Foundation *Action* Special Edition

Supreme Court Alert

The National Right to Work Legal Defense Foundation November/December 2006

Right to Work Defends First Amendment in Looming U.S. Supreme Court Showdown Against Teacher Union

Washington's High Court established a precedent that might jeopardize Right to Work laws

WASHINGTON, DC – With free legal assistance from the National Right to Work Foundation, a group of teachers successfully persuaded the U.S. Supreme Court to review a case in which Washington State's high court slapped down a campaign finance regulation – referred to as "paycheck protection" – and used it as a springboard to cause sweeping damage to employee rights.

Washington State Attorney General Rob McKenna also joined the appeal, representing the state in its related case against the state teacher union.

The well-intentioned Evergreen State law was designed to require government union officials to obtain prior consent from nonunion workers before spending their compulsory union dues (taken as a condition of employment) on certain types of political activities. While striking down what the history has shown to be an ineffective law, however, the state Supreme Court outrageously fabricated a constitutional "right" for union officials to spend on politics the money of employees who want nothing to do with the union.

If upheld, the infamous Washington State Supreme Court rulings in *Davenport v. Washington Education Association* (WEA) and *Washington v. WEA* – which, as Justice Richard B. Sanders' three-member dissent pointed out, "turns the First Amendment on its head" – might open the door for union lawyers to try to attack America's 22 state Right to Work laws, which make union affiliation and dues payment strictly voluntary.

On January 10, 2007, the nine United States Supreme Court justices will hear oral arguments in Right to Work's case.

"It is absolutely imperative that the nation's highest court overturn this dangerous precedent that gives union bosses a 'constitutional right' to spend forced union dues on politics," said Mark Mix, president of the National Right to Work Foundation. "In negating the state's 'paycheck protection' regulation, the activist court inflicted serious collateral damage on the First Amendment and worker freedom."

Union lawyers will most assuredly use this precedent in a renewed attempt to attack Right to Work laws across America. If union officials somehow have a constitutional right to spend nonunion employees' forced dues on politics, then union attorneys could argue that states also violate the First Amendment by banning forced union dues altogether.

Supreme Court gets final say

Foundation attorneys – working jointly with Steve O'Ban of Ellis, Li, and McKinstry – originally filed the *Davenport* class-action lawsuit in the Superior Court of the State of Washington in 2001 for more than 4,000 teachers who are not union members but are nonetheless forced to pay union dues or be fired. This legal action came in response to WEA union officials' unauthorized seizure of $10 to $25 annually from the teachers in violation of provisions of the state's campaign finance law.

A long-awaited ruling in *Davenport* by the Washington State Supreme Court in mid-March upheld an appellate court's decision to overturn a trial court – thereby striking down the last remaining "paycheck protection" provision.

Washington State ground zero for failures of 'paycheck protection'

So-called paycheck protection regulations correctly diagnose one symptom of the forced unionism problem, but the

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record in Washington and several other states has made it clear that this government regulatory approach falls short of providing employees meaningful relief.

Empirical evidence demonstrates that the Washington law was ineffective in truly protecting employees from the misuse of their forced union dues for politics. Because the law left intact all forced unionism privileges, covered only a fraction of state and local electioneering expenditures, and didn't touch other political and non-bargaining expenditures, the WEA union hierarchy was actually able to collect and spend more money on politics after the law took effect. The union simply changed its accounting practices and then jacked up forced union dues even higher.

In her column titled "Piercing the Popular Myth of Paycheck Protection," then *Seattle Times* columnist Michelle Malkin (among other independent analysts) called the statute "workaroundable" and reported, in the first year after Washington's paycheck protection law took effect, that the WEA union actually increased the amount it spent to influence politics by 60 percent! Regrettably, the situation has been similar in the intervening years.

Other analysts at the Heritage Foundation, Public Service Research Council, Mackinac Center for Public Policy, and the Capital Research Center have made similar findings about the failings of this campaign finance regulatory approach to forced unionism.

"It is now clearer than ever that Washington State's paycheck protection regulation has fallen short of limiting the ill-effects of forced unionism. Attempting to regulate away the consequences of bad public policy is the wrong approach," stated Stefan Gleason, vice president of the Foundation. "Only directly attacking the laws on the books that grant union officials the power to seize forced union dues in the first place will effectively protect employees' rights."

