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Due Process: Although Individually Lacking, Series of Notices Regarding Impending Property Demolition, Taken as a Whole, Satisfy Due Process

Yang v. City of Wyoming, no. 14-1846 (6th Cir. July 13, 2015).

The Sixth Circuit has upheld a Michigan city's notice process leading to demolition of a former restaurant where, despite the property owners' failing to receive a comprehensive notice informing them of the property's deficiencies, they had received various mailings advising them of an upcoming demolition hearing and advising them to call for additional information.

Ming Kuo and Julie Yang purchased real estate in the Wyoming, Michigan (City) in 1989. The property was leased to various restaurants until February 2011, when the last tenant ceased operations. Thereafter, the premises were left abandoned, although the Yangs continued to pay property taxes. It soon fell into serious disrepair as the elements and vandals took their toll. By late 2011, the property's roof was leaking badly, its front columns were standing precariously and it had been stripped of electrical wiring, copper conduits and all kitchen equipment. Abandoned cars littered its pothole-filled parking lot. The City posted a notice of abandonment on the property and mailed a copy to the property, mistakenly addressed to the prior owner, Joseph Gordon. No response came.

In mid-2012, the City condemned the property and followed up with a Notice of Order to Repair or Demolish (Notice to Repair), again posted to the property and sent by certified mail, signature required, to the premises in the name of the prior owner. When that letter was returned as having been sent to a "Vacant Property," the City did a further

search and located the Yang's proper address in Grand Rapids. It sent them the Notice to Repair via certified letter in September 2012; again it was returned.

In October 2012, the City sent the Yangs a Notice of Demolition Hearing with a copy to their real estate agent. No response was received to either of these and the Yangs did not attend the demolition hearing. Although the certified mail was returned unsigned, the regular mail had been delivered. Another notice was sent following the demolition hearing, again with no response.

The City demolished the property two months later, in January 2013, and subsequently sent the Yangs a bill for costs of $22,500. This mailing was received and finally got their attention. While they acknowledged receiving prior mail mentioning "repairs," they denied having received notice of the demolition. Rather than pay the bill, they brought a section 1983 action against the City, alleging denial of their due process on the grounds that the City had taken their property without adequate notice. The trial court held for the City.

HELD: On appeal, the Sixth Circuit affirmed.

DISCUSSION: The Fourteenth Amendment requires that, before a governmental entity takes private property, it must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." The Constitution judges the adequacy of notice from the perspective of the sender, which means that the recipient's lack of due diligence does not negate otherwise reasonable efforts at notice.

When certified mail is returned unread, the government must take "reasonable additional steps" which may include posting on the property and/or sending via regular mail. *Jones v. Flowers*, 547 U.S. 220, 234 (2006). Here the record showed that the City made at least *four* separate attempts to contact the Yangs. Regardless of the fate of the mailings, the City had "ample reason to think that the Yangs, like any reasonable property owners" would find the notices posted to their property.

The Yangs attacked the City's actions with a "divide and conquer" strategy. While the original (unopened) certified mailings contained complete information about the impending demolition, the follow-up mailings were not as complete; thus they were not fully apprised of the situation. The majority did not agree. The totality of the City's efforts--including specific notice of a demolition hearing-- afforded the Yangs notice of the impending governmental action. The mailings which the Yangs did receive put them on notice as to the prior mailings: "Notice to call the city would make up for the failed certified mail because it would give any reasonable person a means to learn about the demolition. 'Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry may have led.'"

DISSENT: The dissent saw the facts differently. Although the earlier certified mailings may have contained sufficient information to apprise the Yangs of the City's move

towards demolition, those were never received. And the postings at the property, upon which the majority relies, were never properly entered in the City's own records, casting doubt on the content and adequacy (and fact) of those postings. Furthermore, the timing of the City's posting, based on an apparently immediate decline in the property from a fully operational restaurant in February 2012 to a dangerous structure requiring demolition only eight months later, seemed precipitous.

What the Yangs apparently received as their first confirmed notice of the impending destruction of their property was a regular mailing in mid-October of 2012 apprising them of a demolition hearing two weeks hence. That notice did list their property address in a "RE:" line, but did not refer to "inspection-related deficiencies" at the premises and merely stated that the Yangs had the opportunity to attend and present testimony, advising them to call city hall for further information.

