

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Dillon Police Officers' Ass'n v. City of Dillon

333 F. App'x 195 (9th Cir. 2009) · Decided June 8, 2009

SUMMARY

The Ninth Circuit affirmed dismissal of a complaint by Dillon, Montana, police officers and their association for lack of standing. The court held that alleged actuarial underfunding and improper use of police retirement fund assets did not establish a concrete, actual, or substantially likely injury, and that the association therefore lacked associational standing.

CASE DETAILS

COURT	United States Court of Appeals for the Ninth Circuit
WRITING FOR THE COURT	Per curiam; Fisher; Goodwin; Scannlain
JURISDICTION	Federal
DECIDED	June 8, 2009
DISPOSITION	affirmed
PROCEDURAL POSTURE	Plaintiffs appealed the district court's dismissal of their amended complaint with prejudice under Federal Rule of Civil Procedure 12(b)(1) for lack of standing.
STANDARD OF REVIEW	Standing is a question of law reviewed de novo. The court accepts the allegations in the complaint as true.
PRECEDENTIAL VALUE	nonprecedential
PARTIES	Dillon Police Officers' Association, Police officers from the City of Dillon, Montana v. City of Dillon

TOPICS

- standing
- subject matter jurisdiction
- appellate procedure
- civil procedure
- municipal law

PRACTICE AREAS

- constitutional law
- civil procedure
- municipal law
- public employee retirement benefits

QUESTIONS PRESENTED

1. Whether the individual plaintiffs had Article III standing to challenge the City's alleged failure to maintain or augment the Police Retirement Fund and its alleged improper use of Fund assets.
2. Whether the Dillon Police Officers' Association had associational standing.

HOLDINGS

1. The individual plaintiffs lacked standing because they failed to allege an injury in fact that was actual, concrete, and direct, or a substantial likelihood of future injury.
2. The Association lacked associational standing because it failed to demonstrate that its members would otherwise have standing to sue in their own right.

KEY QUOTATIONS

“Abstract injury is not enough. It must be alleged that the plaintiff ‘has sustained or is immediately in danger of sustaining some direct injury’ as the result of the challenged statute or official conduct.” (195)

“This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.” (197)

FACTUAL BACKGROUND

Police officers and the Dillon Police Officers' Association asserted rights on behalf of persons associated with the City of Dillon Police Retirement Fund. They alleged that the City failed to maintain the Fund on an actuarially sound basis, improperly used Fund assets, and failed to augment the Fund after the Montana Public Employees' Retirement Administration Board gave notice of unfunded liabilities in 2006. The plaintiffs did not allege an immediate, direct, concrete injury or a substantial likelihood of future injury.

PROCEDURAL HISTORY

Police officers and the Dillon Police Officers' Association brought claims concerning the City's administration and funding of the City of Dillon Police Retirement Fund. The district court dismissed the amended complaint with prejudice for lack of standing. The Ninth Circuit reviewed the standing issue de novo and affirmed.

DISPOSITION

affirmed

CASES CITED

- *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002)
- *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004)
- *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)
- *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)
- *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)
- *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)

- *Graham v. Federal Emergency Management Agency*, 149 F.3d 997, 1002 (9th Cir. 1998)
- *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-03 (1983)
- *Nelsen v. King County*, 895 F.2d 1248, 1254 (9th Cir. 1990)

OPINION

Dillon Police Officers' Ass'n v. City of Dillon 333 F. App'x 195

PER CURIAM.

MEMORANDUM **

Police officers from the City of Dillon, Montana (City) and Dillon Police Officers' Association (Association), on their own behalf and on behalf of a class of persons having rights under the City of Dillon Police Retirement Fund (Fund), appeal from the district court's order dismissing their amended complaint with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of standing. "Standing is a question of law reviewed de novo." *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir.2002). "[W]e take the allegations in the [plaintiffs'] complaint as true." *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir.2004). We affirm. Plaintiffs lack standing because they fail to meet the injury-in-fact test. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Plaintiffs argue that the City's alleged failure to maintain the Fund on an "actuarially sound basis" is an actual, concrete harm. Even if the Fund is actuarially unsound, plaintiffs fail to link the level of funding to any immediate, direct injury. "Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct." *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 67 L.Ed. 1078 (1923)). Likewise, even if we assume that the City's use of the Fund's assets was improper under *Mon*197tana* law, plaintiffs fail to link that conduct to any "concrete" and "actual" injury. See *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). "[W]hen plaintiffs have not already suffered a tangible loss at the government's hands, they must establish a substantial likelihood that they 'personally will be injured in the future by the government's policy.'" *Graham v. Fed. Emergency Mgmt. Agency*, 149 F.3d 997, 1002 (9th Cir.1998) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-03, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)). Plaintiffs fail to allege a "substantial likelihood" of future injury. The City's alleged refusal to augment the Fund after the Montana PERS Board gave notice of unfunded liabilities in 2006 does not constitute a "systematic pattern or policy" sufficient to confer standing in the context of a "threat of future harm." See *Nelsen v. King County*, 895 F.2d 1248, 1254 (9th Cir.1990). Finally, the Association lacks standing because it has not demonstrated that "its members would otherwise have standing to sue in their own right ... and [that] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

Friends of the Earth, 528 U.S. at 181, 120 S.Ct. 693. AFFIRMED. This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

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