Religious Accommodation in Forced Union Dues Environments

*By Bruce N. Cameron**

Protecting conscience has always been a national priority in the United States. The Founding Fathers' determination to protect conscience is reflected in the declaration of the First Amendment to the U.S. Constitution that "Congress shall make no law. . .prohibiting the free exercise [of religion]." More recently, this national consensus is embodied in Title VII of the Civil Rights Act of 1964[1] (Title VII), which requires employers and unions to attempt to accommodate sincere religious beliefs in the workplace.

As the size of government and its regulation of society grow, employees who take their religious beliefs seriously find that their beliefs more and more often collide with rules that result from government regulation. For example, both the National Labor Relations Act[2] (NLRA) and the Railway Labor Act[3] (RLA) provide for a single labor union to be the exclusive bargaining representative[4] of all employees, regardless of an employee's religious or political views. Concern for personal religious belief has always been an anti-majority, anti-collective principle.

The touch of government transforms what was a private organization into a monopoly bargaining agent for all employees. The result is that even in contracts between private employers and "private" unions, employees are forced by the mechanism of the government to accept a single agent to negotiate their working conditions with their employer. In a free society it is extraordinary to force individuals of various religious views to accept a single agent for a matter as important as an individual's vocation.

One of the earliest Christian commentaries on labor unions is the 1891 encyclical by Pope Leo XIII titled *On Capital and Labor* (also known as *Rerum Novarum*). Pope Leo wrote that the principal goal of labor unions (worker "associations") was "moral and religious perfection."[5] Pope Leo instructed:

> Social organization [of labor unions] as such ought above all to be directed completely by this goal. For otherwise, they would degenerate in nature and would be little better than those associations in which no account is ordinarily taken of religion.[6]

Of the major Christian denominations, the Catholic Church has traditionally been viewed as a strong supporter of organized labor. Yet, from its earliest pronouncement on worker associations, the Church saw moral perfection as the overriding goal for associating with a labor union. During the years when modern labor unions were taking shape, the Catholic Church remained constant in its teachings about the need for religious compatibility among employees who were members of labor unions.[7]

Because "moral and religious perfection" should be the first priority for any labor union representing Catholic employees, the current "one size fits all" collectivist approach of monopoly bargaining hardly seems to fit Catholics, particularly given the liberal positions of today's unions on such issues as marriage and abortion.

For other Christian churches the fit is even more troublesome. Some Christian churches teach that the activities of labor unions are intrinsically immoral.[8] The Biblical injunction against Christians being "yoked together with unbelievers" is a well-known Christian teaching.[9] Thus, the governmental requirement of a single employee organization acting as the exclusive bargaining representative runs up against the religious beliefs of many employees.

Even more intrusive on individual religious beliefs is the fact that both the NLRA and the RLA permit employers and unions to enter into agreements which require all employees to join or financially support the exclusive bargaining representative.[10] Employees of faith are not only required to accept representation by a labor organization that runs counter to their moral principles, but they can be forced to financially support the labor union as a condition of employment.

Given the primary role of the government in creating a potential conflict between the religious faith of an employee and compulsory union support, the good news is that federal and state governments have taken steps to protect the religious integrity of employees who find that supporting the labor union at their place of work is inconsistent with their religious beliefs.

What are these protections? Employees of faith have three basic options: 1) they can opt out of paying for union political and ideological activities that conflict with their conscience; 2) if their state has a Right to Work statute, employees can work without supporting the union in any way; and, 3) employees whose faith is in conflict with the activities of their union can, under Title VII and its state-level equivalents, require employers and unions to attempt to accommodate them. Just as religious beliefs vary considerably, so do the nature of employee religious objections to supporting a labor union. These protections and the way in which they "fit" various religious beliefs are discussed in turn.[11]

Membership and Political Spending Protections: For some employees, their conscience is clear if they are allowed to refrain from union membership and are relieved of paying for that part of the union fees which goes to support what they believe to be immoral activities.

This kind of objection is protected by the courts. Employees need not have a religiously based objection to

be entitled to refrain from union membership or to pay a reduced union fee that excludes expenses for political, ideological, and social causes. An objection on any basis is sufficient to obtain this accommodation.

