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TOP STORY — U.S.: "Quasi" public employees can't be forced to pay agency fees to union, Supreme Court holds

By Lisa Milam-Perez, J.D.

In a blow to public employee unions seeking to expand their reach, the Supreme Court has ruled that Medicaid-funded home care providers cannot be required, under the First Amendment, to pay agency fees to a union pursuant to a collective bargaining agreement negotiated with the State of Illinois. However, the decision applies only to a category of ostensibly public workers who aren't "full-fledged" state employees, and to which the High Court's 1977 holding in *Abood v. Detroit Bd. of Ed*. therefore does not apply. The "questionable foundations" of that precedent, which held that state employees may be compelled to pay agency fees to public-sector unions, were critiqued at length in a majority opinion authored by Justice Samuel Alito. Nonetheless, the *Abood* ruling survives another day, allowing public-sector unions to breathe a sigh of relief, having averted what could have been a knock-out punch (*Harris v Quinn*, June 30, 2014, Alito, S).

However, the Supreme Court affirmed the Seventh Circuit's holding that the First Amendment claims of home care providers in a different, but related program were not ripe, as those employees had not yet unionized. The Court rejected the petitioners' contention that, given the governor's executive order allowing for collective bargaining, unionization — along with the attendant compulsory fee payments — was imminent.

Dissenting, Justice Kagan (joined by Justices Ginsburg, Breyer, and Sotomayor) argued that *Abood* fit quite nicely here and to apply it in this case "would fully comport with our decisions applying the First Amendment to public employment." And, while the majority "cannot resist taking potshots" at the case, the decision is "deeply entrenched," she noted. In Kagan's view, the decision not to overrule this precedent "is cause for satisfaction, though hardly applause."

Home care providers. The federal Medicaid program funds state-run services that provide home-based care to individuals with medical conditions that would otherwise require institutionalization. Under such programs, federal funds are used to compensate caregivers who attend to the daily needs of individuals needing in-home care. The Illinois program at issue here allows individuals to hire home care providers, many of whom are related to the person receiving care, and some provide care in their own homes. Illinois law explicitly provides that there is an employment relationship between the person receiving home care services and the individual providing it. The law also makes clear that the state "shall not have control or input" in that relationship. Under the law, the customer controls all aspects of the employment relationship with the care provider, including hiring and training (with "complete discretion" over whom to

hire); directing, supervising, and evaluating the provider's work; and imposing discipline or terminating the relationship.

The state, subsidized by the federal Medicaid program, pays the caregivers' salaries. Other than providing compensation, though, the state's role "is comparatively small," setting some threshold employment requirements like having a valid Social Security number, completing an employment agreement with the customer, and requiring an annual performance review (by the customer). The state also suggests certain duties that the care providers might assume, like "household tasks," shopping and personal care.

Public employees? The Illinois Public Labor Relations Act (PLRA) authorizes state employees to join labor unions and to bargain collectively, and provides for a union to be recognized if designated as the representative of the majority of public employees in an appropriate bargaining unit. The PLRA also contains an agency-fee provision, under which members of a bargaining unit who do not wish to join the union are nevertheless required to pay a fee to the union. A 2003 executive order by the governor designated 20,000 providers as public employees for collective bargaining purposes. That directive was subsequently codified by the state legislature, which amended the PLRA to provide that home care providers were "public employees" of the state, but solely for collective bargaining — and for no other purpose. After a majority of home care providers voted for SEIU Healthcare Illinois & Indiana, the union was designated as their exclusive representative. The union subsequently entered into CBAs with the state that required all home care providers who were not union members to pay a "fair share" of union dues, to be deducted directly from their Medicaid payments.

Constitutional challenge. Assisted by the National Right to Work Foundation, a group of providers filed a class-action suit against Illinois Governor Pat Quinn and the union, challenging the agency fee provision. Rejecting the employees' constitutional claim, the Seventh Circuit held the agency fee requirement did not violate the First Amendment. Because they were state employees, the union's collection and use of fair-share fees was permitted under *Abood*, the appeals court found. The state of Illinois and the customers who receive in-home care were "joint employers" of the caregivers, the appeals court reasoned.

Granting the employees' petition for certiorari, the Supreme Court agreed to consider whether a state may, consistent with the First and Fourteenth Amendments, compel the care providers to financially support the union as their exclusive representative to petition the state for greater reimbursements from its Medicaid programs.

