

U.S. DISTRICT COURT – N.D. OF N.Y.

FILED

Oct 13 - 2021

AT ___ O'CLOCK ___ MINUTES
John M. Domurad, Clerk

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

JOHN ABEEL,

Plaintiff,

v.

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

Defendants.

Case No. 1:21-CV-1114 (FJS/CFH)

Hon. _____

COMPLAINT

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

SUMMARY OF THE CASE

1. Despite Plaintiff’s resignation from membership in PEF over six months ago, Defendants have failed to acknowledge that he is not a member and continue to force him to provide financial support to PEF from his wages. Therefore, Plaintiff brings this civil rights action pursuant to 42 U.S.C. § 1983 for declaratory, injunctive, and monetary relief to redress the ongoing deprivation of his 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 he has resigned and 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 his 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 his wages, violating his 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 him any meaningful notice or opportunity to object to the ongoing deductions, the process by which the money is withheld, or the ways in which his money is used, violating his Fourteenth Amendment right to due process.

5. Because Defendants continue to deduct union dues or fees from Plaintiff’s wages in violation of his constitutional rights, Plaintiff seeks injunctive and declaratory relief against all Defendants, compensatory and nominal damages against PEF, and 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 his claims arise under the United States Constitution—and 28 U.S.C. § 1343—because he seeks relief under 42 U.S.C. § 1983.

8. This action is an actual controversy in which Plaintiff seeks a declaration of his 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 John Abeel 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 Department of Education as a Research and Collections Technician. Plaintiff is employed in a bargaining unit represented exclusively for purposes of collective bargaining by PEF. Plaintiff has not been a member of PEF since the date of his 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 Plaintiff 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 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 Plaintiff. He oversees the payroll system for the state, which includes processing all payroll deductions, including union dues or fees deductions pursuant to the requirements of the CBA and the Taylor Law. Mr. DiNapoli is sued in his official capacity.

13. 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 the terms and conditions of Plaintiff's employment. Mr. Volforte is sued in his official capacity.

FACTUAL ALLEGATIONS

14. Acting in concert under color of state law, the State of New York, by and through Defendant Volforte, in his official capacity, and PEF have entered into the CBA that controls the terms and conditions of Plaintiff's 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, art. 4, section 4.2.

16. State law requires Plaintiff's employer, the New York State Department of Education, to extend to PEF the right to dues deductions from the wages of its employees.

17. Specifically, the Taylor Law provides that "[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. . . .” N.Y. Civ. Serv. Law § 208.1.

18. The Taylor Law also provides that “[t]he 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 member of PEF after beginning his state employment in or about 2017.

21. On March 18, 2021, Plaintiff resigned his union membership with PEF and revoked his union dues deductions authorization via letters sent to PEF and Defendant DiNapoli.

22. Defendant PEF never responded to Plaintiff’s letter.

23. Defendant DiNapoli, by and through the Office of the State Comptroller, Bureau of State Payroll Services, responded to Plaintiff’s letter by letter dated April 1, 2021.

24. Defendant DiNapoli’s letter advised Plaintiff that if he wished to terminate his union membership then he must contact PEF to do so, and that his dues deductions would be “discontinued” only when “we are notified by the union that your union membership has been terminated.”

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

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

27. Defendants never provided Plaintiff with written notice of his 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 him are used.

28. No Defendant or any agent or official of Defendants asked Plaintiff to agree to pay money to PEF while not a member of PEF, or to otherwise waive any constitutional rights, following his resignation from PEF membership.

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

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

31. 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 Plaintiff's membership resignation.

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

33. Continually since on or about March 18, 2021, Defendant DiNapoli, in his official capacity as New York State Comptroller and acting in concert with PEF, has continued to deduct purported union dues or fees from Plaintiff's wages.

34. Continually since on or about March 18, 2021, PEF has continued to take, receive, and/or accept purported union dues or fees from Plaintiff's wages.

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

36. Defendants, acting in concert under color of state law, have not provided Plaintiff with meaningful notice or opportunity to object to the deductions, the process by which the money is deducted, or the ways in which his money is used.

37. 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.

38. 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)

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

40. 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.

41. 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.

42. Sections 201 and 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 to end financial support of a union, in violation of public employees' rights under the First Amendment.

43. 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.

44. 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 his 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.

45. 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 his wages without his consent, in violation of the United States Constitution as explained in *Janus*.

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

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

48. 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.

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

50. Plaintiff has not waived his constitutional right not to financially support PEF after he became a nonmember following his resignation of membership in PEF.

51. 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.

52. 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 him to provide financial support, including of the political activities and speech of PEF, without his consent.

53. Defendant DiNapoli is acting under color of state law in seizing payments from Plaintiff's wages via payroll deductions 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 his revocation of consent to payroll deductions.

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

55. 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 his rights and privileges not to fund and support the agenda, activities, expenses, and speech of a private organization;

b. is being deprived of his civil rights guaranteed under the Constitution and statutes of the United States; and

c. is suffering or has suffered monetary damages and other harm.

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

COUNT TWO

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

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

58. 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).

59. 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. Tchr. Union, Loc. No. 1 v. Hudson*, 475 U.S. 292, 307 & n.20 (1986).

60. Defendants have not implemented policies or 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 him, as recognized in *Hudson*.

61. Defendants have not provided Plaintiff with notice of or a meaningful opportunity to object to the continued seizure of a portion of his wages via payroll deductions by Defendant DiNapoli or the use of his funds by PEF.

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

63. 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 his rights and privileges to disassociate from and no longer support the agenda, activities, speech, and expenses of a private organization that he objects to supporting;

b. is being deprived of his 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.

64. If not enjoined by this Court, Defendants and/or their agents will continue to effect the aforementioned deprivations and abridgments of Plaintiff's constitutional rights, thereby causing him 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 his resignation of membership in PEF and without proper constitutional notice and waiver violates his 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 him 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 him to provide financial support of PEF and/or its affiliates after resignation of his 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 his 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 his constitutional and civil rights including, but not limited to, the amount of dues deducted from his wages after his 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: October 13, 2021

s/ Tyler K. Patterson

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*motion for admission *pro hac vice* to be filed