In *Abood v. Detroit Board of Education,*[12] the U.S. Supreme Court considered whether public employees had a First Amendment right to refuse to support the political and ideological activities of their unions, notwithstanding statutory or contractual agreements that required all employees to either join or financially support the union. The Supreme Court ruled that public employees who object to supporting union activities outside the realm of collective bargaining are entitled to reduce their compulsory union fees to reimbursement for bargaining costs only. Employees cannot be required to support the union's political, public policy, and ideological activities.[13]

The U.S. Supreme Court has decided two additional cases under the two major federal labor laws covering private sector workers: the NLRA and the RLA. Those two cases, *Machinist v. Street* (RLA)[14] and *Communications Workers v. Beck* (NLRA),[15] established that no employee could be required to be a member of a labor union or support the political and ideological agenda of any union.

With those three cases, *Abood, Street,* and *Beck*, the right of virtually every employee in the United States to refuse union membership and pay a reduced union fee was established under either the controlling statute or the First Amendment to the U.S. Constitution. In general, however, the right to refuse union membership and the right to opt out of union political and ideological expenses is an inadequate remedy for employees of faith.

Right to Work Laws: If an employee works in one of 22 Right to Work states[16] the employee has complete freedom to decide whether to join or financially support a labor union.[17]

If the employee cannot support a labor union because of conscience, those beliefs are completely protected by the Right to Work law. In Right to Work states, employers and unions are prohibited from agreeing to compel employees to join or financially support the union.[18] The only exceptions are for employees who work in the railroad and airline industries[19] and those who work on federal enclaves over which the state has ceded all jurisdiction.[20]

Unions typically use their monopoly bargaining status to impose a penalty on those employees who take advantage of a Right to Work law by deciding not to join the union. These penalties include the loss of a voice and a vote in the employee's working conditions.[21]

Title VII and the Development of the Charity-Substitution Payment: The serious clash between an employee's religious belief that he cannot support a union and the statutory or contractual requirement that all employees pay union fees as a condition of employment has been met by the courts under Title VII with an unusual solution. This solution, called a "charity substitution payment," permits the religious objector to pay the amount of the union fees to a mutually agreed upon charity. Paying the union fees to charity not only satisfies the union's claim that everyone must pay, it also keeps the employee's conscience clear.

The right of a broad range of religious objectors to make the charity substitution payment did not arise overnight. The earliest cases arose in the 1970s and early 1980s. They involved employees who were members of churches which had specific church doctrine prohibiting union membership.[22] These cases generally involved Seventh-day Adventists, who, as discussed above, have a doctrine proscribing union membership.[23]

What about a religious objector who is not a Seventh-day Adventist? The first expansion of the charity substitution doctrine came in *IAM v. Boeing*.[24] The religious objector in *Boeing*, Thomasine Nichols, had the same deeply held religious beliefs as Seventh-day Adventists. She could not be a member of any labor union. She was not, however, an Adventist. In fact, she wasn't even an official member of the church she had regularly attended for twenty years.

The United States Court of Appeals, over the vigorous objection of the International Association of Machinists union, held that she was entitled to the charity substitution accommodation based purely upon her personal religious beliefs, even though she was not a member of any church.[25]

The next extension of the doctrine came in *EEOC v. University of Detroit.*[26] The University of Detroit is a Jesuit institution. The religious objector in that case, Dr. Robert Roesser, was a member of the university faculty and of the Roman Catholic Church. Affiliates of the National Education Association represented the University's faculty.

The case arose when Dr. Roesser learned that the NEA and its state affiliate were pro-abortion lobbies. Dr. Roesser, consistent with the Catholic Church's historic teachings about the moral issues involved in supporting a labor union, determined that his religious beliefs prevented him from joining the union or paying any union fee flowing to the NEA and its state affiliate. He asked for an accommodation, which the University and union refused. Dr. Roesser suffered discharge rather than compromise his conscience.

