

*Union Dues***Right-to-Work Cases Expected
To Persist in Wake of *Friedrichs***

Challenges to agency fees collected by public employee unions from nonmembers will continue despite the U.S. Supreme Court's leaving intact a legal precedent allowing the practice, law professors said.

The court's one-sentence order March 29 reflecting a 4-4 tie in *Friedrichs v. California Teachers Ass'n* was a direct consequence of the death of Justice Antonin Scalia, who presumably might have furnished the fifth vote sought in the National Right to Work Legal Defense Foundation's litigation drive to overturn agency fees on First Amendment grounds, the legal scholars said.

The *Friedrichs* order effectively upheld the U.S. Court of Appeals for the Ninth Circuit's decision that, under *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 95 LRRM 2411 (1977), the California Teachers Association and the state can collect "fair share" fees from non-member teachers to cover collective bargaining costs (60 DLR AA-1, 3/29/16).

What comes next depends on how Scalia's seat is filled, said Ruben J. Garcia, a professor at the University of Nevada, Las Vegas law school.

"It all rides on who that ninth justice is," he told an April 4 plenary session at a Hunter College annual conference in New York on collective bargaining in higher education. "The challenges will continue."

Wait for Fifth Vote. Much as they did with *Friedrichs*, he said, right-to-work groups will wait until they see five justices as being favorable to their position.

The ultimate goal of their "decades-long campaign" seems to be "constitutionalizing" the right-to-work principle in the private sector as well as in the public sector, Garcia maintained. The cases, he said, "will continue to percolate in the lower courts while we await the ninth justice."

"Unfortunately, there will be more money spent in litigation, rather than working toward solutions at the bargaining table," Garcia said.

Scalia had shown "somewhat conflicting impulses" that had made him "the justice to watch" in the court's 2014 decision in *Harris v. Quinn*, 134 S. Ct. 2618, 199 LRRM 3741 (U.S. 2014) and, until his death, in the *Friedrichs* case, said Charlotte Garden, an assistant professor at Seattle University Law School.

In *Harris*, the court said that personal care assistants paid by the state of Illinois were not "full-fledged" public employees who could be compelled to pay union dues or fees to a union recognized by the state as their bargaining agent (125 DLR AA-1, 6/30/14).

Scalia Role. On one hand, Scalia had defended the constitutionality of union fees and the court's *Abood* decision, Garden said.

But on the other hand, he'd also played a role in making it seem like an opportune time to challenge agency fees, she said, quoting his 2007 suggestion that "it is undeniably unusual for a government agency to give a private entity the power, in essence, to tax government employees."

In a "case to watch" in the aftermath of *Harris*, Garden said, the right-to-work group is seeking to represent a class of 80,000 Illinois home care workers who'd paid agency fees totaling more than \$30 million since April 2008. Class certification is pending in the case, which is before the U.S. District Court for the Northern District of Illinois.

The Illinois case, part of "a new generation of challenges to public-sector union structures," is important as an indicator of whether union-represented nonmembers can get back fees they paid before the *Harris* case was decided, Garden said.

Teeing Up for Next Round. The partial public employee cases, she said, "are just teeing up the next round of cases, which would involve traditional public employees and eventually maybe even private employees."

Other cases seek to make it easier to opt out of paying non-mandatory union dues or fees, or like *Friedrichs*, argue that mandatory union fees are unconstitutional in the public sector, Garden said.

Others maintain that exclusive representation of partial public employees is unconstitutional, seek to limit the ways unions persuade workers to become members, or argue that the First Amendment is implicated in private-sector union relationships under the Railway Labor Act, she said.

"There's no shortage of cases," she said.

With the sole exception of some cases seeking to tinker with opt-out procedures, however, "these cases have been largely unsuccessful so far," Garden said.

"I wouldn't expect that trend to change," she continued. "These cases were being queued up for a Supreme Court with five conservative justices willing to discard

precedent in order to establish employee speech rights in the context of public-sector representation.”

She said she'd have to amend her opinion, though, in the event of a “President Trump” or the appointment of a justice by any other Republican president.

Unions Playing Offense? Unions have been playing defense in constitutional challenges to membership dues and non-member fees, but in the new landscape created by Scalia's death they should consider going on offense with affirmative constitutional arguments, said Cynthia Estlund, a New York University Law School professor.

After *Friedrichs*, advocates will continue their campaign to abolish agency fees one state at a time through right-to-work laws, which now cover more than half the states, Estlund said. Those laws, she said, “create a free rider problem that destabilizes the foundations of the exclusivity-based system of collective bargaining” set by the National Labor Relations Act.

A narrowed reading of the act's Section 14(b) would result in preemption of broad right-to-work laws that prohibit all mandatory fees, including the fair-share fee, she said.

To support the theory, Estlund pointed to a dissent by Judge Diane P. Wood of the U.S. Court of Appeals for the Seventh Circuit in *Sweeney v. Pence* (2014 BL 240711, 7th Cir., 13-1264, 9/2/14). In a 2-1 decision in that case, the court rejected a union challenge to an Indiana right-to-work law (169 DLR AA-1, 9/2/14).

In dissent, Wood said the majority's decision is “either incorrect” or “it lays bare an unconstitutional con-

fiscation perpetuated by our current system of labor law.” Wood's dissent is “a plausible, learned reading” of the act and offers the affirmative litigation strategy of casting right-to-work laws that bar fair-share fees as “an unconstitutional taking without due process,” Estlund said.

Those laws, she said, force unions to “fork over members' dues to represent nonmembers,” creating a “corrosive free-rider problem.”

View Supported by Others. Wood's dissent drew the support of four other appeals court judges in backing a motion for a rehearing en banc, which failed in a 5-5 split in January 2015, Estlund said.

The reasoning, she said, also played a role in decisions blocking a pair of Idaho right-to-work laws (179 DLR AA-1, 9/16/15).

“The First Amendment hasn't been a friend to unions lately,” Estlund said. “In a post-Scalia world, barring a Republican White House, the constitution could again become a friend of unions.”

The conference was sponsored by the National Center for the Study of Collective Bargaining in Higher Education and the Professions at Hunter, which is part of the City University of New York.

BY JOHN HERZFELD

To contact the reporter on this story: John Herzfeld in New York at jherzfeld@bna.com

To contact the editor responsible for this story: Susan J. McGolrick at smcgolrick@bna.com

To request permission to reuse or share this document, please contact permissions@bna.com. In your request, be sure to include the following information: (1) your name, company, mailing address, email and telephone number; (2) name of the document and/or a link to the document PDF; (3) reason for request (what you want to do with the document); and (4) the approximate number of copies to be made or URL address (if posting to a website).