Not "full-fledged" public employees. The care providers weren't "full-fledged" public employees, the Supreme Court observed. The employees answered to their customers, not to the state, and they received few of the rights and benefits of employment that inure to state workers. Moreover, the scope of collective bargaining on their behalf by the union was quite limited; the union could negotiate only those terms and conditions of employment within the state's control — which wasn't much. For example, the High Court noted, traditionally mandatory subjects of bargaining, including the work schedule, breaks, holidays and vacations, job duties, discharge, were all governed by the provider's service plan, of which the union had no input. And, as for adjusting grievances, the union's responsibility was constrained to resolving any grievance the provider may have against the state; it had no authority to address a grievance against the

customer for whom the employee actually works. Also, the majority noted, the state legislature had "taken pains to specify" that these individuals were public employees for the sole purpose of collective bargaining and that, for all other purposes, they were private-sector workers in the eyes of the state.

"This approach has important practical consequences," wrote the majority. For one: *Abood* does not apply. And the majority refused to sanction "what amounts to a very significant expansion" of that holding to apply "not just to full-fledged public employees, but also to others who are deemed to be public employees solely for the purpose of unionization and the collection of an agency fee."

***Abood* "questionable on several grounds."** The majority nonetheless spent a considerable amount of time tracing the private-sector cases leading up to the eventual ruling in *Abood* and calling into question the Court's analysis in that precedential case on several grounds. In fact, in its 2012 decision in *Knox v Service Employees*, the Court had noted that *Abood* was "something of an anomaly," the Court pointed out here. Its earlier decision "failed to appreciate the difference between the core union speech involuntarily subsidized by dissenting public-sector employees and the core union speech involuntarily funded by their counterparts in the private sector," according to the majority. "In the years since *Abood*, as state and local expenditures on employee wages and benefits have mushroomed, the importance of the difference between bargaining in the public and private sectors has been driven home."

The *Abood* Court "also failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends. In the private sector, the line is easier to see. Collective bargaining concerns the union's dealings with the employer; political advocacy and lobbying are directed at the government. But in the public sector, both collective bargaining and political advocacy and lobbying are directed at the government." The majority also cited the administrative problems that resulted in attempting to classify public sector union expenditures as chargeable or non-chargeable, or the practical burden that would befall objecting nonmembers. Finally, according to the majority, *Abood* rested on "an unsupported empirical assumption, namely, that the principle of exclusive representation in the public sector is dependent on a union or agency shop."

At any rate, "whatever its strengths and weaknesses," *Abood* applies only to public employees, and extending the boundaries of that case "to encompass partial-public employees, quasi-public employees, or simply private employees would invite problems." Cautioned the majority: "it would be hard to see just where to draw the line." *Abood* assumed the union possesses the full scope of power available to labor unions under American law. "What justifies the agency fee, the argument goes, is the fact that the State compels the union to promote and protect the interests of nonmembers." But under the Illinois scheme, "the union's powers and duties are sharply circumscribed." *Abood* is therefore "a poor fit," the majority said, and does not control here.

No compelling interest. Consequently, generally applicable First Amendment standards apply to the challenged agency-fee provision: it must serve a compelling state interest unattainable through less restrictive means. And none of the interests cited here was sufficient, the majority held, finding the provision was unable to satisfy even the test used in *Knox*.

The majority rejected the notion that the agency-fee provision served a compelling interest in that it promotes "labor peace," noting that "[a] union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked." And even if it were, the "labor peace" rationale holds little sway here, where the employees don't work together in one state facility, but work independently in private homes.

Also rejected was the argument that the agency-fee requirement promotes the well-being of the care providers and, in turn, the rehabilitation program. "The thrust of these arguments is that the union has been an effective advocate for personal assistants in the State of Illinois, and we will assume that this is correct. But in order to pass exacting scrutiny, more must be shown. The agency-fee provision cannot be sustained unless the cited benefits for personal assistants could not have been achieved if the union had been required to depend for funding on the dues paid by those personal assistants who chose to join. No such showing has been made." This is particularly so given the circumstances of this case, the Court observed. The state here was hardly "the closed-fisted employer that is bent on minimizing employee wages and benefits and that yields only grudgingly under intense union pressure."