The fact is, Foundation-won precedents include much broader relief to employees – a reduction of some $200-$300 in their forced dues attributable to all union politics, lobbying and public relations costs.

Even if the Washington statute had achieved its intended impact, under it non-union employees would have only received $10 to $25 back per year because most of the union's political expenditures fall outside the law's deliberately narrow definition of politics.

And, in fact, the Washington-based Evergreen Freedom Foundation (EFF), a supporter of the so-called "paycheck protection" regulatory approach, may actually have an even more dim view of the law's impact. In its *amicus* brief to the U.S. Supreme Court, EFF argued that "even if every non-member declined to opt-in to the use of dues for political purposes, the impact to the WEA would amount to less than 1/4 of 1% of the WEA's total expenditures…a miniscule drop in funds available for political purposes."

Pilot Robert Miller, and Right to Work representatives hold a press conference after oral arguments before the Supreme Court in 1998.

WEA union boss Charles Hasse insists that rank-and-file teachers must support the union hierarchy's radical political agenda.

Opening emerges for Right To Work Foundation to go on offensive

Putting aside concerns about the effectiveness or wisdom of the underlying campaign finance regulation, the state Supreme Court's outrageous finding that union officials have a constitutional right to spend forced dues for politics cannot be allowed to stand.

But this U.S. Supreme Court battle is not entirely a defensive battle seeking to undo a damaging interpretation of the First Amendment. Aside from vigorously attacking the Washington State Supreme Court's wrongheaded ruling striking down the campaign finance regulation, Foundation attorneys have gone on the offensive.

Because of the legal issues involved in the *Davenport* case, Foundation attorneys have found a rare opportunity to challenge a wrongheaded doctrine that flowed from a Supreme Court ruling handed down 45 years ago in *Machinists v. Street* – a doctrine that union bosses ever since have turned into a tool to hamstring workers who do not want to pay for a union's politics.

1961 Supreme Court phrase opened door for mischief

The *Street* case was one of the earliest Supreme Court cases dealing with forced unionism, decided before the Right to Work Foundation even existed. *Street* involved both dues-paying union members and nonmembers threatened with discharge for not joining the union.

Although finding that the workers had a right to withhold forced dues for politics, the *Street* court said that

"dissent is not to be presumed."

For decades, these six words have been exploited by union bosses to place extraordinary burdens on workers, especially nonmembers. Moreover, the Washington Supreme Court used these words to "justify" its perversion of the First Amendment.

Relying on the phrase from *Street*, Big Labor takes the position that even if employees take the dramatic step of resigning from union membership, it can't be "presumed" they dissent from paying full dues, including dues spent for non-bargaining activities like union electioneering, lobbying, and public relations.

It's a ridiculous notion to suppose that when someone quits a union (or never joins in the first place), he still somehow supports it! But the result of this twisted logic has been dramatic.

Union bosses have used this ridiculous concept to justify setting up procedures that make nonmembers submit objections during narrow "window periods" every single year – just to get refunds of forced dues to which they are already entitled.

This union requirement is why the Washington nonunion teachers in the *Davenport* lawsuit had not already received the $200 to $300 Right to Work Foundation-won rebate they deserved.

High Court asked to reverse burden on employees

If the U.S. Supreme Court focuses on this legal issue and clarifies that an employee registers sufficient dissent through the act of becoming or remaining a nonunion member – then every forced-dues-paying nonunion member in America (who doesn't already enjoy the more fundamental protections of a Right to Work law) will automatically be entitled to a reduction in their forced dues excluding all non-bargaining union expenditures, including all costs attributable to politics, lobbying, and union public relations activity.

Winning on this argument would be a major leap forward, and it could multiply the effectiveness of earlier Supreme Court rulings won by Foundation attorneys *by a factor of ten*.

If all employees had to do is resign from the union to get a reduction of $200 to $300 in their forced dues, hundreds of thousands more employees could do so almost overnight.

Big Labor's lawyers and the Washington State Supreme Court majority didn't intend to throw the Right to Work movement this opportunity. But in the union bosses' drive for more forced-dues power, they may have overreached and created a real opportunity.

If Foundation attorneys can persuade the U.S. Supreme Court to make it clear that the "dissent is not to be presumed" doctrine logically only applies to members, as opposed to forced-dues-paying nonmembers, the union bosses will rue the day *Davenport* made its way to the nation's highest court. Consequently, a portion of Foundation Staff Attorney Milton Chappell's opening brief on the merits presents this significant issue for the justices to consider.

