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Filing Annual Objection to Agency Fees Too Burdensome, Second Circuit Says

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A union representing employees at the City University of New York violated a professor's First Amendment rights by requiring him to file annual objections for agency fees and by requiring him to specifically state what percentages of the disputed fees he found unreasonable, the U.S. Court of Appeals for the Second Circuit ruled Aug. 1 (*Seidemann v. Bowen*, 2d Cir., No. 05-6773, 8/1/07).

Reversing a trial court, the Second Circuit agreed with Brooklyn College geology professor David Seidemann that the Professional Staff Congress of the City University of New York's requirement that agency fee payers make annual objections was an unreasonable requirement and therefore violated his First Amendment rights.

"PSC's annual objection requirement burdens employees exercising their constitutionally protected right to object, and the union has proffered no legitimate need for disallowing continuing objections," the Second Circuit ruled.

"PSC's annual objection requirement burdens employees exercising their constitutionally protected right to object, and the union has proffered no legitimate need for disallowing continuing objections," Judge Peter W. Hall wrote for the court.

Circuit Split Exists.

The Third Circuit acknowledged a circuit split exists on the question of whether annual objections are burdensome, but joined with the Fifth Circuit's reasoning in *Shea v. Int'l Ass'n of Machinists & Aerospace Workers*, 154 F.3d 508, 159 LRRM 2257 (5th Cir. 1998) to find the requirement was unreasonable.

Courts in the Sixth Circuit--in *Tierney v. Toledo*, 824 F.2d 1497, 125 LRRM 3217 (6th Cir. 1987)--and the D.C. Circuit --in *Abrams v. Communications Workers of America*, 59 F.3d 1373, 149 LRRM 2928 (D.C. Cir. 1995)--have upheld an annual objection requirement based on the theory that dissent should not be presumed.

But the Third Circuit explained that there was no suggestion in Supreme Court precedent that said "merely because an employee must initially make his objection known, a union may thereafter refuse to accept a dissenter's notice that his objection is continuing. The fact that employees have the responsibility of making an initial objection does not absolve unions of their obligation to ensure that objectors' First Amendment rights are not burdened."

Specific Procedures.

In 2002, Seidemann filed written objections with the union seeking to reduce his agency fee for charges he alleges are not related to the collective bargaining process. He brought an action in the U.S. District Court for the Eastern District of New York accusing the union, and its president Barbara Bowen, of interfering with his First Amendment rights and the union's duty of fair representation.

Several times during pretrial litigation the union revised the procedures by which nonmembers may make such objections and refunded Seidemann's agency fees for the 2001-2004 fiscal year, with interest.

According to the union's April 2003 procedures, prior to the annual objection period PSC must provide agency fee payers with information regarding the previous fiscal year's rebatable expenditures.

Under these procedures, objecting fee payers are then given one month to mail their objections and they are entitled to an advanced rebate for the projected pro rata amount of expenditures not related to the collective bargaining process. If they are dissatisfied with the amount of the advance rebate or dispute an expenditure, they may appeal the determination in writing to the union president within 35 days and the union will submit the matter to a neutral arbitrator for a hearing.

Particularity in Dissent Unreasonable.

In reversing summary judgment granted by the trial court, the Second Circuit said that in addition to the annual notice being burdensome, the union failed to provide a legitimate interest that was narrowly tailored enough to justify the burden.

The union argued that it wanted to "take advantage of inertia on the part of would-be dissenters who fail to object affirmatively, thus preserving more union members," the Second Circuit explained in finding the argument unreasonable.

In addition to finding the annual reporting too burdensome, the Second Circuit rejected the union's requirement that fee payers identify the percentage of the objected-to activity they found unreasonable.

"The Supreme Court has specifically and consistently rejected the notion that dissenters must object with particularity," Hall explained, adding that "requiring particularized objections to preserve an objector's rights to dissent places an additional unnecessary burden on objectors."

Because of confusion over evidence, the Second Circuit refused to decide whether other union procedures and notice requirements were permissible but instead sent the issue back to the trial court. The Second Circuit, however, did rule that Seidemann's claims were not moot because the union failed to demonstrate that it had made a good faith effort to correct past problems and to not violate rights in the future.

Judges Rosemary S. Pooler and Robert D. Sack joined in the decision.

Phineas E. Leahy of Davis Polk & Wardwell in New York represented Seidemann. James R. Sandner of the New York State United Teachers union in New York represented the union.

By Michael R. Triplett

The decision may be accessed on the Internet at <http://op.bna.com/dlrcases.nsf/r?Open=mtrt-75ns74>

New Sarbanes-Oxley Rulings Featured in Whistleblowing Supplement

Significant Labor Department and federal court decisions interpreting the whistleblower provisions under the Sarbanes-Oxley Act are featured in the new *2006 Cumulative Supplement to Whistleblowing: The Law of Retaliatory Discharge, Second Edition*, published by BNA Books.

The *2006 Cumulative Supplement* includes DOL Administrative Review Board rulings in such cases as *Welch v. Cardinal Bankshares Corp.* and *Klopfenstein v. PCC Flow Techs. Holdings Inc.* It also discusses decisions by DOL administrative law judges on a variety of substantive and procedural issues, as well as federal court rulings.

Whistleblowing: The Law of Retaliatory Discharge, Second Edition includes chapters both on litigating whistleblower cases and on avoiding whistleblower litigation.

The *2006 Cumulative Supplement to Whistleblowing: The Law of Retaliatory Discharge, Second Edition*, may be purchased alone (224 pages Order No.

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