***Pickering* did not apply.** The majority also dismissed the contention that a *Pickering* balancing test should apply in this context — and that union speech that is germane to collective bargaining does not address matters of public concern and, as a result, is not protected. "This Court has never viewed *Abood* and its progeny as based on *Pickering* balancing," it noted. And even assuming that *Pickering* applied, the related argument "flies in the face of reality," given that Medicaid costs amount to fully one-quarter of state expenditures. As such, "speech by a powerful union that relates to the subject of Medicaid funding cannot be equated with the sort of speech that our cases have treated as concerning matters of only private concern." And the balancing test that follows would clearly tip in favor of the objecting caregivers' First Amendment rights.

Kagan dissents. The state of Illinois has important interests in imposing fair-share fees, Justice Kagan argued in dissent. In fact, she wrote, the case at hand "offers a prime illustration of how a fair share agreement may serve important government interests." She noted that the state indeed benefits "by negotiating with an equitably and adequately funded exclusive bargaining agent over terms and conditions of employment," adding, "[t]hat Illinois has delegated to program customers various individualized employment issues makes no difference to those state interests."

The only point of contention, Kagan suggested, was whether it mattered that the caregivers here "are employees not only of the State but also of the disabled persons for whom they care." While much of the majority's analysis rests "on the simple presence of another employer, possessing significant responsibilities, in addition to the State," High Court precedents "provide no warrant for holding that joint public employees are not real ones. To the contrary, the Court has made clear that the government's wide latitude to manage its workforce extends to such employees, even as against their First Amendment claims," Kagan wrote. The majority too downplayed the significant role that the state played in structuring the employment relationship, noting "Illinois has sole authority over every workforce-wide term and condition of the assistants' employment — in other words, the issues most likely to be the subject of collective bargaining."

Also, as for the majority's observation that the scope of bargaining is more limited here, given the customer's authority over such matters as hiring and firing, Kagan simply asked, "so what? Most States limit the scope of permissible bargaining in the public sector — often ruling out of bounds similar, individualized decisions. The idea that *Abood* applies only if a union can bargain with the State over every issue comes from nowhere and relates to nothing in that decision — and would revolutionize public labor law."

Still, Kagan was gratified that the majority stopped short of overruling *Abood*, noting that the petitioners here had "devoted the lion's share of their briefing and argument to urging us to overturn that nearly 40-year-old precedent." The *Abood* rule is deeply entrenched, and "has created enormous reliance interests," she pointed out. "More than 20 States have enacted statutes authorizing fair-share provisions, and on that basis public entities of all stripes have entered into multiyear contracts with unions containing such clauses." And "the majority's criticisms of *Abood* do not remotely defeat those powerful reasons for adhering to the decision."

Practitioners' perspective. "Today, the U.S. Supreme Court ruled that individuals performing jobs that were deemed by the State as State employees, but who in function were not State employees, could not be compelled to join a union or pay agency fees. In so doing, the Court refused to extend its holding in *Abood* that public employees could be required to join or pay a fee to the union that represented them, to quasi-public employees. Here, the employees were not even State employees, making the analysis far easier," notes W.V. Bernie Siebert, a partner in the Denver, Colorado firm Sherman & Howard and member of the Employment Law Daily Editorial Advisory Board. "The ruling does cast doubt on the continued viability of *Abood*, but the Court left that for another day. It would seem doubtful that the decision will have far-reaching application as it seems limited by its facts."

"It seems the Supreme Court ruled as it did because it simply could not stomach the idea that, in view of the First Amendment, either the state or the SEIU was providing much value for the fees the employees at issue were being forced to pay," said **Brooke Duncan III, a partner in the New Orleans firm Adams and Reese** (and ELD Editorial Advisory Board member). Duncan was particularly struck by the majority's statement, "The agency-fee provision cannot be sustained unless the cited benefits for personal assistants could not have been achieved if the union had been required to depend for funding on the dues paid by those personal assistants who chose to join. No such showing has been made."

Another sentence that stood out, in Duncan's view, was Alito's conclusion: "If we accepted Illinois' argument, we would approve an unprecedented violation of the bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support."

"It may be that in actuality the decision will have limited impact, given the narrow factual circumstances of the case," Duncan suggested. "Nonetheless, the sentiment emanating from the majority opinion could not be more clear — you can't force people to pay to support an organization that not only did they not choose to join but which doesn't do much for them either, at least not in the public sector. From that perspective, all public-sector unions should be worried that their utility may be limited unless they have real power to advocate and bargain on behalf of the employees they claim to represent.

The case number is: 11–681.

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