The majority's stance, relying on a "skeletal hearing notice" was not sufficient to pass Constitutional muster:

> They ask us to imagine a scenario where the government acknowledges that the plaintiff did not receive the original, detailed, and specific notice, so it follows up with a letter in which it asks the plaintiff to call city hall so that it can relay the information contained in the original notice.

Given that the notice was insufficient, it mattered little that the notice had also been sent to the Yang's realtor. "Insufficient notice does not suddenly become sufficient because it is sent to multiple interested parties."

Because the Yangs had received "less information than the average parking ticket," the majority had erred.

LINK (last accessed July 29, 2015).

Excessive Force: Sheriff's Single Instance of Failure to Investigate Officer's Excessive Force Does Not "Ratify" Officer's Actions

Salvato v. Miley, no. 5:12-cv00635 (11th Cir. June 25, 2015).

Where a Florida police officer was found to have used excessive force by shooting a retreating, unarmed arrestee and by not intervening when a fellow officer tasered the arrestee repeatedly, a Sheriff who declined to order an independent internal investigation of the incident could not be said to have "ratified" the excessive force.

Lauren Miley, a Florida police officer, responded to a call about a disoriented, shirtless male along a road in Marion County, Florida. She questioned the man, Joshua Salvato,

determined that he was not armed, but then called for backup when his behavior became "intimidating." Officer Norman Brown arrived, immediately drawing his pistol.

When the officers tried to corral Salvato, he became belligerent and a fracas ensured. He charged, knocking Miley to the ground, and then retreated. As he was backing away, Miley shot Salvato before giving any verbal warning, hitting him in the abdomen. He did not drop and attempted to walk away. The two officers pursued Salvato, knocked him down and eventually subdued him. During the process, Brown tasered Salvato a dozen times, many of which occurred after Salvato had been handcuffed. Salvato later died of internal bleeding from the gunshot wound.

His estate brought section 1983 actions against Officer Miley individually for using excessive force and against the Sheriff of Marion County in his official capacity on the grounds that the Sheriff "ratified" Miley's conduct by failing to order an internal affairs investigation of the incident, relying instead on investigations by a Florida grand jury and the Florida Department of Law Enforcement. The trial court denied Miley's qualified immunity-based motion for summary judgment and denied the Sheriff's motion for summary judgment after a jury verdict against him in Salvato's favor. Each appealed.

HELD: The Eleventh Circuit upheld the denial of Miley's qualified immunity defense but reversed at to the denial of summary judgment to the Sheriff.

DISCUSSION: The court found that Miley had used excessive force, not only in shooting Salvato as he was backing away but by not intervening verbally as Brown continued to taser Salvato. Her behavior in shooting Salvato was not "objectively reasonable" under the circumstances: the reason she had initially confronted Salvato was because he was "yelling and cussing" at traffic—not a criminal activity. She had verified that Salvato was not armed and he was retreating when she shot him. She had also used excessive force by not attempting to curb Officer Brown's excessive use of the taser, despite admitting that she could have done so. Her explanation that she was still overwhelmed by the immediately preceding attack from Salvato to focus on Brown's activity did not suffice: "An officer who is present at the scene and fails to take action reasonable steps to protect the victim of another officer's use of excessive force can be held liable for her nonfeasance." (citation omitted).

The Sheriff's actions were viewed differently by the circuit court. Without more, a single instance of failure to investigate could not be construed to ratify the underlying excessive force:

> When plaintiffs are not relying on a pattern of unconstitutional conduct but on a single incident, they must demonstrate that local government policymakers had an opportunity to review the subordinate's decision and agreed with both the decision and the decision's basis before a court can hold the government liable on a ratification theory. (citation omitted)

Here, the Sheriff had not reviewed or approved Miley's actions in advance and there was no evidence that he or his department promoted or tolerated any pattern of declining to scrutinize instances of alleged excessive force. Although a persistent pattern of failure to investigate might, in and of itself, justify a finding of ratification, a single such instance required a showing of prior approval of the underlying incident to be culpable.

LINK (last accessed July 29, 2015).

Fair Housing Act: Plaintiff has "Neighborhood Standing" to Bring Suit Enjoining Public Housing Redevelopment, But Precluded by FHA Safe Harbor Provision

McCardell v. HUD, No. 14-40955 (5th Cir. July 23, 2015).

