government policies or management." *Leshko*, 423 F.3d at 340 (emphasis in original).

Neither category applies to the membership dues deductions Molina claims violated his due process rights. Local 668 is not an "actor" performing a state function with respect to the union's internal membership policies and practices or its collection of voluntary membership dues from members. And although the County deducted those dues from Molina's paycheck pursuant to his written authorization, that purely ministerial act does not make Molina's payment of dues to Local 668 state action for §1983 purposes. *See Sament v. Hahnemann Med. Coll. & Hosp. of Philadelphia*, 413 F. Supp. 434, 439 (E.D. Pa. 1976), *aff'd*, 547 F.2d 1164 (3d Cir. 1977). Were it otherwise, every payment made by a public actor at the direction of a private party (whether via payroll deduction, via deductions from a tax refund, or via debit from an account with a state-run financial institution such as a state-run bank) would trigger constitutional protections and potential §1983 liability.

entitlement arises where nonunion employee "bears the burden of objecting" to *compelled* dues payments).

Molina also was not harmed by any purportedly inadequate "process," but was instead fully informed of the means for asserting his rights. Molina's signed dues authorization stated the term for which the authorization was valid and the means by which Molina could terminate dues deductions. *See* Lukert Decl. Exh. B. Molina first notified Local 668 and his employer of his resignation, as required by the terms of his authorization, in July 2018. *See* FAC ¶28. Local 668 thereafter processed Molina's resignation and refunded the dues deducted after his resignation. Lukert Decl. ¶¶6, 13.[5]

Because Local 668's internal membership practices and policies and the County's ministerial collection of voluntary dues payment pursuant to the private agreement between Molina and Local 668 do not involve state action; because Molina was not deprived of any protected property or liberty interest; and because Molina was fully informed of the process for terminating his voluntary dues deduction authorization, summary judgment should be entered in favor of Local 668 on Count III of Molina's First Amended Complaint.

CONCLUSION

For the foregoing reasons, summary judgment as to Molina's remaining claims should be entered in Local 668's favor

Dated: October 4, 2019

Respectfully Submitted,

/s/P. Casey Pitts

P. Casey Pitts (CA262463)

[5] Indeed, Local 668 did not even hold Molina to the process for terminating dues deductions: Although Molina's resignation letter was sent outside the window period specified in his dues authorization card, Local 668 instructed Lehigh County to cease dues deductions immediately.

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