Dr. Roesser's case was factually unlike the earlier cases in two ways. First, Dr. Roesser did not have a *per se* objection to labor unions. He could have been a member of the NEA if it had not taken a pro-abortion position. Second, the inaccurate public perception that the Catholic Church had historically been regarded as promoting unions created the impression that Dr. Roesser was taking a position contrary to the teachings of his church.[27]

The United States Court of Appeals in *University of Detroit* determined that individual religious belief is the proper focus of inquiry. Because Dr. Roesser's individual beliefs prevented him from associating with the NEA and its state affiliate, the court determined that he was entitled to an accommodation which would allow him to redirect his money away from the objectionable union.[28]

The Procedure for Membership and Political Spending Objections: The procedure for protecting an employee's religious beliefs varies with the nature of the employee's religious objections. If an employee wants to resign his union membership, he is merely required to put the union on notice of this. Unions are not permitted under federal law to place any restrictions on the right of an employee to resign from membership.[29]

If the employee's conscience requires that he withhold both membership in the union and a certain amount of his union fees, notice to the union is again required. This objection, however, can be a very simple "I object to paying for more than the costs of collective bargaining. I specifically object to paying for political and ideological expenses. Please reduce my union fees accordingly." No explanation of the nature of the religious belief is required because all objections, regardless of whether or not they are religious, entitle the employee to pay a reduced fee.[30]

The practical problem with a reduced fee payment is knowing how much the fee should be reduced to protect the employee's conscience. In *Chicago Teachers Local 1 v. Hudson,*[31] the U.S. Supreme Court addressed this problem. Assume that union dues are $500 a year. The union tells employees that the objector's fee is $450 a year for collective bargaining. How would an employee know if $450 is the correct amount? Must employees trust union officials to correctly calculate the collective bargaining costs?

The answer is "no:" employees do not have to trust union officials. Ronald Reagan said, "Trust, but verify." The Supreme Court in *Hudson* said essentially the same thing. Union officials, when they make the demand for payment, must give potential objectors independently "verified" financial information[32] so that employees can make their own judgment on whether the union's fee claim is correct. Generally, courts have interpreted the "verified" requirement to mean that the union must provide an audited financial statement of its expenses along with an explanation of which expenses are properly included in the union's reduced fee.[33]

If the employee looks at the union's numbers and decides the union is correctly claiming only those expenses that do not offend the employee's conscience, the employee lets the union know he wishes to pay only the reduced fee and that is the end of it. The employee pays what the union claims is chargeable. Various unions have different twists to their procedures. However, generally the employee must object to pay the reduced fee (as calculated by the union). The difference between the dues amount and the reduced fee is the employee's money which he can use as he sees fit.

On the other hand, if the employee looks at the union's financial figures and thinks they include expenses which conflict with his conscience, the employee can make the union prove the legitimacy of its fee claim. In *Hudson*, the Supreme Court placed upon unions a requirement that they must provide employees with a hearing before an "impartial decision maker" if the employee thinks the union's numbers are wrong.[34]

To obtain a hearing on a further reduction, the employee must make an objection known to the union. Objecting, and thereby letting the union know its calculations are at issue, is the key to obtaining a hearing on the question. Most unions will not reduce the fee amount unless the employee objects. No union will undertake the burden of proving its fee claims in a hearing unless an employee objects.

At the hearing, the union carries the burden of proof, not the employee. The union must prove that its agency fee numbers are correct.[35] Until the union proves these numbers, the union does not get any of the employee's disputed money. This is another requirement the Supreme Court placed upon unions in *Hudson*. The employee's money stays in an escrow account until the union proves its fee claims over disputed money.[36]

Of course, if an employee does not dispute part of the fee, and the employee agrees that the union is entitled to a certain portion of the fee, then that amount goes to the union. By the same token, any amount that the union agrees was used for politics goes to the employee. So it is just the disputed money that is held in escrow.[37]

At the hearing, the general standard for determining the correct amount of the fee provides that the union can charge objectors for collective bargaining and contract administration expenses but cannot charge them for political or ideological expenses, or other expenses not related to bargaining.[38]

Procedures for Employees Who Cannot Support the Union at All: Employees whose conscience does not allow them to pay any money to the union must give notice of this problem to the union and the employer. The notice must indicate the nature of the employee's religious beliefs so that the union and employer will know that some accommodation is sought.[39]

