

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.

OPINION

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.