

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK**

DOLLY BERNARD,

Plaintiff,

v.

THE PUBLIC EMPLOYEES FEDERATION, AFL-CIO;
MICHAEL N. VOLFORTE, in his official capacity as
Director of the Governor’s Office of Employee
Relations; THOMAS P. DINAPOLI, in his official
capacity as the New York State Comptroller,

Defendants.

Case No. 1:21-CV-0058 (LEK/DJS)

(Hon. _____)

COMPLAINT

AND NOW comes Plaintiff Dolly Bernard, by and through her undersigned attorneys, and states the following claims for relief against Defendants The Public Employees Federation, AFL-CIO (“PEF”); Michael N. Volforte, in his official capacity as Director of the Governor’s Office of Employee Relations; and Thomas P. DiNapoli, in his official capacity as the New York State Comptroller, and avers as follows:

SUMMARY OF THE CASE

1. This is a civil rights action pursuant to 42 U.S.C. § 1983 for declaratory, injunctive, and monetary relief, to redress the ongoing deprivation of Plaintiff’s rights, privileges, and/or immunities under the First and Fourteenth Amendments to the United States Constitution. This deprivation is caused by Defendants’ contracts, policies, and practices, under color of state law, including the state’s Public Employees’ Fair Employment Act, N.Y. Civ. Serv. Law, art. 14 (the “Taylor Law”), in which Defendants have and continue to have union dues or fees seized from Plaintiff’s wages, even though she is a nonmember public employee who objects to financially supporting PEF.

2. The United States Supreme Court has held that the First Amendment to the Constitution of the United States prohibits the government and unions from compelling nonmember public employees to pay dues or fees to a union as a condition of employment. *See Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2486 (2018). Defendants are violating Plaintiff's constitutional rights by deducting payments of union dues or fees from her wages as a condition of employment.

3. Despite Plaintiff's resignation from union membership, PEF has continued to act in concert with the state of New York, by and through its agents and officials, to seize and to accept union dues or fees from her wages, violating her First and Fourteenth Amendment rights to free association, self-organization, assembly, petition, and freedoms of speech, thought, and conscience.

4. Additionally, PEF has acted in concert with the state, by and through its agents and officials, to deduct and to accept union dues or fees from Plaintiff's wages without providing her any meaningful notice or opportunity to object to the ongoing deductions, the process by which the money is withheld, or the ways in which her money is used, violating her Fourteenth Amendment right to due process.

5. Because Defendants continue to deduct union dues or fees from Plaintiff's wages in violation of her constitutional rights, Plaintiff seeks injunctive and declaratory relief against all Defendants, compensatory and nominal damages against PEF, as well as attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

JURISDICTION AND VENUE

6. This action arises under the Constitution and laws of the United States of America, including the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983, to redress the deprivation, under color of state law, of Plaintiff's rights, privileges, and immunities under the Constitution of the United States, and particularly the First and Fourteenth Amendments thereto, and 42 U.S.C. § 1988.

7. This Court has jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. § 1331—because her claims arise under the United States Constitution—and 28 U.S.C. § 1343—because she seeks relief under 42 U.S.C. § 1983.

8. This action is an actual controversy in which Plaintiff seeks a declaration of her rights under the Constitution of the United States. Pursuant to 28 U.S.C. §§ 2201 and 2202, this Court may declare plaintiffs' rights and grant further necessary and proper relief, including injunctive relief pursuant to Federal Rule of Civil Procedure 65.

9. Venue is proper in this Court under 28 U.S.C. § 1391(b), because one or more defendants are domiciled in, and operate or do significant business in, this judicial district, and a substantial part of the events giving rise to the claims in this action occurred in this judicial district.

PARTIES

10. Plaintiff Dolly Bernard is a “public employee” within the meaning of the Taylor Law, *see* N.Y. Civ. Serv. Law § 201(7) (McKinney 2020), employed by the New York State Division of Criminal Justice Services, Office of Victim Services as a Contract Management Specialist. Ms. Bernard is employed in a bargaining unit represented, exclusively for purposes of collective bargaining, by PEF. Ms. Bernard was a member of PEF, but has not been a member of PEF since the date of her resignation letter.

11. Defendant PEF is an “employee organization” within the meaning of the Taylor Law, *see* N.Y. Civ. Serv. Law § 201(5). Pursuant to the collective bargaining agreement (“CBA”) between PEF and the State of New York, PEF represents Ms. Bernard exclusively for purposes of collective bargaining with the state. PEF maintains a place of business at 1168-70 Troy-Schenectady Road, Albany, New York, and conducts its business and operations throughout the state of New York, including the Northern District of New York.

