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Federal Court Of Appeals Holds That Disparate Discipline And Anti-Union Remarks Support First Amendment Claims Of Police Officer And Union

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Happy New Year! We'll kick off the blog this year with a note on an interesting court decision regarding public sector unions.

On New Year's Eve, the Tenth Circuit, in *Cillo v City of Greenwood Village*, reversed summary judgment entered by a lower court and held that a reasonable jury could conclude a police officer's union activity was a substantial motivating factor in the decision to fire him based on evidence that he was terminated while similarly situated non-union officers who also violated the Fourth Amendment were treated more favorably, and in one instance not disciplined at all.

The employee was an officer for the Greenwood Village Police Department for 28 years and overall had a solid work record and history of promotions. Before 2007, most officers belonged to the local lodge of the Fraternal Order of Police, a national association with some, but not all characteristics of a union (for example, it does not advocate collective bargaining). In 2007, the employee and two others formed Local 305, a chapter of the International Union of Police Associations, and the employee served as chapter president. Unlike the Fraternal Order of Police, the union advocated collective bargaining and did not allow members of management to join. The union launched an aggressive recruiting effort that criticized the city and command staff for inadequate training, poor morale, low pay, and unfairness in decision making, among other things. In June 2009, the employee was discharged for allegedly violating the Fourth Amendment when he forcefully entered a motel room when attempting to stop a crime. The employee and the union sued the city, the city manager, the chief, and the investigating lieutenant alleging violations of their First Amendment right of free association under Sec. 1983. The employee also filed a state law claim against the city for discriminating against him based on his union association and a state law claim against the individual defendants for tortious interference with his employment contract.

Noting that the other non-union officers had been shown leniency for similar infractions, anti-union comments made by management, and other evidence of union animus, the Tenth Circuit held that there was sufficient evidence to support an inference that the employee's association with the union served as the basis for his termination – which would potentially violate his First Amendment right to associate with a union under Section 1983. The Court also held the employee's supplemental state law claims likewise should be heard by a jury. This case serves as a reminder that while most "government entities" are not subject to the National Labor Relations Act, there are

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constitutional and other legal considerations that must be evaluated when handling labor relations issues in the public sector.

A copy of the court's decision can be found here.