Reg Weaver's National Education Association and its Washington affiliate are fighting tooth-and-nail at the High Court to trample teachers' rights.

Right to Work Foundation no stranger to U.S. Supreme Court

Since its inception in 1968, the Foundation has amassed an impressive

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Spotlight on... *Gary Davenport*

Now retired from his career as a high school teacher, Gary Davenport, lead plaintiff in *Davenport v. WEA*, took a few minutes to talk with Foundation ***Action*** about the Washington teachers' upcoming appeal to the U.S. Supreme Court.

Did you imagine your case would ever reach the U.S. Supreme Court?

"Not at all. As I understand it, these matters are more often settled quickly. But the WEA union refused to budge and maintained they have a right to take Washington teachers' money for politics."

What troubles you most about the WEA union?

"They believe they have rights over the rights of individual teachers. It just doesn't seem fair to force people to join your group against their will and then make them pay for that unwanted membership. That's not American."

How did you learn about the National Right to Work Foundation?

"My father, who was a school-teacher for 30 years, had an experience with the Foundation. He received some legal assistance from their attorneys in the nineties. Remembering his positive interaction motivated me to stand up for my own rights."

Do you have any final thoughts?

"The Foundation goes out of its way to give assistance to people who don't have the funds, knowledge, and resources to fight these battles against unions for themselves. As a teacher, I was most concerned with teaching – not fighting the union. But [Foundation Staff Attorney Milton Chappell] is very experienced and extremely helpful."

Supreme Court Victories

Since its inception in 1968, the National Right to Work Foundation has amassed an impressive collection of precedents at the U.S. Supreme Court, advancing the individual liberty of millions of American workers along the way. Here are a few highlights:

1977 - Abood v. Detroit Board of Education

Compulsory union dues for politics and other non-bargaining activities violates the First Amendment.

1984 - Ellis v. Brotherhood of Railway, Airline, and Steamship Clerks, et al.

Union officials cannot commit dissenters' funds to improper uses – even temporarily.

1986 - Chicago Teachers Union v. Hudson

Union officials owe public employees due process and information supporting their claims of how the union spends workers' forced dues.

1988 - Communications Workers of America v. Beck

Private sector workers can withhold forced dues from unions for everything but the documented cost of collective bargaining.

1991 - Lehnert v. Ferris Faculty Association

Established a three-part test, based on the First Amendment, to judge the chargeability of union activities paid for with workers' forced dues.

1998 - Air Line Pilots Association v. Miller

Employees cannot be required to exhaust a union's internal kangaroo court before challenging in a federal court action the amount of forced dues they must pay.

1998 - Marquez v. Screen Actors Guild

Union officials must inform employees of their right to refrain from formal union membership and withhold forced dues for expenses unrelated to collective bargaining.

With free legal help from the Foundation, telephone worker Harry Beck won a landmark case at the High Court in 1988. His surname is now synonymous with employees' rights.

collection of victories at the U.S. Supreme Court, advancing liberty for millions of American workers along the way (see left).

In fact, no other public interest organization has even been able to get a single case heard by the High Court in this critical area of law.

"Foundation staff attorney Milton Chappell, a 30-year veteran at National Right to Work, is one of the most experienced attorneys in America when it comes to defending the constitutional rights of teachers," said Mix. "Aside from returning the situation in Washington to the status quo, taking this opening to advance the battle against forced unionism may allow us to turn lemons into lemonade."

Dozens of public policy groups filed *amicus* briefs

Co-counsel Steve O'Ban coordinated the filing of *amicus curiae* ("friend of the court") briefs by groups supporting the teachers' and state's legal position.

Ultimately, six states, two federal agencies, and 27 public policy, legal foundations, and independent teacher organizations signed various briefs supporting the teachers and the state of Washington.

Oral arguments are scheduled for January 10, 2007, and a ruling is expected by June.

"Let's hope that the U.S. Supreme Court gives the Washington judges some remedial instruction about the First Amendment," said Mix. "And let's further hope that our nation's highest court clarifies that when someone resigns from a union, it means they are indeed a dissenter!"

The Foundation has created a special webpage for late breaking news about the U.S. Supreme Court Case: www.nrtw.org/davenport