12. Defendant Michael N. Volforte is the Director of the Governor's Office of Employee Relations. On information and belief, Mr. Volforte negotiated, entered into, and/or is the signatory to, on behalf of the state, the CBA, which governs Plaintiff's terms and conditions of employment. Mr. Volforte is sued in his official capacity.

13. Defendant Thomas P. DiNapoli, in his official capacity as the New York State Comptroller, is responsible for, among other things, issuing wages to state employees, including to Ms. Bernard. He oversees the payroll system for the state, which includes processing all payroll deductions, including union dues or fees pursuant to the requirements of the CBA and the Taylor Law. He is sued in his official capacity.

FACTUAL ALLEGATIONS

14. Acting in concert under color of state law, New York, by and through Director Volforte, in his official capacity, and PEF have entered into the CBA that controls Plaintiff's terms and conditions of employment. Relevant portions of the CBA are attached hereto as "Exhibit A," and incorporated by reference herein.

15. Article 4 of the CBA provides for certain rights to PEF as an "employee organization," including the right to "exclusive payroll deduction of membership dues." Ex. A, CBA art. 4.2.

16. The CBA's grant of a right to PEF to have the state of New York, through its officials and agents, deduct union dues or fees for PEF is authorized by state law, which requires the state of New York to extend to PEF the right to dues deduction.

17. The Taylor Law provides,

(a) The term "membership dues deduction" means the obligation or practice of a government to deduct from the salary of a public employee with his consent an amount for the payment of his membership dues in an employee organization. Such term also means the obligation or practice of a government to transmit the sums so deducted to an employee organization.

(b) The term “agency shop fee deduction” means the obligation or practice of a government to deduct from the salary of a public employee who is not a member of the certified or recognized employee organization which represents such employee for the purpose of collective negotiations conducted pursuant to this article, an amount equivalent to the amount of dues payable by a member. Such term also means the obligation or practice of a government to transmit the sums so deducted to an employee organization.

N.Y. Civ. Serv. Law § 201(2).

18. The Taylor Law also provides, in relevant part,

A public employer shall extend to an employee organization certified or recognized pursuant to this article the following rights: . . . (b) to membership dues deduction, upon presentation of dues deduction authorization cards signed by individual employees. . . . The right to such membership dues deduction shall remain in full force and effect until: (i) an individual employee revokes membership in the employee organization in writing in accordance with the terms of the signed authorization. . . .

N.Y. Civ. Serv. Law § 208(1).

19. In 2018, the Office of the New York State Comptroller, led by Defendant DiNapoli, issued State Agencies Bulletin No. 1664-1, which affects “employees who are seeking to initiate or terminate deductions for union dues.” The bulletin states that agencies should “notify employees to contact their union” to terminate dues or membership status.

20. Plaintiff became a union member after beginning her state employment as a Contract Management Specialist.

21. On August 15, 2020, Plaintiff resigned her union membership and sought to end union dues deductions via letter mailed to PEF’s headquarters, with copies sent to PEF via facsimile and e-mail to PEF’s president.

22. The State of New York, by and through Defendant DiNapoli, and/or his agents or officials, also received a copy of Ms. Bernard’s resignation letter via mail, e-mail, and facsimile.

23. No Defendant, or agent or official thereof, has confirmed that Plaintiff is no longer a member of PEF.

24. Defendants have refused to stop deducting union dues from Plaintiff's wages for PEF as of the date of her membership resignation from PEF.

25. Defendants never provided Plaintiff with written notice of her constitutional rights, including the right as a nonmember to choose not to pay any union dues or fees to PEF or to due process, including notice and an opportunity to object to how any nonconsensual union dues or fees taken from her are used.

26. No Defendant or any agent or official of Defendants asked Plaintiff to agree to pay money to PEF as a nonmember of PEF, or to otherwise waive any constitutional rights, following her resignation from PEF membership.

27. Plaintiff never received notice from Defendants that she had the constitutional right not to pay union dues or fees to PEF when she was not a member of PEF.

28. Plaintiff never waived her constitutional right as a nonmember not to pay union dues or fees to PEF.

29. Defendant DiNapoli, acting in concert with PEF, pursuant to the CBA, the Taylor Law, and their joint policies and practices, refuses to immediately end union dues deductions from Plaintiff's wages upon her membership resignation.

30. Defendants, pursuant to the CBA, the Taylor Law, other agreements between them, and/or their joint policies and practices, act in concert under color of state law to collect, distribute, accept, and/or retain union dues or fees deducted from Plaintiff's wages since her membership resignation.

31. Continually since on or about August 15, 2020, Mr. DiNapoli, in his role as New York's Comptroller and acting in concert with PEF, has continued to deduct purported union dues or fees from Plaintiff's wages.