In 2008, Hurricane Ike ravaged Galveston, Texas. In the wake of the storm, four public housing projects were destroyed, displacing hundreds of low-income families. The Galveston Housing Authority (GHA) demolished the housing projects in accordance with HUD guidelines and ultimately developed a redevelopment plan to build fewer multi-family, mixed income housing units at the locations of the demolished sites. Several individuals brought suit in district court seeking to enjoin the development of the new housing units. The complaints allege that the GHA's housing plans would "actively concentrate poverty in already impoverished and racially segregated areas" and deny the neighborhood the benefits of "interracial associations."

The district court dismissed all plaintiffs for lack of standing, except for Tryshatel McCardell. McCardell subsequently filed an amended complaint, stating that her neighborhood was predominately composed of racial minorities and that the new tenants of the pubic housing units are estimated to be racial minorities. She alleged that construction of GHA's proposed public housing plan would have an economic and "racially segregative effect" on her neighborhood and deprive her the benefits of interracial associations. She asserted that she had "neighborhood standing" to challenge GHA's proposed plan and sough injunctive and declaratory relief.
The district court dismissed the state defendants from the case on sovereign immunity grounds, and granted summary judgment for the remaining defendants. McCardell appealed to the Fifth Circuit.

HELD: The Circuit Court (1) upheld the district court's dismissal of other plaintiffs in the suit; (2) found that McCardell had alleged sufficient facts to support her claim of "neighborhood standing" under the Fair Housing Act; (3) found that Congress had not abrogated state sovereign immunity under the Eleventh Amendment; and (4) held that McCardell's claims were precluded by a safe harbor provision in the FHA.

DISCUSSION: The plaintiff argued first that the district court's dismissal of the other plaintiffs was improper. Refusing to rule on the merits, the court held that it lacked jurisdiction to hear the appeal because the dismissed plaintiffs had not appealed themselves. McCardell argued unsuccessfully that she had a personal stake in advancing the claims of the dismissed plaintiffs. The court disagreed; a notice of appeal must name all parties making the appeal. Failure to name a party in a notice of appeal is a fatal defect that removes the unnamed plaintiffs' claims from the jurisdiction of the appellate court.

Next, the court addressed the issue of whether the plaintiff had standing to bring the appeal. After Congress passed the FHA, the Supreme Court had handed down a trilogy of cases recognizing "neighborhood standing," under which "the deprivation of "the benefits that result from living in an integrated community" is an injury sufficient to support Article III standing. The defendants argued that McCardell did not establish a "certainly impending" injury and that the future harm alleged in her complaint was merely speculative, noting that the public housing project was designed to attract a variety of mixed-income tenants, and it was to uncertain whether the redevelopment project would deprive the plaintiff of the socio-economic benefits of a diverse neighborhood.

The court rejected this argument, finding that the injury asserted would be "felt in the logical course of probable events" because redevelopment would occur and low-income and minority populations would be concentrated in McCardell's neighborhood and segregated from the rest of the city. The court was particularly persuaded by several expert reports regarding the socioeconomic effects of GHA's proposed housing plan. Moreover, the court noted that other courts have upheld neighborhood standing to challenge "future segregative effects of a planned by yet unbuilt public housing project." Accordingly, the appellate court held that McCardell alleged facts "sufficient to show that the development of new public housing units in her neighborhood would deny her the benefits of living in a diverse community."

A third issue on appeal was whether the lower court erred in dismissing the state defendants on the grounds that they were immune from suit under the Eleventh Amendment, which bars suits by private citizens against a state in federal court. McCardell argued that the FHA abrogates a state's sovereign immunity, thereby making the state amenable to suit. As a general rule, Congress may enact a statute that voids a state's sovereign immunity under the Eleventh Amendment, if (1) makes it "unmistakably clear" that its intent is to do so and (2) acts pursuant to a constitutionally valid exercise of its power. Here, the court found that the statute lacked explicit language allowing for its enforcement by private right of action against a state.

Lastly, McCardell appealed the lower court's grant of summary judgment to the remaining defendants. The circuit court upheld the lower court's finding that McCardell's claims were precluded by a safe harbor provision in the FHA, which precludes a claim against the redevelopment of public housing units if significantly fewer replacement units are being provided than the number of units demolished.

LINK (last accessed July 28, 2015).

First Amendment: Court Dismisses Religious Discrimination Case, Finding Non-Retaliatory Reasons for Termination

Haji v. Columbus City Schools, No. 12-3520 (6th Cir. July 16, 2015).