If the employer and union are unwilling to accommodate the religious objector through a charity substitution payment, the objector must file a timely charge with the local office of the Equal Employment Opportunity Commission and the corresponding state agency. The EEOC is the federal agency that enforces the rights of religious objectors under Title VII of the Civil Rights Act. Filing with

the EEOC (or the corresponding state agency) is a prerequisite to bringing the employee's claim to court.[40]

In every state, a timely charge may be filed within 180 days of the failure to accommodate. In most states, this time period for filing can be extended to 300 days.[41]

Conclusion

Religious objectors today have at their disposal a wide array of rights to protect various requirements of the conscience. No employee in the United States can be required to be a union member. Employees covered by Right to Work laws are not required to pay any union fees. Employees who are not covered by Right to Work laws have the right to limit their fee payment to reimbursement for collective bargaining costs. Employees whose sincere religious objections bar them from paying any money to the union are able to redirect their entire union fee to charity.

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Footnotes

[1] 42 U.S.C. § 2000e *et seq*.

[2] 29 U.S.C. § 151 *et seq.*

[3] 45 U.S.C. § 151 *et seq.*

[4] 29 U.S.C. § 159(a) (NLRA); 45 U.S.C. § 152 Fourth (RLA).

[5] Pope Leo XIII*, Rerum Novarum* ¶ 77 (Papal Encyclical, 15 May 1891).

[6] *Id.*

[7] Pope Pius XI, *Quadragesimo Anno* ¶ 32 (Papal Encyclical, May 15, 1931).

[8] The Seventh-day Adventists and the Mennonites are the two largest Christian denominations which teach that their members should never join or financially support a labor union because of the clash of values between the teachings of the church and practices of modern labor unions. *Industrial Relations: A Statement of Position of the Mennonite and Brethren in Christ Churches* (1941); *Mennonites and Industrial Organizations* (Special Committee of the Mennonite General Conference, 1937); *Seventh-day Adventist Relationship to Labor Organizations in the United States*, 1973 Annual Council; *Working Policy*, North American Division of the General Conference of Seventh-day Adventists, HC 30 10 Historical Position (1996-97 ed.).

[9] 2 Corinthians 6:14 (NIV).

[10] NLRA: 29 U.S.C. § 158(a)(3); RLA: 45 U.S.C. § 152 Eleventh.

[11] One remedy that does not currently exist is a religious objector's right to opt out of monopoly bargaining. There is some current scholarly agitation to allow multiple bargaining representatives. *See* Charles J. Morris, The Blue Eagle At Work: Reclaiming Democratic Rights In The American Workplace (ILR Press, 2005). However, no religious objector appears to have requested that relief in any reported federal case.

[12] 431 U.S. 209 (1977).

[13] *Id.* at 233-37.

[14] 367 U.S. 740 (1961).

[15] 487 U.S. 735 (1988).

[16] These twenty-two states are: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming.

[17] To avoid a question of pre-emption of these state Right to Work laws, Congress passed a specific provision permitting them. 29 U.S.C. § 164 (b).

[18] Of course, even in states where employees are not protected by a Right to Work law, compulsory unionism requirements are generally a matter of agreement between the union and the employer. If an employee works under a collective bargaining agreement that fails to require employees to either join the union or pay union fees, the employee is free to follow his or her religious beliefs.

[19] *Compare* 45 U.S.C. § 152, Eleventh *with* 29 U.S.C. § 164(b).

[20] *See, e.g.* Lord v. Local 288, Electrical Workers*,* 646 F.2d 1057 (5th Cir. 1981).

[21] There is authority, rejected by most unions, supporting the proposition that employees who join the union can object to their dues being used for politics. *See Abood*, 431 U.S. at 212 n.2; *Ellis*, 466 U.S. at 439 n.2; *but see* Kidwell v. TCU, 946 F.2d. 283 (4th Cir. 1991). Whether an employee of faith would be willing to join the union to obtain a voice and a vote in his working conditions on the basis that he could refuse to pay for union activities which conflict with his conscience would depend on the employee's religious beliefs.

