**DISCUSSION**: Discrimination claims may be pursued in two ways. First, under the direct method, a plaintiff may bring forward sufficient direct or circumstantial evidence proving the employer's discriminatory animus motivated an adverse employment action. Alternatively, a plaintiff can use the *McDonnell Douglas* burden-shifting approach, under which the plaintiff establishes a prima facie case by showing 1) she is a woman, 2) she suffered an adverse employment action, 3) she met the "legitimate business expectations" of the employer, and 4) a similarly situated man would have been treated differently. If this is established, the employer then has the burden to articulate legitimate, non-discriminatory reasons for the adverse action, which, if accomplished, shifts the burden back to the plaintiff, who must show that such articulated reasons are pretextual and that gender was the actual motivating factor for the adverse action.

The Circuit Court determined that Harper failed under the direct approach because the proffered evidence was not direct, nor was it strong enough as circumstantial evidence to allow a jury to infer gender discrimination. The only evidence proffered by Harper consisted of the testimony of two fellow county employees. The first, a member of the County Board between 1998-2010, recounted that 1) a male Board member was once appointed chair without using the traditional election approach and instead used a straw poll, 2) male Board members argued that a female Board member who missed meetings due to a lengthy commute should resign, but did not make the same arguments against a male with the same commute and same absentee issue, and 3) that in her observation of the Board "a sufficient number of the male members of the Board who had influence with the remaining male members of the Board were biased against women." The second, a former Circuit Clerk, said that whenever the County Clerk's salary was set higher than hers, she had to make a presentation and prove why her compensation should be the same, but that male officers were not required to make such presentations. She also felt the male Board members were more "aggressive" towards her than her male colleagues. The Circuit Court said this evidence was conclusory, speculative, and in any event did not establish that male Board members' bias against women led to the decision to deny Harper's pay raise.

Under the indirect *McDonnell Douglas* approach, the issue was whether the County's justifications for differential treatment were pretextual. The County advanced numerous reasons for denying Harper's requested pay raise, all of which focused on performance, including the fact that Harper did not work full-time hours, did not provide work product as requested and on-time, and failed to attend Finance Committee meetings or to assist with the budgeting process. The Circuit Court found that Harper merely argued that these shortcomings were not her fault, but did not produce any evidence that these reasons were pretextual. It therefore affirmed the district court's dismissal.

http://caselaw.findlaw.com/us-7th-circuit/1662892.html (last accessed Apr. 16, 2014).

## Housing: City's Failure to Use Certified Code Inspectors During Construction Does Not Support Due Process Claims By Ousted Tenants

## *Customer's Bank v. Municipality of Norristown*, No. 13-2512 (3rd Cir. Apr. 11, 2014).

The Third Circuit has denied claims for compensation by residents who were ousted from a condemned building despite the fact that the City had issued the building an Occupancy Certificate based on flawed code compliance activities, finding that such deficiencies, although potentially negligent, did not "shock the conscience" as required for a substantive due process claim.

In 2006 Fazio Properties Rittenhouse Club, LLC began building the Rittenhouse Club Condos. In 2007 the building was issued a Use and Occupancy Certificate by Norristown, Pennsylvania officials. As a result residents moved in.

In 2010 Norristown officials issued condemnation notices for the entire property (because of failures to comply with various safety laws) and filed a complaint and petition for a preliminary injunction against the builders. The court filings included reports by the private inspectors hired in 2006 and 2007 to ensure code compliance that the properties were deficient, including having wooden fire escapes and walls that lacked the proper concrete fill. As a result the court condemned the property and ordered the residents to vacate so that Fazio could prepare and implement a remediation plan. The remediation took place between 2010 and 2012 and the residents then resumed occupancy.

Upon moving back in, the residents filed a Section 1983 suit, asserting violations of substantive due process, the Equal Protection Clause, and the Takings Clause. Additionally, they brought a *Monell* claim against the City. The plaintiffs contended that the City and several employees knew that Fazio lacked experience building complex buildings like the condos at issue, that the City failed to enforce the state's uniform construction code and instead apathetically entrusted enforcement to inexperienced employees and outside firms, that virtually none of the outside firms employed certified code inspectors, and that the one firm that did "identified serious safety deficiencies" but failed to report them.

The City moved to dismiss the allegations. The district court dismissed the federal claims and declined to exercise supplemental jurisdiction on any state claims. The plaintiffs appealed only the dismissal of the substantive due process and the *Monell* claims.

**HELD**: The Third Circuit affirmed the district court, dismissing the Constitutional claims because the City's actions did not "shock the conscience" as required for a substantive due process claim and because the harm suffered did not meet the first prong of the state-created danger doctrine.

**DISCUSSION**: Success on substantive due process claims requires a finding that the governmental activity at issue, without due process of law, deprived the plaintiffs of life, liberty, or property to such a degree that it "shocks the conscience." This standard includes only the most egregious conduct. The plaintiffs failed to set forth facts proving this high standard