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Employment: No Disability-Based Discrimination Where Employer has Non-Pretextual Reason for Declining to Grant Job Reassignment

Small v. Memphis Light, Gas and Water, no. 19-5710 (6th Cir. Mar. 12, 2020).

Lack of evidence dooms an injured employee's claims of disability-based or religiously-based discrimination.

For over a decade, Jason Small (Small) worked as an electrician at Memphis Light, Gas and Water (Memphis Light). In 2013, he suffered an on-the-job injury that required him to change positions. He expressed interest in a position as a revenue inspector, but Memphis Light offered him a service dispatcher position. Without another offer—and at the risk of otherwise being terminated—Small accepted the dispatcher position.

Small raised concerns with Memphis Light that his new position would conflict with his Jehovah's Witness religious obligations. He had services on Wednesday evenings and Sundays as well as community work on Saturdays. He asked to be reassigned to a different position or to different shifts. But Memphis Light denied the request, explaining that the accommodations would impose an undue hardship on the company and that its union required shifts be assigned based on seniority. Memphis Light suggested that Small swap shifts with his co-workers or use paid time off. When Small renewed his request Memphis Light reconsidered and offered Small the option to "blanket swap" shifts—swapping his shifts with another employee for an entire quarter.

Small remained in his dispatcher position and in 2017, sued Memphis Light for disability and religious discrimination as well as retaliation. The district court granted summary judgment to Memphis Light, whereupon Small filed a motion with that court to enforce an alleged settlement agreement between the parties. The district court rejected the motion, finding that the parties had never agreed on all material terms.

Disability-based Discrimination. On appeal, Small again argued that Memphis Light discriminated against him based on his disability by refusing to offer him a revenue inspector position. But Memphis Light offered a legitimate, non-discriminatory reason: namely, that Small physically could not do the work of an inspector.

To rebut that explanation, Small had to offer evidence that Memphis Light's stated reason was pretextual. He contended that Memphis Light presented shifting accounts of who determined that he could not do the work of an inspector—a disability committee or an individual HR manager. This suggested, he said, that the true reasons for its denial were being obscured. But he could not produce substantive evidence of this alleged inconsistency.

Small further pointed to various Memphis Light policies that, he said, gave him a "right" to be reassigned to a different position--but could not explain how those policies revealed that Memphis Light's reason for not reassigning him to a particular position was pretextual. Finally, Small said that there were factual disputes about whether he could do the work of an inspector. But the question was not whether Memphis Light was correct that Small could not do the work—the real question was whether Memphis Light "honestly believed" that to be the case. Small did not offer any evidence to cast doubt on Memphis Light's honest belief.

Religious Discrimination. Small also argued that Memphis Light discriminated against him by failing to accommodate his religion. But Memphis Light responded that additional accommodations would have impeded the company's operations, burdened other employees, and violated its seniority system, an assertion that Small could not rebut.

Settlement agreement. Small also challenged the district court's refusal to enforce an alleged settlement. The Sixth Circuit reviewed the lower court's finding for clear error. The record showed that Memphis Light made its final settlement offer to Small on a Friday around noon. That offer required Small to agree to a nondisparagement provision, a clause that Small's counsel rejected in minutes because such a provision because might bar him from filing future claims. She also said that she would talk to Small about the offer. Memphis Light soon acknowledged her response with an "O.K. Thanks." The company followed up a few hours later asking for an update on its offer. Small's counsel responded, "Not yet." She explained that she could not talk to Small because he was in a mandatory meeting. Finally, two hours later—after no further emails—Memphis Light revoked its offer.

> Given this evidence, it almost goes without saying that the parties never agreed on all the material terms. Memphis Light insisted on a non-disparagement

provision; Small resisted that provision. Nothing in the record suggests that the district court erred—let alone clearly so— when it found that the parties had not reached an agreement.

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Housing: No Evidence of Discriminatory Intent where Flawed and Unfair Process Deprived Plaintiff of Opportunity to Bid on Property

Crain v. City of Selma, No. 19-50490 (5th Cir. Mar. 12, 2020).

Affirming the court below, the Fifth Circuit finds insufficient evidence of racial animus or discriminatory intent where an African-American resident's bid was submitted late due to a flawed bidding process, resulting in a Hispanic bidder purchasing the property; it also found no racially-based irregularities in the city's ballot application process.

In December 2014 Alton Crain (Crain), an African American resident of Selma, Texas (City), became aware that the City was selling nine parcels of land, including "Parcel 5" next to his house. He arrived at City Hall on December 19, 2014, the deadline for bids, and asked for advice about how much he should bid for Parcel 5. He was advised to bid 3% over the property's value, as measured by the Bexar County Appraisal District (BCAD).

