

The Survival of *Abood v. Detroit Board of Education*, Part 3

Labor & Employment Law Update

on March 29, 2017

Exactly a year ago today in what now appears to be a temporary reprieve, the United States Supreme Court issued its decision in *Friedrichs v. California Teachers Association*. An “equally divided court” affirmed the judgment of the 9th Circuit that “fair share” or “agency” fee provisions in public sector contracts were valid. Up to that time, observers had anticipated that the Supreme Court would use *Friedrichs* to overturn its 1977 opinion in *Abood v. Detroit Board of Education*, which held agency fees were deemed proper if exacted for “collective bargaining, contract administration and grievance adjustment” but not for “ideological or political purposes.” However, with the passing of Justice Antonin Scalia, the Supreme Court could not muster a majority and the status quo remained.

Fast forward to March 2017, and following Donald Trump’s victory in the race for the White House, we find ourselves in the middle of confirmation hearings to fill the Supreme Court vacancy with President Trump’s choice, Judge Neil Gorsuch, a conservative appellate judge from the 10th Circuit who, most would agree, will likely tip the scales in favor of overturning *Abood*.

Indeed, new cases are making their way through the system in an effort to put the fair share question back on the Supreme Court’s docket. Just last week, the 7th Circuit affirmed a dismissal of a complaint in *Janus v. AFSCME* where Judge Posner noted that neither the 7th Circuit nor the district court can overrule the *Abood* decision. *Janus*, which began as *Rauner v. AFSCME*, was first filed by Republican Illinois Governor Bruce Rauner shortly after his election. Northern Illinois District Judge Robert Gettleman dismissed Governor Rauner’s complaint noting that Rauner had “no personal interest at stake” as he was “not subject to the fair share fees requirement.” To keep the lawsuit moving forward, and with the backing of the National Right to Work Legal Defense Foundation and the Liberty Justice Center, Mark Janus and fellow state employee Brian Trygg intervened in the case.

In February 2017, Ryan Yohn and a number of his fellow teachers filed a case in the Central District of California against the California Teachers Association following the *Friedrichs* blueprint and seeking to enjoin Defendants from requiring nonunion employees to pay agency fees. And, in the Western District of Kentucky, a class action filed by teachers working for Jefferson County Public

School Board of Education where plaintiffs allege that requiring union nonmembers to pay a “fair share” fee is unconstitutional is currently pending and moving forward.

As noted by Justice Elena Kagan during the *Friedrichs* oral arguments in early 2016, overruling *Abood* will impact “tens of thousands of contracts with [agency fee] provisions...affect[ing] millions of employees” across the country. Clearly, we have not heard the last word on this issue and it will most certainly make its way up to the Supreme Court. Stay tuned!

Check out our previous articles on *Abood* and the challenges to public sector agency fees:

Part One: Will *Abood V. Detroit Board of Education* Survive?

Part Two: *Abood v. Detroit Board of Education* Survives...for now?

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