32. Continually since on or about August 15, 2020, PEF has continued to take, receive, and/or accept purported union dues or fees from Plaintiff's wages.

33. Defendants have taken and continue to take and have accepted and continue to accept purported union dues or fees from Plaintiff's wages against her will and without her consent.

34. Defendants, acting in concert under color of state law, have provided Plaintiff no meaningful notice or opportunity to object to the deductions, the process by which the money is deducted, or the ways in which her money is used.

35. On information and belief, PEF uses the financial support forcibly seized from Plaintiff as a nonmember for purposes of political speech and activity, among other purposes.

36. Plaintiff objects to the compelled association with and financial subsidization of any activities of PEF and/or its affiliates for any purpose.

CLAIMS FOR RELIEF

COUNT ONE

(Violation of 42 U.S.C. § 1983 and
the Constitution of the United States)

37. Plaintiff re-alleges and incorporates by reference all allegations contained in the foregoing paragraphs of this Complaint as if fully set forth herein.

38. The First Amendment to the Constitution of the United States protects the associational, free speech, and free choice rights of United States citizens, and the Fourteenth Amendment to the Constitution of the United States incorporates the protections of the First Amendment against the States.

39. The First Amendment requires that “[n]either an agency fee nor any other payment to the union may be deducted from a nonmember’s wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay.” *Janus*, 138 S. Ct. at 2486.

40. Section 208 of the Taylor Law and the CBA, on their face and/or as applied by Defendants, authorize and/or require the State of New York, by and through its agents, and PEF to force public employees to remain union members and/or full dues payers despite their expressed intention to resign union membership and end financial support of a union, in violation of employees’ rights under the First Amendment.

41. The Taylor Law, on its face and/or as applied by Defendants, permits Defendants to require that employees maintain unwilling allegiance to PEF and to financially support PEF and is, therefore, unconstitutional.

42. Defendants’ actions, taken pursuant to the Taylor Law, the CBA, and their joint policies and practices, under color of state law, impinge on Plaintiff’s exercise of her rights to free association, self-organization, assembly, petition, and freedoms of speech, thought, and conscience, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

43. The Taylor Law, on its face and/or as applied by Defendants, authorizes Defendants to violate Plaintiff’s constitutional rights by deducting union dues or fees from her without her consent, in violation of the United States Constitution as explained in *Janus*.

44. Because Plaintiff is a nonmember employed in a bargaining unit represented exclusively for collective bargaining by PEF, the First Amendment protects her from being forced to financially support or otherwise be associated with PEF.

45. Because Plaintiff is not a member of PEF, the First Amendment protects her from having Defendant DiNapoli deduct nonconsensual financial support from her wages for PEF.

46. A valid waiver of constitutional rights requires clear and compelling evidence that the putative waiver was voluntary, knowing, and intelligent and that enforcement of the waiver is not against public policy. Defendants bear the burden of proving that these criteria are satisfied.

47. Plaintiff has not waived her constitutional right as a nonmember not to provide financial support via payroll deduction or other method to PEF.

48. Plaintiff has not waived her constitutional right not to financially support PEF after she became a nonmember following her resignation of membership in PEF.

49. PEF is acting in concert and under color of state law with the state of New York, by and through its agents, including Defendant DiNapoli, to seize and/or accept deductions of payments from Plaintiff's wages.

50. These forced payroll deductions violate Plaintiff's rights protected by the First and Fourteenth Amendments to the United States Constitution, and violate 42 U.S.C. § 1983, by causing her to provide financial support, including of the political activities and speech of PEF, without her consent.

51. Defendant DiNapoli is acting under color of state law in seizing payments from Plaintiff's wages via payroll deduction in concert with PEF and pursuant to state law, their joint policies and practices, and the provisions of the CBA between them, despite Plaintiff's status as a nonmember of PEF and her revocation of consent to payroll deductions.

52. Defendants, by deducting and collecting financial support from Plaintiff via payroll deduction despite her revocation of consent to dues deductions, and without clear and compelling evidence that she has waived her constitutional rights, are depriving Plaintiff of her First Amendment rights to free speech and association, as secured against state infringement by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

53. As a direct result of Defendants' concerted actions, taken pursuant to state law, their CBA, and their joint policies and practices, Plaintiff:

- a. is being prevented from exercising her rights and privileges not to fund and support the agenda, activities, expenses, and speech of a private organization;
- b. is being deprived of her civil rights guaranteed under the Constitution and statutes of the United States; and
- c. is suffering or has suffered monetary damages and other harm.

54. If not enjoined by this Court, Defendants and/or their agents will continue to effect the aforementioned deprivations and abridgments of Ms. Bernard's constitutional rights, thereby causing her irreparable harm.

