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CIRCUIT RULES THAT JURY MUST WEIGH REVOCATION OF GUARD'S UNION LEAVE

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ALBANY -- Revocation of full-time union leave can constitute an adverse employment action, a unanimous federal appellate panel has found in reversing a trial court.

The U.S. Court of Appeals for the Second Circuit in *Hoyt v. Andreucci*, 04- 5551-cv, rejected a district judge's holding that Albany County, in revoking leave of a corrections officer after he spoke up at a meeting of the county legislature, was not an adverse employment action as a matter of law.

Rather, the circuit said a jury should determine whether county officials retaliated against longtime union activist Ron Hoyt for exercising his free speech rights.

'[W]hether an undesirable employment action qualifies as being 'adverse' is a heavily fact-specific, contextual determination,' Judge Robert A. Katzmann wrote for a panel that also included Judges Sonia Sotomayor and Richard K. Eaton, a judge of the Court of International Trade sitting by designation.

In the past, the Second Circuit has broadly defined the nature of an 'adverse employment action,' finding that actions ranging from reprimand to termination may apply. It reaffirmed that broad reading in *Hoyt*.

The case centers on Mr. Hoyt, then president of Council 82, a statewide labor union representing, among others, corrections officers at the Albany County Jail, where the plaintiff is still employed.

In 1996, the union negotiated an agreement with Albany County in which Mr. Hoyt would be permitted to take full-time leave of his responsibilities at the jail in order to work for Council 82. As part of the agreement, Mr. Hoyt promised he would 'not personally represent Council 82 in grievances, administrative proceedings or other labor matters in which Albany County is a party.'

However, on Feb. 13, 2002, Mr. Hoyt appeared before the Albany County Legislature and criticized the undersheriff, accusing him of stripping union members of choice jobs as a form of punishment.

Mr. Hoyt claimed the undersheriff had lied to the union, had lost all credibility and should be removed from office. He also mentioned indirectly a pending arbitration matter which involved a suspended corrections officer.

Although Mr. Hoyt had been warned that if he spoke at the legislative meeting he would be ordered back to work, he maintained that his comments solely concerned matters of public interest and would not violate the agreement.

The next day, invoking the provision in the union leave arrangement barring Mr. Hoyt from representing Council 82 in matters in which Albany County is a party, the county ordered Mr. Hoyt to return to his job at the jail. He did so, but had to abandon the union post for lack of time. He responded with a lawsuit alleging the county had retaliated against him for exercising his First Amendment rights.

Senior U.S. District Judge Lye E. Strom of Nebraska, appearing in the Northern District as a visiting judge, dismissed the action, finding as a matter of law that revocation of union leave is not an adverse employment action.

Judge Strom observed that when Mr. Hoyt's union leave was rescinded, he was permitted to resume his original position at the jail, with his salary and benefits intact. Consequently, Judge Strom held, Mr. Hoyt suffered no harm.

On appeal, Mr. Hoyt argued that since he was on union leave during the time period in question, he should not be required to show that he suffered an adverse employment action. He claimed that his threshold of proof should rest on whether the loss of union leave was the loss of a governmental benefit.

The Second Circuit rejected that argument, but it also said Judge Strom erred in holding as a matter of law that revocation of leave could not constitute an adverse employment action.

Judge Katzmann observed that once Mr. Hoyt returned to the jail, all of his job responsibilities, as well as the physical location of his job, changed. In other words, he went from being a full-time union executive with a stipend to a corrections officer.

#### Exercise of Rights Deterred

'We believe that...the prospect of a wholesale reassignment of job duties, to the extent that occurred here, could 'deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights,'" Judge Katzmann said, quoting *Washington v. County of Rockland*, 373 F.3d 310 (2004), at 320. 'We...believe the district court went too far in holding that...Hoyt's full-time leave was--as a matter of law--not 'a significant aspect of [his] employment relationship with the County.' ...The question of whether the revocation of Hoyt's full-time leave amounted to an adverse employment action should have been reserved for the jury...'

Elmer Robert **Keach** III of Amsterdam argued for Mr. Hoyt. The defendants were represented by Albany attorneys John W. Bailey, Robert P. Roche of Roche, Corrigan, McCoy & Bush and Michael J. Smith and Catherine M. Hedgeman of Hiscock & Barclay.

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