



Compelling Employees to Pay Nonmember Agency Fees May Not Necessarily Survive Constitutional Scrutiny

Federal, state, and local governments are so legally

and financially intertwined that it can be mesmerizing to consider the U.S. Constitution's conflict with a state legislature's statutory initiatives. A recent U.S. Supreme Court ruling in *Harris v. Quinn*,² illustrates the Constitutional conflict between the First Amendment and the Illinois Public Labor Relations Act's (PLRA) requirement that Medicaid-funded home health care personal assistants pay fees to a union. More specifically, the Supreme Court was required to answer "whether the First Amendment permits a State to compel personal care providers to subsidize speech on matters of public concern by a union that they do not wish to join or support."³

The federal Medicaid program funds health care services for individuals who require medical assistance in their home. This is less expensive for the state and the individual patient than

directing, evaluating, and otherwise supervising the work performed by the personal assistant, imposing ... disciplinary action against the PA, and terminating the employment relationship between the customer and the PA.⁷ The minimal involvement of the state in this employee-employer relationship is generally limited to funding the salaries of the personal assistants, establishing basic qualifications, and facilitating performance reviews.⁸

At issue in this case is § 6 of the PLRA, which "authorizes state employees to join labor unions and to bargain collectively on the terms and conditions of employment"⁹ and the PLRA's "agency-fee provision, i.e., a 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."¹⁰ The fee is considered to be a fair share provision, where it requires non-union members of an "organization to pay their proportionate share of the costs

The Court will not "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."

—Justice Alito, *Harris v. Quinn*¹

the exorbitant cost of placing that patient into a nursing home or health care facility.⁴ This program provides that a personal assistant can administer in-home medical care and is paid wages by the state.

While a state's adoption of this in-home health care rehabilitation program ensures federal funds to pay the personal assistants,⁵ Illinois has created a statutory scheme whereby the medical patient is essentially the "customer" and "employer" of the personal assistant.⁶ The Illinois Administrative Code empowers the medical patient by allowing him or her to be "responsible for controlling all aspects of the employment relationship between the customer and the [personal assistant (or PA)], including, without limitation, locating and hiring the PA, training the PA,

of the collective-bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment."¹¹ The agency fee provision has proven to be expensive for nonunion members as fee payments are "deducted directly from the personal assistants' Medicaid payments," and generates almost \$4 million annually in union fees.¹²

In response to the statutory requirement that nonunion members must pay fees to the exclusive union designee, Service Employees International Union (SEIU) Healthcare Illinois and Indiana, several personal assistants filed a putative class action seeking "an injunction against enforcement of the fair-share provision and a declaration that the Illinois PLRA violates the First Amendment insofar as it requires personal assistants to pay a fee

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to a union that they do not wish to support.”¹³ The U.S. District Court for the Northern District of Illinois dismissed the claims of the personal assistants and “the Seventh Circuit affirmed in relevant part, concluding that the case was controlled by this Court’s decision in *Abood v. Detroit Bd. of Ed.* ... which held that state employees who choose not to join a public-sector union may nevertheless be compelled to pay an agency fee to support union work that is related to the collective-bargaining process.”¹⁴

Importantly, 33 years after the *Abood* decision, the Supreme Court recently held in *Knox v. Service Employees* that *Abood* was actually “something of an anomaly.”¹⁵ *Knox* determined that the reason unions have been able to collect fees from nonmembers is “to prevent nonmembers from free-riding on the union’s efforts, sharing the employment benefits obtained by the union’s collective bargaining without sharing the costs incurred.”¹⁶ However, the free-rider arguments “are generally insufficient to overcome First Amendment objections.”¹⁷

Abood relied on *Railway Employees’ v. Hanson*¹⁸ and *Machinists v. Street*,¹⁹ which involved compulsory union payments in the private sector. However, *Abood* “involved a public-sector collective-bargaining agreement.”²⁰ More specifically, the Detroit Board of Education’s collective bargaining agreement required that every teacher “pay the [Detroit Federation of Teachers] Union a service charge equal to the regular dues required of Union members.”²¹ A putative class of teachers objected to this service charge because the union engaged in “activities and programs which are economic, political, professional, scientific, and religious in nature of which Plaintiffs do not approve, and in which they will have no voice.”²² The *Abood* Court believed that *Hanson* and *Street* “upheld union-shop agreements in the private sector based on two primary considerations: the desirability of ‘labor peace’ and the problem of ‘free riders[hip].”²³

However, the “*Abood* Court seriously erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public-sector union. *Abood* 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.”²⁴ The public sector deals with issues of pensions and benefits, not normally as significant in the private sector, and public-sector expenses have a direct impact on taxpayers. “Increased wages and benefits for personal assistants would almost certainly mean increased expenditures under the Medicaid program, and it is impossible to argue that the level of Medicaid funding (or, for that matter, state spending for employee benefits in general) is not a matter of great public concern.”²⁵ Therefore, the Court engaged in a constitutional analysis under the First Amendment.