COUNT TWO

(Violation of 42 U.S.C. § 1983 and
the Constitution of the United States)

55. Plaintiff re-alleges and incorporates by reference all allegations contained in the foregoing paragraphs of this Complaint as if fully set forth herein.

56. The Fourteenth Amendment to the Constitution of the United States guarantees due process to citizens facing deprivation of liberty or property by state actors. *See Mathews v. Eldridge*, 424 U.S. 319, 348–49 (1976).

57. Additionally, public-sector unions and public employers have a responsibility to provide procedures that minimize constitutional impingement inherent in compelled association and speech and that facilitate the protection of public employees' rights. *See Chi. Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 307 & n.20 (1986).

58. Defendants have not implemented policies and procedures that are narrowly tailored to reduce the impingement on Plaintiff's constitutional rights, including the constitutionally required

procedures and disclosures regarding the use of union dues or fees taken from her, as recognized in *Hudson*.

59. Defendants have not provided Plaintiff with notice of or a meaningful opportunity to object to the continued seizure of a portion of her wages via payroll deductions by the state Defendants or the use of her funds by PEF.

60. Plaintiff has never waived her due process rights, including her right not to subsidize the speech and activities of PEF.

61. As a direct result of Defendants' concerted actions, taken pursuant to state law, their CBA, and their joint policies and practices, Plaintiff:

a. is being prevented from exercising her rights and privileges to disassociate from and no longer support the agenda, activities, speech, and expenses of a private organization that she objects to supporting;

b. is being deprived of her civil rights guaranteed under the Constitution and statutes of the United States and has suffered monetary damages and other harm; and

c. is in imminent danger of suffering irreparable harm, damage, and injury inherent in the violation of First and Fourteenth Amendment rights, for which there is no adequate remedy at law.

62. If not enjoined by this Court, Defendants and/or their agents will continue to effect the aforementioned deprivations and abridgments of Ms. Bernard's constitutional rights, thereby causing her irreparable harm.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court order the following relief:

A. **Declaratory:** A judgment based upon the actual, current, and *bona fide* controversy between the parties as to the legal relations among them, pursuant to 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57, declaring:

i. that Defendants' actions in forcing Plaintiff to provide ongoing financial support of PEF as a union nonmember, and the Taylor Law provisions contained in N.Y. Civ. Serv. Law §§ 201(2) and 208(1), to the extent they relate to, authorize, and/or require Defendants to do so, on their face and/or as applied, violate the First and Fourteenth Amendments to the United States Constitution;

ii. that any taking of union dues or fees from Plaintiff after her resignation of membership in PEF and without proper constitutional notice and waiver violates her rights under the First and Fourteenth Amendments to the Constitution of the United States, and that any provisions in the Taylor Law, the CBA, or any other purported authorizations that authorize or require such deductions of union dues or fees are unconstitutional;

iii. or, alternatively, that the First and Fourteenth Amendments require PEF to provide Plaintiff with constitutionally adequate notice and a meaningful opportunity to object to the nonconsensual monies being seized from her and the purposes for which the monies are used, including the notice and procedures required by *Hudson*.

B. **Injunctive:** A permanent injunction requiring Defendants, their officers, employees, agents, attorneys, and all others acting in concert with them:

i. not to enforce against Plaintiff any provisions in the Taylor Law, the CBA, or any other purported authorizations for deducting dues that require her to provide financial support of PEF and/or its affiliates after resignation of her PEF membership without proper constitutional notice and waiver, or to otherwise engage in conduct or enforce any provisions of the Taylor Law or the CBA declared unconstitutional under Part B;

ii. not to collect any money from Plaintiff in the form of union dues or fees, through deductions from her wages or any other manner, or otherwise seek to enforce the terms of any purported authorizations for deducting dues;

iii. or, alternatively, to provide constitutionally adequate notice and procedures regarding the state's payroll deductions of forced financial support of PEF from Plaintiff's wages.

C. **Monetary:** A judgment against PEF awarding Plaintiff nominal and compensatory damages for the injuries sustained as a result of Defendants' unlawful interference with and deprivation of her constitutional and civil rights including, but not limited to, the amount of dues deducted from her wages after her resignation of PEF union membership, plus interest thereon, and such amounts as principles of justice and compensation warrant;

D. **Attorneys' Fees and Costs:** A judgment awarding Plaintiff costs and reasonable attorneys' fees under 42 U.S.C. § 1988; and

E. **Other:** Such other and further relief as the Court may deem just and proper.

Respectfully submitted,

Dated: January 15, 2021

s/ Tyler K. Patterson

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*motion for admission *pro hac vice*
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