

Massachusetts Supreme Judicial Court Rejects Nonunion Employees' Challenge to Unions' Exclusive Representation of Unit Employees in Collective Bargaining

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In [Janus v. American Federation of State, County, and Municipal Employees, Council 31, No. 16-1466 \(June 27, 2018\)](#), the Supreme Court of the United States significantly expanded the rights of nonunion public employees by holding that unions may not collect fees from such employees without their consent. On April 9, 2019, in [Branch v. Commonwealth Employment Relations Board](#), the Massachusetts Supreme Judicial Court rejected an effort by nonunion public employees to stretch those rights even further to encompass the right to participate in labor negotiations.

The four plaintiffs in *Branch* are public sector employee-educators who work in designated bargaining units but are not members of the unions that serve as their exclusive bargaining representatives. The collective bargaining agreements between the plaintiffs' employers and the unions that represent them contain provisions authorizing the unions to collect agency fees from nonmembers, including the plaintiffs, and the unions maintain rules stating that nonmembers are "not entitled . . . to participate in affiliate decision-making," to attend union meetings (other than contract ratification meetings), or to "vote on election of officers, bylaw modifications, contract proposals or bargaining strategy."

Two Massachusetts statutes—Massachusetts General Laws chapter 150E, sections 5 and 12—authorize public sector unions to collect agency fees from members and nonmembers and provide that the bargaining unit's "exclusive representative shall have the right to act for and negotiate agreements covering all employees in the unit," including employees who are not members of the union (such as the plaintiffs), and that the exclusive representative "shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership."

The plaintiffs challenged both the exclusive representation and the mandatory agency fee provisions of Chapter 150E under the First Amendment to the Constitution of the United States. Specifically, with respect to the exclusive representation provision of the statute, the plaintiffs argued that exclusive representation compels them to associate with the unions in violation of their First Amendment rights. In rejecting that argument, the Massachusetts Supreme Judicial Court began by noting that the exclusive representation concept is "a basic building block" of state and federal labor law policy and that exclusive representation "is necessary to effectively and efficiently negotiate

collective bargaining agreements and thus promote peaceful and productive labor-management relations.” It reasoned further, citing the Supreme Court of the United States’ decision in *Minnesota State Board for Community Colleges v. Knight* (1984), that “the First Amendment creates no ‘government obligation to listen’ to particular voices on policy questions,” and thus that a state’s right to designate a union as the exclusive representative for meet-and-confer and meet-and-negotiate sessions was “within its inherent right to ‘choose its advisers.’” In addition, the Massachusetts Supreme Judicial Court explained that exclusive representation does not impair the associational freedoms of nonmember employees because nonmembers are not required to become members of the union, and while they might feel “some pressure to join” the union in order to gain a voice in the meet-and-confer sessions, such pressure is inherent both in the concept of majority rule, “which is a guiding principle of ‘our system of government,’” and in the collective bargaining process itself. As such, the court held that exclusive representation “does not create an unconstitutional inhibition on associational freedom.” In addition, the court observed that although the constitutionality of exclusive representation is “inextricably coupled” with the union’s duty of fair representation to all bargaining unit employees, including nonunion members, that duty does not require that nonmembers be allowed input on the collective bargaining process (e.g., how the union selects its negotiators and develops its proposals), just that the results of that process be fair to members and nonmembers alike.

The court then considered the plaintiffs’ argument that exclusive representation violates their First Amendment rights because the unions use it to deprive them of a voice and a vote regarding their workplace conditions “unless they join the unions and support their politics.” The court rejected that argument for two reasons. First, it held that the unions are not state actors for First Amendment purposes because the link between exclusive representation and the unions’ membership requirements is “too attenuated” to constitute state action. Second, it held that even if the unions could be considered state actors, their exclusion of nonmembers from the bargaining process does not violate the First Amendment; rather, it is a natural and necessary consequence of the majority-rule concept that is fundamental not only to federal labor policy but also to American democratic government.

Finally, with respect to the unions’ collection of agency fees from nonmembers, the court noted that the unions had already stopped permitting the nonconsensual collection of agency fees from employees who are not in a union, in light of the Supreme Court’s holding in *Janus* that public sector unions may no longer collect agency fees from nonunion employees unless they affirmatively consent. As a result, the court held that the plaintiffs’ challenge to the unions’ collection of agency fees from nonmembers did not present an actual controversy, and it dismissed that aspect of their challenge as moot.

The *Branch* decision confirms and upholds the ability of public sector unions to act as the exclusive representatives of unit members in bargaining with government employers in Massachusetts. As such, it is a victory for public sector unions, which suffered a significant blow when the Supreme Court issued the *Janus* decision in 2018. The victory may be short-lived, however. The National Right to Work Foundation, which represents the plaintiff-educators in *Branch*, reportedly is considering seeking review of the *Branch* decision in the Supreme Court of the United States. That Court would be less constrained by precedent than the *Branch* court was, and, as the *Janus* decision indicated, it may prove to be a more hospitable venue for challenges to public sector unions.

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