

FAIR SHARE FEES: WILL THEY SURVIVE?

By

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Since at least 1977, it has been legal for public employee unions to collect fair share fees from non-members to support the collective bargaining operations of the unions. As stated in *Abood v. Detroit Bd. of Ed.* 431 U. S. 209 (1977): “Insofar as the service charges are used to finance expenditures by the Union for collective bargaining, contract administration, and grievance adjustment purposes, the agency shop clause is valid.”

At the same time, the Supreme Court noted that the “Constitution requires that a union's expenditures for ideological causes not germane to its duties as a collective bargaining representative be financed from charges, dues, or assessments paid by employees who do not object to advancing such causes and who are not coerced into doing so against their will by the threat of loss of governmental employment.” In other words, non-members of a union cannot freeload and may be required to pay their fair share of the costs of the union’s representation of the bargaining unit. However, they cannot be forced to contribute to the activities of the union that are not germane to its duties as the representative of bargaining unit members (such as, for instance, supporting political candidates).

The collection of fair share fees has never been easy. The courts and, here in Ohio, the General Assembly, have imposed detailed and sometimes costly procedures that must be strictly followed before a public-sector union may compel payment of a fair share fee to support the union work that is related to the collective-bargaining process.

But now the primary issue concerning fair share fees is whether they will even be allowed to be collected. Some Ohio legislators, influenced by Right to Work (RTW), believe that fair share fees should be outlawed. If outlawed, public and even private employees would be able to get a free ride and obtain the benefits of union representation, without belonging to the union or paying anything for those benefits. In addition to the legislative concerns, there is an issue as to whether courts will even continue to permit any fair share fees for public employees, despite the holding in *Abood*.

Abood was criticized in *Knox v. Service Employees International Union*, a 2012 Supreme Court case. Still, the right of unions to collect fair share fees was upheld in *Knox* so long as unions followed the statutory/constitutional/contractual provisions on fair share fees and did not increase fair share fees without going through the process of notifying members, hearing objections, etc.

However, the continued legitimacy of *Abood* was further questioned in *Harris v. Quinn*, a 2014 Supreme Court case. That case dealt with fair share provisions applicable to personal assistants who provide in-home care to individuals (often their relatives). These personal assistants were not typical government employees. Instead, they were deemed to be employees of the

individuals receiving the care. However, the State of Illinois, subsidized by the Federal Medicaid program, paid the personal assistants' salaries. Because they were paid by the State, Illinois (through an executive order issued by the Governor) treated them as members of a bargaining unit represented by SEIU. Several of those personal assistants objected to having fair share fees taken out of their pay and filed suit.

Justice Alito delivered the opinion of the Supreme Court, stating:

This case presents the question 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. We hold that it does not, and we therefore reverse the judgment of the Court of Appeals.

In holding that a union could not collect fair share fees from these personal assistants, the Court relied on their unique status as employees of the individuals receiving care. The Court did *not* overrule *Abood*. However, several members of the Court suggested that *Abood* was not good law and implied that it should be overruled. While the *Harris* decision itself does not affect the validity of fair share fee provisions in firefighter contracts, the problem is that the language of several justices, critical of *Abood*, was an invitation to RTW to file more challenges to fair share fees.

RTW attorneys gladly accepted the invitation, filing suit to argue that members must be made to opt-in before a fair share fee can be collected, rather than the current practice of requiring them to opt-out, and that *Abood*, in any event, should be overruled. In *Friedrichs v. California Teachers Association*, the 9th Circuit Court of Appeals rejected the RTW arguments. However, the United States Supreme Court accepted an appeal by RTW. The issues presented were (1) whether *Abood v. Detroit Board of Education* should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment; and (2) whether it violates the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.

Oral argument was held January 11, 2016. But then Justice Scalia passed away. *Harris v. Quinn*, above, was a 5 - 4 decision. Scalia joined with Justices Roberts, Kennedy, Thomas, and Alito in striking down the fair share fee in that case. Justices Kagan, Ginsburg, Breyer, and Sotomayor voted to uphold fair share fees. The 5 - 4 majority that seemed to be inclined to invalidate fair share fees no longer existed after Scalia's death; the justices were then evenly split 4 - 4. That meant the Court of Appeals decision in *Friedrichs*, upholding the constitutionality of fair share fees, remained in force.

But it will not be long before the issue returns to the Supreme Court. RTW lawyers plan to take another case to the Supreme Court where President Trump's recent nominee, Judge Neil Gorsuch, now sits. Gorsuch has not written any decisions regarding fair share fees, so it is difficult to predict how he might rule. However, there is no doubt that RTW supporters expect him to restore the 5-4 split, with the majority striking down fair share fees and overruling *Abood*.

We shall see.