

Supreme Court Upholds State's Right to Limit Union's Use of Non-Member Fees for Political Purposes

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On June 14, 2007, the United States Supreme Court unanimously upheld a Washington state law requiring public employee unions to obtain consent from non-members before using their fees for election-related activities in the case of *Davenport v. Washington Educational Association*, 2007 WL 1703022 (June 14, 2007).

Generally, states have the power to regulate the relationship between unions and public employees. Thus, states can enact laws requiring non-members to pay union fees because collective bargaining benefits both union members and non-members alike. The Washington state law at issue in *Davenport* prohibited unions from using non-member agency fees for election-related activities unless the non-member "affirmatively authorize[s]" it. The state of Washington and a group of non-union public school teachers sued the Washington Educational Association, a public school employees union, claiming that the union failed to obtain affirmative authorization prior to using the non-members' fees for election-related purposes. The union defended its actions on the grounds that the law violated its First Amendment right of political expression. The Supreme Court only addressed the validity of the law, not the union's compliance with it.

The state of Washington and the teachers appealed to the United States Supreme Court after the Supreme Court of Washington held that the law was unconstitutional. The opinion, authored by Justice Scalia, first pointed out that the state could limit the union's ability to collect fees from non-members to those used exclusively for collective

Authors

Andrew G. Woodson
Partner
202.719.4638
awoodson@wiley.law

bargaining or it could even prohibit the union from collecting fees from non-members altogether. Thus, the state's affirmative authorization requirement was "simply a condition on the union's exercise of this extraordinary power [whereby the government allows a private group to tax government employees]."

The Court's analysis then addressed two separate issues. First, the Court assessed the Supreme Court of Washington's interpretation of Supreme Court precedent. The Court faulted the Supreme Court of Washington, which had struck down the law as violating the First Amendment, with misinterpreting prior Supreme Court cases. While prior cases had focused on the validity of opt-out provisions, these cases set a floor, not a ceiling, and thus did not prohibit opt-in provisions. Since unions have no constitutional right to non-member fees, the state court had improperly "balanced the constitutional rights of unions and non-members."

Next, the Court turned to the union's First Amendment arguments. The Court held that the law did not violate the union's right to political advocacy under campaign finance law because, while the fees were lawfully in the union's possession, the law did not restrict the union's use of its own money, but its use of "*other people's* money."

The Court also rejected the union's argument that the law was an unconstitutional content-based restriction of speech. Acknowledging that the regulation was indeed content-based since it regulated only election-related expenditures, the Court nevertheless upheld the law. According to the Court, the government may discriminate on the basis of content when it is regulating speech that it could completely proscribe. The Court also noted that "no suppression of ideas is afoot, since the union remains as free as any other entity to participate in the electoral process with all available funds other than the state coerced agency fees lacking affirmative permission."

The Court's holding could limit the pool from which unions draw to finance political expenditures. While the ruling does not make it illegal for unions to generally collect fees from non-members or even for unions to collect fees from non-members and use them for election-related activities, it does permit states to limit unions' use of non-member funds for election-related activities.

In light of this opinion, more states may consider similar opt-in policies for non-members. The Washington law was the only law in the country which placed the burden on the public employee union to obtain consent before using non-member fees for election related-purposes. (Prior to the Supreme Court's decision, Washington amended the law by limiting its application.) Laws in other states only require the union to allow non-members to opt-out, placing the burden on the non-member. States may now move to enact more restrictive policies.

The Court explicitly limited its holding to public employee unions, declining to address the validity of a law requiring affirmative authorization as applied to private-sector unions.