

Abood v. Detroit Board Of Education Survives...for now?

Labor & Employment Law Update

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Back in November of last year, I wrote about *Friedrichs v. California Teachers Association*, “one of five cases to watch” during the Supreme Court’s 2015 term according to Washington’s *The Hill* newspaper.

At the beginning of the term, many observers had anticipated that the Court’s conservative majority would use *Friedrichs* to overturn its 1977 opinion in *Abood v. Detroit Board of Education*, a case which upheld “fair share” provisions in public sector union contracts as dues properly exacted for “collective bargaining, contract administration, and grievance adjustment purposes” so long as their dues were not used for other ideological or political purposes. However, the passing of Justice Antonin Scalia caused *Friedrichs* to limp to the finish line without a winner even being declared. On Tuesday March 29th, the Court issued a one sentence decision that the judgment of the 9th Circuit was “affirmed by an equally divided Court.”

During oral arguments on January 11th, Justice Samuel Alito questioned whether *Abood* was even workable, and challenged California Solicitor General Edward Dumont to draw a line between legitimate contract administration fees and lobbying fees, specifically pointing to Section 3546(b) of the California Government Code which provides that agency fees may be used for “the cost of lobbying activities designed to secure advantages in wages, hours, and other conditions of employment, in addition to those secured through meeting and negotiating with the employer.” On the other side of the argument, Justice Elena Kagan focused on the issue of overruling long-standing precedent that would impact “tens of thousands of contracts with [agency fee] provisions...affect[ing] millions of employees.” The path seemed cleared for a 5-4 decision in favor of striking down the fair share fees and overturning *Abood* until February 13th when news broke out that Justice Scalia had died while on a hunting trip in Texas.

Had the Supreme Court overturned *Abood*, it would have had a profound impact across the country’s twenty five states that permit compulsory “fair share” for teachers, firefighters, police and other public workers. Certainly, the decision is a reprieve for unions. The parties can petition for a rehearing. Pursuant to the Court’s rules, such a petition would have to be approved by 5 Justices, which is highly unlikely in light of the 4-4 vote in the decision. As a result, a new case may have to be filed and processed through the lower courts. Assuming the Republicans stay firm on their position to block Judge Merrick Garland’s

nomination, this constitutional question will not be resolved until after the 2016 Presidential election and will rest squarely on the shoulders of the new Justice that is ultimately appointed and confirmed.

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