
**Federal Court Report**

**Union Leader Lawfully Fired Based on Performance Issues**

11/10/2021

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A county corrections department lawfully terminated a probation officer who was a union leader based on performance issues, according to the 5th U.S. Circuit Court of Appeals.

The plaintiff was a probation officer for 15 years for the Bexar County Community Supervision and Corrections Department (CSCD) in Texas. In April 2015, an investigation confirmed he was routinely taking unapproved overtime and using his computer to send union-related e-mails. Although termination was recommended, the CSCD chief decided that the plaintiff should instead receive counseling and a performance improvement plan.

In an October 2015 evaluation, the plaintiff's manager gave him the lowest rating in several categories and noted numerous areas for improvement, but also rated him as satisfactory overall, praised his work and described him as an asset to the team.

In January 2016, the plaintiff became president of the Bexar County Probation Officers Association. The CSCD chief then allegedly asked the plaintiff to stop the union's no-confidence petition against him and told the former president he would go after the plaintiff if the vote went forward, reportedly saying he "hated" the plaintiff. The CSCD chief denied these allegations.

In February 2016, the plaintiff switched units with a probation officer who, upon taking over the plaintiff's duties, found case management issues with the plaintiff's work that required notifying the court of unreported probation violations. A case audit indicated significant case management deficiencies that, according to the assistant chief, revealed the plaintiff's "blatant disregard to instructions from the judges" and "gross negligence in case management." In August 2016, the assistant chief recommended the plaintiff be fired based on these issues as well as two instances of conducting union business while at work and one instance of using his work e-mail to send a union-related message.

On Nov. 9, 2016, the union issued a no-confidence petition calling for the CSCD chief's removal. On Nov. 15, 2016, the chief heard the plaintiff's appeal of the proposed termination. On Jan. 3, 2017, the chief fired the plaintiff based on his "questionable ethical professional conduct" and "inability to comply" with CSCD policies and procedures.

In December 2017, the plaintiff and the union sued the CSCD chief and assistant chief in their official and individual capacities, claiming the plaintiff was fired in retaliation for his union-related speech and association in violation of the First Amendment, federal law and Texas law.

The federal district court granted summary judgment for both defendants, and the 5th Circuit affirmed.

In rejecting the plaintiff's First Amendment claim, the 5th Circuit held that the CSCD chief had valid reasons to fire the plaintiff apart from any protected activity. The plaintiff failed to demonstrate that the reasons given were pretextual because, among other things, he could not show that similarly situated officers were treated more favorably.

The 5th Circuit also rejected the union's claim that the CSCD chief treated the union less favorably than similarly situated organizations by penalizing the plaintiff for conducting union business on work time and with work equipment. The 5th Circuit rejected this "class-of-one equal protection" claim. The 5th Circuit explained that the U.S. Supreme Court has held that such claims do not apply in the public employment context because this would improperly interfere with a public entity's discretionary decisions regarding employee discipline.

Finally, the 5th Circuit affirmed that the CSCD chief and assistant chief were entitled to official immunity under Texas law, because there was no basis to conclude they were not acting in good faith in performing their discretionary duties.

*United Steel, Paper and Forest v. Anderson*, 5th Cir., No. 20-50501 (Aug. 17, 2021).

**Professional Pointer:** While employers have discretion in making disciplinary decisions, they should be prepared to demonstrate that their decisions are based on legitimate business reasons, unrelated to any protected activities and consistent with how prior similar situations were handled.

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