[22] McDaniel v. Essex, 571 F.2d 338 (6th Cir. 1978); 696 F.2d 34(1982); Tooley v. Martin-Marietta, 648 F.2d 1239 (9th Cir. 1981); Nottleson v. Smith Steel Workers, 643 F.2d 445 (7th Cir. 1981); Anderson v. General Dynamics, 589 F.2d 397(9th Cir. 1978); Burns v. Southern Pacific Transp. Co., 589 F.2d 403 (9th Cir. 1978); Cooper v. General Dynamics, 533 F.2d 163 (5th Cir. 1976).

[23] Adventists were probably the source of the charity substitution payment idea. They lobbied for the insertion of this principle into the NLRA in 1974, when it was amended to cover nonprofit, nonpublic hospitals such as those owned by the Seventh-day Adventist Church. The Church had established a large number of hospitals as part of its religious outreach to the community, in which many Adventists were employed. Adventists wanted to avoid having to force their own employee church members to support labor unions in contradiction to church doctrine. 120 Cong. Rec. 12950-55 (Remarks of Sen. Ervin, brief of Seventh-day Adventist Church and statement of W. Melvin Adams); 120 Cong. Rec. 22575 (remarks of Sen. Williams);

and 120 Cong. Rec. 22577 (remarks of Sen. Cranston).

[24] 833 F.2d 165 (9th Cir. 1987).

[25] *Id.* at 169-70.

[26] 904 F.2d 331 (6th Cir. 1990).

[27] This perception was bolstered by the fact that the University was a Jesuit institution, and it was a Catholic priest who had discharged Dr. Roesser for his refusal to support the union.

[28] *University of Detroit,* 904 F.2d at 335.

[29] *See* Pattern Makers v. NLRB, 473 U.S. 95 (1985).

[30] *See* Chicago Teachers Local 1 v. Hudson, 475 U.S. 292, 306 n.16 (1986); *Abood,* 431 U.S. at 238.

[31] 475 U.S. 292 (1986).

[32] *Id.* at 307, n.18, 310.

[33] *See e.g.,* Second Circuit: Andrews v. Educ. Ass'n of Cheshire, 829 F.2d 335, 340 (2d Cir. 1987); Third Circuit: Hohe v. Casey, 956 F.2d 399, 415 (3d Cir. 1992); Fourth Circuit: Dashiell v. Montgomery Cty., 925 F.2d 750, 756-57 (4th Cir. 1991); Sixth Circuit: Lowary v. Lexington Local Bd. of Educ., 903 F.2d 422, 431-32 (6th. Cir. 1990) Seventh Circuit: Ping v. Nat'l Educ. Ass'n, 870 F.2d 1369, 1374 (7th Cir. 1989) (quoting Lowary v. Lexington Local Bd. of Educ., 704 F. Supp. 1461, 1466 (N.D. Ohio 1988)); Ninth Circuit: Knight v. Kenai Peninsula Borough Sch. Dist., 131 F.3d 807, 813 (9th Cir. 1997); D.C. Circuit: Ferriso v. NLRB, 125 F.3d 865, 867-72 (D.C. Cir. 1997).

[34] *Hudson,* 475 U.S. at 307.

[35] *Id.* at 306; *Abood,* 431 U.S. at 239-40 n.40.

[36] *Hudson,* 475 U.S. at 309-10.

[37] *Id.* at 310.

[38] *Abood,* 431 U.S. at 236; *see also* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) (applying the general standard).

[39] Smith v. Pyro Mining, 827 F.2d 1081, 1085 (6th Cir. 1987); Protos v. VW of America, 797 F.2d 129, 133 (3d Cir. 1986); Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476, 481 (2d Cir. 1985), *aff'd in part, rev'd in part*, 479 U.S. 60 (1986); Anderson v. General Dynamics, 589 F.2d 397, 401 (9th Cir. 1978); Brown v. General Motors, 601 F.2d 956, 959 (8th Cir. 1979); Redmond v. GAF Corp., 574 F.2d 897, 901 (7th Cir. 1978).

[40] 42 U.S.C. § 2000e-5(f)(1).

[41] 42 U.S.C. § 2000e-5(e)(1).