Plaintiff Abdurahman Haji (Haji) is a native Somalian and an imam at a mosque in Columbus, Ohio. In 2005, he was hired as a teaching assistant in an ESL class at a local public middle school to help translate for students who were native Somali speakers. Under the terms of his employment, he was permitted to leave his teaching position early on Friday afternoons to lead prayer services at the mosque. In April 2008, after a a complaint by a teacher stating that Haji's early departures were interfering with his job duties, the school rescinded the agreement allowing Haji to leave early without permission. Haji repeatedly ignored this new restriction and continued to leave his post for Friday prayer services. In June of 2008, a disciplinary hearing was held where the Haji was terminated for neglect of duty, insubordination and absence from work without leave. The decision to terminate was ratified by the school board in August.

He sued the school system, alleging religious discrimination under Title VII and First Amendment retaliation under 42 U.S.C. § 1983. The district court granted summary judgment to the defendant.

HELD: The Sixth Circuit Court of Appeals affirmed.

DISCUSSION: At issue on appeal was whether Haji had established a prima facie case for his religious discrimination and retaliation claims.

A government-employee plaintiff establishes a prima facie case of First Amendment retaliation if he demonstrates that:

> (1) he engaged in constitutionally protected speech or conduct; (2) an adverse action was taken against him that would deter an ordinary person from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two.

Defendants conceded the first two factors; thus, the court focused its discussion on the "causal connection" element. In order to survive a motion for summary judgment in a retaliation case, the plaintiff has the burden of producing enough evidence of a retaliatory motive such that a reasonable juror could conclude that his termination would not have occurred but for his engagement in the protected activity.

The Sixth Circuit has held that temporal proximity between the employer's knowledge of the protected activity and the termination of employment can establish a prima facie causal connection. Specifically, the court has held that a gap of three months between the employer's knowledge of the activity and the adverse employment action may permit a jury to infer a causal connection. Here, the plaintiff argued that the school became motivated to terminate him in March 2008, after a YouTube video surfaced where he was shown making disparaging statements about the school during a religious service at the mosque. Since he was terminated in June, the plaintiff argued that he met the temporal proximity requirement to establish a prima facie causal connection. The court agreed, noting that Board of Education's ratification of the plaintiff's termination in August was a mere "bureaucratic formality." As such, the court concluded that the plaintiff established a prima facie First Amendment retaliation claim.

Notwithstanding the plaintiff's evidence of retaliation, the court still ruled against the defendant. The court explained that "even if the employee establishes that his protected conduct was a motivating factor behind his termination, the employer is not liable if it can show that it would have made the same employment decision even if the employee had not engaged in the protected activity." The court found that the plaintiff had repeatedly violated the attendance policy for the school by leaving early without permission. "Overt disregard for the employer's policy and insubordination are generally sufficient and legitimate grounds for termination," said the court.

Since the plaintiff only became subject to the attendance policy after the school rescinded its previous agreement with the plaintiff, the court also inquired as to whether the rescission itself was retaliatory. Here, the court noted that the plaintiff had established a prima facie inference of a retaliatory motive. However, the rescission would not be deemed to be retaliatory if the defendants presented evidence sufficient to show a non-retaliatory reason for the rescission of the agreement. The court held that the school had such a reason, noting that the complaint by a teacher stating that his early Friday departures were disrupting the classroom and interfering with job duties, was sufficient to establish a non retaliatory reason for termination.

The court also dismissed the plaintiff's religious discrimination claim. The plaintiff argued that he was terminated because of his religion, in violation of Title VII. To prevail on his claim, the plaintiff must prove that he is (1) a member of a protected group, (2) subject to an adverse employment decision, (3) qualified for the position, and (4) replaced by a person outside of his class or that similarly situated employees were treated more favorably. The defendants conceded on the first three points, and the court focused its discussion on the final element. The court ultimately held that the plaintiff failed to meet the burden of proving the fourth prong because could not provide specific evidence that would establish an inference of discrimination.

In sum, while Haji stated a prima facie claim for First Amendment retaliation, his claim failed because the defendant was able to demonstrate sufficient and non-retaliatory reasons for his termination. Similarly, Haji failed to satisfy the prima facie burden for his

religious-discrimination claim because he failed to provide evidence of discriminatory intent.

LINK (last accessed July 28, 2015).