In *Harris*, the State of Illinois desired to expand *Abood* to include partial public employees, who have limited rights and benefits.²⁶ However, the Supreme Court refused to extend *Abood* to *Harris* because “*Abood* itself has clear boundaries; it applies to public employees. Extending those boundaries to encompass partial-public employees, quasi-public employees, or simply private employees would invite problems.”²⁷ More importantly, the “mere fact that nonunion members benefit from union speech is not enough to justify an agency fee because ‘private speech often

further the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for.”²⁸

The Court found that the “government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves.”²⁹ Further, “‘compelled funding of the speech of other private speakers or groups’ presents the same dangers as compelled speech.”³⁰ Accordingly, the Court found that “an agency-fee provision imposes a ‘significant impingement on First Amendment rights,’ and this cannot be tolerated unless it passes ‘exact[ing] First Amendment scrutiny.’”³¹ The Illinois agency fee must serve “compelling state interests ... that cannot be achieved through means significantly less restrictive of associational freedoms.”³²

In *Harris*, the Court could not find any important state interests that would be served by imposing an agency fee on Medicaid-funded personal assistants and the “First Amendment prohibits the collection of an agency fee from personal assistants in the Rehabilitation Program who do not want to join or support the union.”³³ Therefore, the Court held that no individual should be compelled to subsidize speech that the individual does not support, except in exceptional circumstances. ☉

Endnotes

¹*Harris v. Quinn*, 573 U.S. —, 134 S.Ct. 2618, 2644 (2014).

²*Harris v. Quinn*, 134 S.Ct. at 2618.

³*Harris v. Quinn*, 134 S.Ct. at 2618, 2623.

⁴42 U.S.C. § 1396n(c)(1).

⁵*Id.*; see also 42 CFR §§ 440.180, 441.300–441.310 (2013).

⁶*Harris v. Quinn*, 134 S.Ct. at 2624, quoting, 89 Ill. Admin. Code § 676.30(p) (“an individual employed by the customer to provide ... varied services that have been approved by the customer’s physician”) and 89 Ill. Admin. Code § 676.10(c) (Illinois “shall not have control or input in the employment relationship between the customer and the personal assistants.”).

⁷89 Ill. Admin. Code § 676.30(b).

⁸*Harris v. Quinn*, 134 S.Ct. at 2626 (finding “that the Act declared personal assistants to be ‘public employees’ of the State of Illinois—but ‘[s]olely for the purposes of coverage under the Illinois Public Labor Relations Act.’ Ill. Comp. Stat., ch. 20, § 2405/3(f). The statute emphasized that personal assistants are not state employees for any other purpose, ‘including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits.’”).

⁹*Harris v. Quinn*, 134 S.Ct. at 2625.

¹⁰*Id.*; *Workers v. Mobil Oil Corp.*, 426 U.S. 407, 409, n. 1, 96 S.Ct. 2140, 48 L.Ed.2d 736 (1976).

¹¹*Id.*, quoting, Ill. Comp. Stat., ch. 5, § 315/6(e).

¹²*Harris v. Quinn*, 134 S.Ct. at 2626.

¹³*Id.*; *Harris v. Quinn*, 656 F.3d 692, 696 (7th Circuit 2011).

¹⁴*Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977); *Harris v. Quinn*, 656 F.3d at 698.

¹⁵*Knox v. Service Employees*, 567 U.S. —, 132 S.Ct. 2277, 2290, 183 L.Ed.2d 281 (2012).

¹⁶*Davenport v. Washington Ed. Assn.*, 551 U.S. 177, 181, 127 S.Ct. 2372, 168 L.Ed.2d 71 (2007).

¹⁷*Knox v. Service Employees*, 132 S.Ct. at 2289.

many out-of-work—and employed—reserve component members who should be benefitting from USERRA's protections. In 2013, Gulf War II veterans, many of whom continue to serve in the Guard and Reserves, remained unemployed at a far higher rate than their civilian counterparts.³⁵ ☉

Endnotes

¹S. Gates et al., Supporting Employers in the Reserve Operational Forces Era: Are Changes Needed to Reservists Employment Rights Legislation, Policies, or Program? RAND Corporation, National Security Research Division, 2013, 71-72.

²*Ibid.*, xvi.

³*Ibid.*, 44, Figure 4.1.

⁴38 U.S.C. § 4303(13).

⁵*Ibid.*, 3, Figure 1.1.

⁶38 U.S.C. §4303(4)(A).

⁷38 U.S.C. §4304(1)(2).

⁸38 U.S.C. §4311-4319.

