In order to prevail on a constitutional violation under the "state created danger" theory, the plaintiff must prove: "1) the harm ultimately caused was foreseeable and fairly direct; 2) a state actor acted with a degree of culpability that shocks the conscience; 3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and 4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all." *Kneipp v. Tedder,* 95 F.3d 1199, 1205 (3d Cir. 1996).

The Third Circuit concluded that the plaintiff had failed to allege a deprivation of a right secured by the Constitution and that inquiry was dispositive of the case. Relying on the Supreme Court decision in *Martinez v. California,* 44 U.S. 277 (1980), the Circuit Court held that the defendant officers' actions could not be said to have deprived Officer Walker of his life. The Circuit Court reasoned that the killing of Officer Walker was "too remote a consequence of the failure to arrest [the parolee] to constitute a cognizable 'deprivation' by the Defendants under the Fourteenth Amendment." The plaintiff/appellant argued that the third element of the state created danger theory was met because police officers are a "distinct class of individuals who "are at a greater risk than the general public within the context of a[n encounter with a] parolee." The court disagreed with the plaintiff/appellant's argument and refused to expand the "state created danger theory" in such a manner. Finally, because there was no constitutional violation, the court deemed it unnecessary to assess defendants' qualified immunity defense.

http://www2.ca3.uscourts.gov/opinarch/131902np.pdf (last accessed Feb. 6, 2014)

Employment: County's Commitment to Provide Employees With Premium-Free Health Insurance Coverage Does Not Imply Cost-Free Coverage

***Hussey v. Milwaukee County*, No. 12-3625 (7th Cir. Jan. 29, 2014).**

Esther Hussey began working for Milwaukee County in 1961 and stayed until 1991. In 1971, the county provided its employees with health insurance pursuant to the county code, which stated that the "county shall participate in the payment of monthly premiums for such insurance . . . for eligible employees in the classified service, except for employees 65 years or age or over." In that same year, the county also decided to expand its coverage to retired employees with 15 years or more of public service. In 1989, the code was amended to read the "County shall participate in the payment of the monthly costs or premium for [health insurance] benefits" and it stated it would pay these same costs for any employees that began working prior to 1989, as well as retired employees. Moreover, the code noted "the provisions of this subsection are considered a part of an employee's vested benefit contract."

Esther Hussey paid no insurance payments, deductibles, co-insurance, or co-payments during her employment with Milwaukee County. The year she retired her employee handbook stated "If an active employee retires with fifteen years or more of County service, the retiree may participate in the health plan in which he/she is currently enrolled on the same basis as

coverage provided to the active employee group. The County will make the full premium contribution on behalf of the retiree." In 2006, Esther Hussey was asked to contribute money to her health insurance plan, and again in 2012, was asked to make increased contributions. Hussey sued the County, alleging its failure to pay health insurance costs for her and other retired employees was a taking without due process of law. Hussey believed the County ordinances bestowed upon her and other similarly-situated retired county employees a property interest in cost-free healthcare. The County responded that it only promised retirees that it would allow them to participate in the plan that active employees were in, on a "premium-free" basis.

A magistrate judge agreed with the County, granting its motion for summary judgment, a decision which Hussey appealed.

HELD: The Seventh Circuit affirmed, finding the County promised only premium-free health insurance to retirees.

DISCUSSION: The Circuit Court reviewed due process challenges under the United States Constitution, noting that to prove such a claim the plaintiff "must have more than an abstract need or desire for [the property interest in question]. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Of course the Constitution does not create the interest in question, rather it must be created and "defined by existing rules or understanding that stem from an independent source such as state law rules or understandings." The court found that both parties agreed Hussey had some vested property interest in participating in the County's health insurance plan, but identified two different interpretations of that interest: Hussey said it was the right to have no deductibles, fees, co-insurance, or co-payments at all, and the County saw it as the right to participate in the plan of active employees and have it pay the "premiums" for her.

The court found that amendments to the plan in 1971, 1989, and 1993 only promised the county would supply "premium-free" insurance, not "cost-free" coverage. Evaluating exactly what the promise to pay "monthly costs" means – the term used variously in the ordinances – the court found, like the magistrate, that deductibles, co-payments, and co-insurance are not 'monthly costs' because they are not incurred monthly. They are annual, if incurred at all. The court went on to evaluate the employee handbook and held it bolstered this because it promised retirees that it would pay a "premium contribution" and nothing more.

Ultimately, the court said Hussey's "consternation is understandable," for she participated in the county's health insurance plan for two and half decades without paying anything, but that fact did not mean the county promised her such a benefit or that it became a vested property interest. She had a property interest in participation in the county's health insurance plan provided to active employees and premium-free coverage if she did so, but only a mere expectation of cost-free health insurance.

http://hodanganzer.files.wordpress.com/2014/01/7th-circuit-dec.pdf (last accessed Feb. 5, 2014)

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