De facto union victory in dues case leaves issue unsettled

Attorney plans to ask to hold case until a new justice is named

By Meghann M. Cuniff

The split vote Tuesday by the U.S. Supreme Court regarding the constitutionality of requiring public employees to pay union dues is at the least a temporary victory for unions, but other battles over the explosive labor relations issue are looming.

"We think we have a compelling First Amendment argument, so we're quite optimistic," said Michael A. Carvin, a partner in the Washington, D.C, office of Jones Day LLP who sued the California Teachers Association on behalf of Rebecca Friedrichs, an Orange County resident, and nine other schoolteachers.

Carvin said he plans to ask the court to hold the case "until a new justice is appointed."

"Then the full Supreme Court can resolve this one way or the other," Carvin said.

But Michael Rubin, an employee-side lawyer with Altshuler Berzon LLP, is confident there won't be a different outcome in the future.

"As a practical matter, we think the concerns about an adverse decision in Friedrichs or a post-Friedrichs lawsuit are pretty much over," Rubin said.

The 4-4 vote by justices in Friedrichs et. al. v. California Teachers Association et. al., 14-915, is not precedent setting and simply upholds a 2014 decision by the 9th U.S. Circuit Court of Appeals that mandatory dues under the 1977 Supreme Court ruling in Abood v. Detroit Board of Education do not violate dues paying members freedom of speech.

Carvin's plan throughout was to concede the case to the 9th Circuit in order to create a precedent through the Supreme Court, and oral arguments in January indicated justices likely would vote 5-4 in his favor. But Justice Antonin Scalia’s death last month changed everything: Even Carvin said Tuesday that the split vote "wasn't entirely unexpected" because of Scalia’s passing.

Now he, as well as union side lawyers, are preparing for another likely round of wrangling.

Catherine Fisk, a labor law expert and professor at UC Irvine School of Law said whether another lawsuit could succeed depends on who wins the November election and how the appointment of Scalia's replacement is handled.

"If the Democrats win, they are highly unlikely to appoint a justice who believes that unions and collective bargaining are unconstitutional," Fisk said. "It's anyone's guess who Donald Trump would appoint, (but) I think we might expect that a Republican nominee might vote to overturn."
California Teachers Association spokesman Frank Wells said the union is prepared for more lawsuits.

“There have been a slew of attempts. We certainly don’t think this is the last,” Wells said. “Our membership is strong and we’re continuing to build on that, so we’re going to move forward.”

But David A. Schwarz of Irell & Manella LLP, who wrote an amicus brief for the plaintiffs and attended oral arguments in January, believes the First Amendment argument is too compelling for the full court to ignore.

“I don’t for a moment believe that this issue is dead and gone,” Schwarz said.

One case set to emerge now that Friedrichs has concluded: Bain v. California Teachers Association, CV15-2465 (C.D. Cal., filed April 3, 2015), in which four teachers claim they are unfairly forced to choose between paying dues for political causes they don’t support or receiving key union benefits.

U.S. District Judge Stephen V. Wilson issued a stay in the case pending the Supreme Court decision on Friedrichs. Joshua S. Lipshutz, a lawyer with the plaintiff’s firm Gibson, Dunn & Crutcher LLP, said Tuesday he plans to request a new hearing regarding the union’s motion to dismiss now that Friedrichs is resolved.

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