⁹U.S. Department of Labor Veterans' Employment Training Service, USERRA: FY2012 Annual Report to Congress, December 2013, 11.

¹⁰38 U.S.C. §4311(a).

¹¹38 U.S.C. §4311(b).

¹²*Carder v. Cont'l Airlines, Inc.*, 636 F.3d 172 (5th Cir. Tex. 2011).

¹³P.L. 112-56(251).

¹⁴*Staub v. Proctor Hosp.*, 131 S.Ct. 1186 (U.S. 2011).

¹⁵U.S. Department of Labor Veterans' Employment Training Service, USERRA: FY2012 Annual Report to Congress, December 2013, 11.

¹⁶38 U.S.C. §4312(a)(1)(2).

¹⁷38 U.S.C. §4312(a)(1).

¹⁸38 U.S.C. §4312(e)(1)(A)(C)(D).

¹⁹38 U.S.C. §4312(e)(2)(A).

²⁰38 U.S.C. §4313(a)(1)(A).

²¹38 U.S.C. §4313(a)(2)(A).

²²38 U.S.C. §4313(d)(1)(A)(B)(C).

²³38 U.S.C. §4316(c)(1).

²⁴38 U.S.C. §4316(c)(2).

²⁵*Hart v. Family Dental Group, PC*, 645 F.3d 561, 562 (2d Cir. Conn. 2011).

²⁶38 U.S.C. §4311(a).

²⁷U.S. Department of Labor Veterans' Employment Training Service, USERRA: FY2012 Annual Report to Congress, December 2013, 11.

²⁸38 U.S.C. §4311(a)(1)(A).

²⁹38 U.S.C. §4311(b).

³⁰*Crews v. City of Mt. Vernon*, 567 F.3d 860, 869 (7th Cir. Ill. 2009).

³¹*Sutherland v. SOSi Int'l, LTD.*, 2007 U.S. Dist. LEXIS 58919 (E.D. Va. Aug. 10, 2007).

³²38 U.S.C. §4323(d)(1)(h)(2).

³³*Serricchio v. Wachovia Sec., LLC*, 258 F.R.D. 43, 44 (D. Conn. 2009); *Serricchio v. Wachovia Sec., LLC*, 706 F. Supp. 2d 237, 265 (D. Conn. 2010).

³⁴*Butterbaugh v. Dept of Justice*, 336 F.3d 1332, 1337-38 (Fed. Cir. 2003).

³⁵Kent A. Eiler, *The Dead Letter Veterans Preference Act: How the Federal Government Is Failing to Lead by Example in Hiring Veterans*, May 27, 2013, CREIGHTON LAW REVIEW Accessed at: papers.ssrn.com/sol3/papers.cfm?abstract_id=2175671.

STATE continued from page 22

¹⁸*Railway Employees' v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956).

¹⁹*Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961).

²⁰*Harris v. Quinn*, 134 S.Ct. at 2630.

²¹*Abood v. Detroit Bd. of Ed.*, 431 U.S. at 212, 97 S.Ct. 1782.

²²*Id.* at 212-213.

²³*Harris v. Quinn*, 134 S.Ct. at 2631, quoting *Abood*, 431 U.S. at 220-224.

²⁴*Id.* at 2632.

²⁵*Id.* at 2642.

²⁶*Id.* at 2634 ("Consistent with this scheme, under which personal assistants are almost entirely answerable to the customers and not to the State, Illinois withholds from personal assistants most of the rights and benefits enjoyed by full-fledged state employees. As we have noted already, state law explicitly excludes personal assistants from statutory retirement and health insurance benefits. Ill. Comp. Stat., ch. 20, § 2405/3(f). It also excludes personal assistants from group life insurance and certain other employee benefits provided under the State Employees Group Insurance Act of 1971. *Ibid.* ('Personal assistants shall not be covered by the State Employees Group Insurance Act of 1971'). And the State 'does not provide paid

vacation, holiday, or sick leave' to personal assistants. 89 Ill. Admin. Code § 686.10(h)(7))."

²⁷*Id.* at 2638.

²⁸*Id.* at 2636, quoting *Lehnert v. Ferris*, 500 U.S. 507, 556, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991).

²⁹*Knox v. Service Employees*, 132 S.Ct. at 228; see also, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992); *Riley v. National Federation of Blind of N.C.*, 487 U.S. 781, 797, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988); *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943); *Wooley v. Maynard*, 430 U.S. 705, 713-715, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977).

³⁰*Harris v. Quinn*, 134 S.Ct. at 2639, quoting *Knox v. Service Employees*, 132 S.Ct. at 2288.

³¹*Id.*, quoting *Knox v. Service Employees*, 132 S.Ct. at 2288.

³²*Knox v. Service Employees*, 132 S.Ct. at 2289.

³³*Harris v. Quinn*, 134 S.Ct. at 2644.