AMERICAN HEALTH LAW ASSOCIATION

HEALTH LAW WEEKLY

August 15, 2025

A Union's Duty to Accommodate Employee Religious Objection to Joining Union and Paying Union Dues

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When the word "accommodation" comes to mind, most people familiar with or practicing labor and employment law likely think of the Americans with Disabilities Act or maybe even the Family Medical Leave Act. Few may consider the National Labor Relations Act (NLRA, or the Act) in that context. But, as explained more fully below, a section of the Act, 29 U.S.C. § 169, may require a religious accommodation to employees under Title VII--and not just by the employer, but by the union.

Employee Objections to Unions – Generally

It is not uncommon for employees to object to being members of a union. It has long been held that, even if those employees are not members of the union, they may still be required to pay some amount of money to the union for the fair value of the union's

representation from which the objecting employees nevertheless benefit. Such arrangements are formalized between the employer and the union in what are called "union security agreements," and specifically in this context, "agency shop" agreements.[1] But sometimes the employees object to even financing the union, let alone being a member.

Religious Objections – What Happens to the Money?

When bargaining unit employees object to the payment of membership dues on *religious grounds*, the money to be collected from them may be paid to a mutually agreeable charity instead of the union:

Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employees' employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of Title 26, . . .

29 U.S.C. § 169. This has its origins in Title VII and, while the periodic dues in lieu of language of the statute may resemble a process developed pursuant to the Supreme Court decision in *Communications Works of America v. Beck*, 487 U.S. 735 (1988), *Beck* is inapplicable and does not supersede the accommodation obligation under the statute.[2]

Title VII prohibits employers from engaging in unlawful discrimination against their employees, including because of religion. When an employee claims that the conditions of their employment improperly interfere with their religious beliefs, the employer may be required to provide the employee with a reasonable accommodation. In the context of union membership, there arose a tension between the union's right under the NLRA to collect at least some money from the objecting employees to fund those aspects of the union's activities from which the objecting employees still benefited, and the objecting employee's Title VII right to not have to associate with or finance the union at all pursuant to their religious beliefs.

The Fifth Circuit held in 1976 that Section 8(a)(3)'s permission for unions and employers to enter into union-security agreements does not supersede an employee's right to object to such agreements on religious grounds.[3] The Fifth Circuit rejected the notion that recognizing an employee's right to do so curtailed the employer's (or the union's) rights under Section 8(a)(3):

[N]either the passage of the health-care exemption nor the passage and amendment of Title VII precludes or trenches in any direct way upon any employer' making a union security agreement. He and his union can make any they like and enforce it in the general run of cases in all *except the unusual one where compliance would run counter to a particular employee's religious conviction, sincerely held, that can be accommodated without undue hardship*.[4]

Approximately two years later, the Sixth Circuit agreed: "The union security provisions of Taft-Hartley do not relieve an employer or a union of the duty of attempting to make reasonable accommodation to the individual religious needs of employees."[5] The Sixth Circuit even observed that paying dues into a non-sectarian charity instead of the union could be a possible accommodation (although it left that issue for the district court to decide on remand).[6]

Then, in 1981, the Ninth Circuit expressly held that a request by Seventh-Day Adventists to pay an amount of money equal to union dues to a mutually agreeable charity instead of the union was a reasonable accommodation for a religious objection to supporting the union, citing the language of 29 U.S.C. § 169.[7] The court observed that this section of the NLRA was amended for the *very purpose* of providing a reasonable accommodation to religious objectors:

The legislative history to that amendment (1) recognizes that the substituted charity accommodation effects a reasonable reconciliation between section 8(a)(3) of the NLRA and Title VII, and otherwise constitutes a reasonable accommodation under section 701(j)3 and (2) establishes that the accommodation does not interfere with the employer's or union's right to execute union shop agreements, which are still authorized under section 8(a)(3).[8]

The Duty to Accommodate an Employee's Religious Objections Applies to the Union Too

Given the law, a union's "duty of fair representation" can implicate Title VII and, as such, constitute a basis upon which to encourage the union to agree to address religious objections to paying union membership dues in its union-security agreement with the employer. As the exclusive bargaining representative of the employees in its bargaining unit, a union has a statutory duty to fairly represent all those employees, in both its collective bargaining and its enforcement of the resulting collective bargaining agreement.[9] This is generally called the "duty of fair representation."[10] "This duty applies in all contexts of union activity, including contract negotiation, administration, enforcement, and grievance processing."[11] "Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."[12]

