THE AMERICAN SPECTATOR

Public Employee Watch

Supreme Court Takes One Step Away From Forced Unionization

A blow to SEIU's recruitment scheme

By Michael J. Reitz

On Monday, the Supreme Court ruled that thousands of home-based caregivers in Illinois—and perhaps hundreds of thousands in eight other states—are not required to pay union dues as a condition of employment. The case involving Hobby Lobby and contraceptives will garner the most headlines, but this ruling on union dues (Harris v. Quinn) will have lasting implications for organized labor and signals the court's growing disgust with forced unionization.

How did we get here? Hundreds of thousands of disabled individuals in this country require the assistance of a caregiver. In order to avoid institutionalizing these patients, a federal Medicaid program provides assistance for in-home care. Many patients are cared for by a friend or family member; the petitioner in this case, Pamela Harris, provides round-the-clock care for her adult son Josh, who was born with a genetic disorder.

Most people wouldn't equate selfless parenthood to labor unions, but the Service Employees International Union saw the flow of Medicaid dollars as an opportunity to reverse organized labor's decades-long membership slump. SEIU began organizing caregivers in Los Angeles in the 1990s, and then moved to Washington, Oregon, Illinois, and several other states.

The arrangement was quite simple: SEIU would convince a state agency to declare that caregivers were public employees of the agency, when in reality the caregivers are privately employed by the care recipients and paid through the Medicaid program. The union would then run a union election to designate itself the representative of the "public employees," ostensibly to bargain for higher wages and better working conditions. The state then diverted a portion of the Medicaid payments to SEIU in the form of union dues, regardless of whether the caregivers wanted to belong to a union.

The practice of unionizing private caregivers greatly enriched SEIU. The Mackinac Center for Public Policy, where I work, exposed a similar scheme in Michigan in 2009. Michigan Gov. Rick Snyder and the Michigan Legislature dismantled

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the program, but not before SEIU skimmed $34 million away from disabled adults.

In Illinois, then-Gov. Rod Blagojevich (federal prisoner No. 40892-424) led a 2003 effort to unionize more than 20,000 independent caregivers in this manner. Caregivers like Pamela Harris were shocked to discover that union dues were being deducted from their public assistance checks. With the help of the National Right to Work Legal Defense Foundation, Pam and others sued.

The Harris case eventually reached the Supreme Court. In the 5-4 majority decision announced yesterday, Justice Samuel Alito wrote that home-based caregivers in the Medicaid program are not public employees, despite Illinois's insistence otherwise. The recipients of the care, noted the court, have prime authority in hiring, firing, and supervising their caregiver, while the state merely administers the program and provides minimal regulatory oversight. The court held that the State of Illinois had no compelling interest to require caregivers to pay mandatory union dues. Justice Alito wrote:

If we accepted Illinois' argument, we would approve an unprecedented violation of the bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support. The First Amendment prohibits the collection of an agency fee from personal assistants

in the Rehabilitation Program who do not want to join or support the union.

The court also noted that a ruling for SEIU would lead to absurd results, potentially unionizing as public employees a host of private workers who receive payments from a government agency. Doctors, hospitals workers, childcare providers, and foster parents could all be face the same tactic. As the Mackinac Center noted, there could be no end to this type of public-sector unionization if it were allowed to be played out to its full extent. Could grocers be unionized because some customers use food stamps? Or perhaps landlords if some tenants receive housing subsidies? We noted such a landscape in one of two amicus briefs we filed in this case, and it appears the majority took note. Justice Alito wrote: "Extending those boundaries to encompass partial-public employees, quasi-public employees, or simply private employees would invite problems."

Justice Elena Kagan and the three other liberal justices dissented. Justice Kagan wrote that unions were justified in collecting dues from objecting caregivers as the state has a legitimate interest in a well-funded counterpart at the negotiating table. She also warned that caregivers (or "free riders," as she called them) would have an "economic incentive" to refuse to support the union if given the option. (Justice Kagan may have seen the news from Michigan — after SEIU's dues skim was terminated the union lost 44,000, or 80 percent, of its members.)

Organized labor (and its primary political beneficiary) will criticize the ruling, but secretly labor leaders must have breathed a sigh of relief on Monday. Why? During the Harris v. Quinn litigation a much larger issue emerged: whether any public employee should be required to financially support a union he does not wish to join as a condition of employment. In 1977 the court had ruled in Abood v. Detroit Board of Education that public school employees could be required to pay union dues, even if they objected to the union's ideological expenditures.

Two years ago the justices loudly signaled their willingness to review mandatory dues, which Justice Alito wrote were an "anomaly" that "appears to have come about more as a historical accident than through the careful application of First Amendment principles" (Knox v. SEIU, 2012).

In the Harris majority, the Court again indicated that Abood stood on a "questionable" constitutional foundation, but declined to reverse the precedent, as the Illinois caregivers are not truly public employees.

So what's next? The Supreme Court's ruling ends the union practice of charging in-home caregivers mandatory dues. This ruling will apply nationwide, but especially in the nine states that have unionized hundreds of thousands of such workers.

But just as significant, the Harris ruling is another step in the direction of giving all public employees a choice in whether to support a labor union.

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