Unbeknownst to Crain or the other bidders, the City had contracted with a third-party appraiser to value the properties. While BCAD valued Parcel 5 at $16,020, the third party valued it at $19,250. The City Council agreed that it would only accept bids that matched or exceeded the third-party value, but did not provide this information to prospective bidders. At City Hall, Crain submitted a bid for 3% above the BCAD value; while he was doing so, a City abruptly official left the office to take a phone call. Soon thereafter, Jose Bustos (Bustos) and his wife arrived at City Hall and met with City officials. Crain claims that he overheard them telling Bustos to use "market value" as the benchmark for his bid on Parcel 5, and to ensure that the parcel number was written on the outside of his bid. Crain became concerned that Bustos might outbid him, so he submitted a new bid for $17,622—10% higher than the BCAD value. Bidding closed at 5pm on Friday, December 19, 2014.

Bustos' bid of $24,000 was accepted by the City, even though it bore a stamp indicating that it was "Received" on December 22, 2014 at 4:49 p.m. Bustos provided an affidavit stating that he had submitted his bid "on December 19, 2014, and the City stated that City Hall clerks occasionally switched the date on a "Received" stamp to the following

business day late on Friday afternoons. Crain filed suit in May 2016, alleging violations of the Fair Housing Act (FHA).

While his suit was pending, Crain decided to run in the upcoming May 2017 election for City Council, specifically for a position occupied a white man. The City provided all interested candidates with a letter explaining the City's election-related deadlines. In order to appear on the ballot, all candidates were required to submit an application to the City Secretary's office no later than February 17, 2017. Alternatively, the letter informed candidates that they could appear as a write-in candidate if they submitted an application "no later than midnight" on February 21, 2017. In reality, the deadline for submitting a write-in application was 5:00 p.m. but the same erroneous letter was handed to all applicants when they picked up their applications.

Crain submitted his ballot application in person on the last day, February 17. He alleges that he asked if the application was complete, and whether it needed to include his birthdate, and was initially told that the document sufficed. The City notified Crain later that day that his application was invalid without a signature, but that there was still time to submit a write-in application. He went to City Hall with a new application after 5pm and found the doors locked. He then emailed the application to the City and dropped the written application in a USPS kiosk before midnight.

The City rejected Crain's write-in application as untimely, and on March 9, passed an ordinance declaring the 2017 election uncontested; Crain's opponent thus retained his position on City Council.

Crain amended his complaint to assert a section 1983 equal protection claim, arguing that defendants discriminated against him on the basis of race when they denied him access to the ballot. The district court granted summary judgment to the defendants, dismissing Crain's claims under both the FHA and those filed pursuant to section 1983.

The FHA makes it unlawful to "discriminate against any person in the terms, conditions, or privileges of sale . . . of a dwelling . . . because of race." To make out a prima facie claim of disparate treatment under the FHA, Crain had to establish "(1) membership in [a] protected class, (2) that [he] applied and was qualified to rent or purchase housing[,] (3) that [he] was rejected, and (4) that the housing thereafter remained open to similarly situated applicants." (Crain argued that his intent was to build a residence on the land, bringing him within the ambit of "dwelling" for FHA purposes).

If Crain established a prima facie case of discrimination, the burden-shifting framework in *McDonnell Douglas* would give the defendant an opportunity to articulate a "legitimate, non-discriminatory reason for the rejection;" the burden would then shift back to Crain to rebut the reason offered, by showing it is a pretext for discrimination."

Like the district court, the Circuit assumed that Crain established a prima facie case of disparate treatment under the FHA. The City responded by providing a legitimate, non-discriminatory reason for denying Crain's bid: Bustos was the highest bidder for Parcel

5, and he was the only bidder whose bid exceeded the third-party appraisal value. The burden thus fell on Crain to establish that the defendants' proffered rationale was pretextual. Although racial animus need not have been the "sole motivation" for the adverse action, Crain had to establish a genuine dispute of material fact regarding whether "race was a significant factor" in the denial of his bid. The Eighth Circuit agreed with the lower court that Crain failed to meet his burden. True, he could point to various irregularities and procedural flaws that affected the bidding process, including Bustos being personally instructed about the bid requirements and advised to bid "market value" for Parcel 5, and Bustos's bid accepted as conforming even though there was reason to believe that it was received after the bidding deadline.

But that evidence did not give rise to an inference that race played any role in the defendants' actions. The fact that Bustos was Hispanic and Crain was African American did not, in itself, demonstrate that the defendants' actions were motivated by race. "Indeed, we have held that 'unsound, unfair, or even unlawful' actions do not give rise to an FHA disparate treatment claim 'if there is no evidence from which a jury reasonably could infer that race was a significant factor' in the challenged action." Here, the most Crain could demonstrate was that the defendants failed to ensure a fair bidding process, which doomed his FHA claim.