A breach of the duty of fair representation occurs when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. Title VII likewise prohibits unions from discriminating against members of their bargaining unit:

It shall be an unlawful employment practice for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.[13]

Thus, "[t]he duty of fair representation and Title VII plainly overlap in that they both prohibit discrimination; indeed, some courts essentially equate the two."[14] The Sixth Circuit is one of those courts, holding that "a claim that the duty of fair representation was breached on account of discrimination and a claim of discrimination in failing to fairly represent the employee are essentially the same."[15]

Therefore, the case law permitting payment of union dues collected from bargaining unit members who object to financing the union on religious grounds to charities instead, as a reasonable accommodation to their religious objections under Title VII, should apply in the context of the union's duty of fair representation too.

Getting Ahead of These Issues in Bargaining

It follows that, in negotiating a union-security agreement with an employer in the course of collective bargaining, if the union ignores religious objections from members of its collective bargaining unit to paying union membership dues to the union, rather than paying them to a mutually agreeable charity, the union could be exposed to liability for discriminating against those objecting members of the bargaining unit on the basis of religion (although whether a bargaining representative has acted fairly, impartially, and without hostile discrimination would depend on the facts of each case).[16]

As a practical matter, especially during negotiations of an initial contract where the union normally introduces a proposal about union security, a hospital might consider incorporating a reference to 29 U.S.C. § 169 into its counterproposal on the subject to

hedge against any threats of the union striking in the event of an impasse. If there were thereafter a strike, this would force the union to publicly defend its refusal to accommodate its bargaining unit employees with bona fide religious objections, who must be legally accommodated as expressly protected under the same Act that allows the union to negotiate the labor contract, and risk breaching its duty of fair representation to them.

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[1] Union security agreements are a general category of agreements permitted under Section 8(a)(3) of the Act that include "union shop" agreements and "agency shop" agreements. *Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Mobil Oil Corp*., 426 U.S. 407, 409 n. 1 (1976). "A 'union shop' agreement provides that no one will be employed who does not join the union within a short period of time after being hired," and "[a]n 'agency shop' agreement generally provides that while employees do not have to join the union, they are required usually after 30 days to pay the union a sum equal to the union initiation fee and are obligated as well to make periodic payments to the union equal to the union dues." *Id.* This article concerns agency shop, since the issues pertain to non-union members in the bargaining unit who object to the financing of the union on religious grounds.

[2] Although *Beck* allowed unions to collect an amount of dues from nonmember employees on activities related to collective bargaining, contract administration, or grievance adjustment, *Beck* said nothing about religious objections to becoming a member of a union or a union's collection or spending of membership dues. Thus, 29 U.S.C. § 169 allows a religious objector, notwithstanding *Beck*, to refuse to support a union financially even for those union services allowed under *Beck*. The statute, however, upon providing that an employee may be required in a contract to pay sums equal to union dues and initiation fees to a non-religious, non-labor organization charitable fund, likely is guided by the *Beck* principles as to the amount of lawfully applicable dues and fees to be paid to the funds.

[3] *Cooper v. Gen. Dynamics, Convair Aerospace Div. FT. Worth Operation*, 533 F.2d 163, 168-170 (5th Cir. 1976).

[4] *Id.* (emphasis added).

[5] *McDaniel v. Essex Int'l, Inc*., 571-F.2d 338, 343 (6th Cir. 1978)

[6] *Id.* at 343-344.

[7] *Tooley v. Martin Marietta Corp*., 648 F.2d 1239, 1242 (9th Cir. 1980).

[8] *Id.* at 1242.

[9] *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Merrit v. Int'l Ass'n of Machinists and Aerospace Workers*, 613 F.3d, 609, 619 (6th Cir. 2010).

[10] *Merrit*, 613 F.3d, at 619.

[11] *Id.*

[12] *Vaca*, 386 U.S. at 177.

[13] 42 U.S.C.A § 2000e-2(c).

[14] *Agosto v. Corr. Officers Benev. Ass'n*, 107 F. Supp. 2d 294, 304 (S.D.N.Y 2000).

[15] *Wells v. Chrysler Grp. LLC*, 559 F. App'x 512, 514 (6th Cir. 2014), *citing Agosto*, 107 F. Supp. 3d at 304.

[16] *CF Merritt*, 613 F.3d at 621.