Crain similarly failed in his Equal Protection claim. He had to allege and prove "that he received treatment different from that received by similarly situated individuals and that the unequal treatment stemmed from a discriminatory intent.'" The misleading letter ballot process letter was provided to all applicants, and Crain could not point to any applications that had been accepted after 5pm.

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Qualified Immunity: History of Sexual Misconduct by Deputies Insufficient to Alert Sheriff of Likelihood of Specific Assault

McGuire v. Cooper, No. 18-2809 (8th Cir. Mar. 6, 2020).

Reversing the lower court which had found deliberate indifference where a sheriff did not take preemptive action after repeated complaints of sexual misconduct by his deputies, the Eighth Circuit holds that the prior infractions were not sufficiently similar to the specific assault in question to deny qualified immunity.

One evening in February 2013, Cory Cooper (Cooper), a deputy in the Douglas County Sheriff's Office (DCSO), approached a truck parked near a lake in Omaha, Nebraska. He found a couple in the front seat, saw marijuana in plain sight, and after a further search, discovered drug paraphernalia. Cooper placed the woman, Megan McGuire (McGuire) in the back of his patrol car, saying that her boyfriend could be incarcerated if

Cooper reported the incident. He began asking McGuire what she would do to keep her boyfriend out of jail. After nearly an hour of questioning, McGuire eventually asked Cooper if he wanted her to undress. Cooper purportedly replied, "I am not going to say no" or words to that effect and stared at McGuire through his rearview mirror while she removed her shirt and bra. He then got out of the front seat, opened McGuire's passenger side door, unzipped his pants, and asked McGuire what else she would do. She performed oral sex on Cooper for about five seconds, at which point he released McGuire; she ran to the truck and the couple drove away.

McGuire immediately reported the incident to the Omaha Police Department (OPD), which notified the DCSO that it was investigating a sexual assault by a law enforcement officer at the lake. The DCSO did not commence its own investigation.

In April 2013, a sheriff's deputy reported that Cooper had asked a woman with an arrest warrant to meet him at a secluded park. Cooper was then placed on limited duty status and the DCSO commenced its own investigation, discovering that Cooper had run a record check on McGuire and her boyfriend, and that the GPS in Cooper's car placed him at the location of the lakeside assault in February. He was terminated, found guilty of third-degree assault and attempted tampering with evidence, and sentenced to consecutive terms of six months in jail on each count.

At the time of the McGuire incident, the DCSO did not have a policy of reviewing employees' behavior to determine those at risk for sexual misconduct and had no comprehensive policy addressing sexual misconduct. The DCSO did have a citizen complaint process, however, and since 1995 when DCSO Sheriff Timothy Dunning (Sheriff) was appointed, there had been at least 15 complaints of sexual misconduct by DCSO deputies.

The district court found: (1) because the Sheriff was notified of every citizen complaint regarding deputies under his supervision and he had actual notice of at least 11 complaints of sexual misconduct in his department, a jury could find there was a pattern and practice of DCSO deputies involved in inappropriate sexual misconduct; (2) the lack of policies and training on sexual misconduct, the lack of investigation into allegations of sexual misconduct by deputies, and the alleged "cavalier attitude" by the Sheriff was sufficient evidence to give rise to a jury question regarding deliberate indifference; and (3) there was sufficient evidence of a causal link between the Sheriff's failure to train or supervise his employees and Cooper's assaultive behavior such that he was not immune from McGuire's due process, equal protection, and Fourth Amendment claims. It denied motions by the Sheriff and Douglas County for summary judgment based on qualified immunity, and the Sheriff sought interlocutory appeal.

The Eight Circuit reversed. In order for McGuire to establish a claim against the Sheriff for failing to supervise deputy Cooper, she had to show that the Sheriff: 1) Received notice of a pattern of unconstitutional acts committed by subordinates; 2) Demonstrated deliberate indifference to or tacit authorization of the offensive acts; 3) Failed to take

sufficient remedial action; and furthermore 4) That such failure proximately caused McGuire's injury.

The Sheriff contended that the first element was not met: the reported incidents of prior sexual misconduct by deputies were insufficient to provide notice that an on-duty deputy might sexually assault a member of the public like Cooper did. The Circuit agreed:

> [W]e conclude that the prior instances of sexual misconduct are not similar in kind or sufficiently egregious in nature to demonstrate a pattern of sexual assault against members of the public by deputies. In order to establish a pattern, our case law requires a showing of more than general allegations of a wide variety of sexual misconduct. It requires the other misconduct to "be very similar to the conduct giving rise to liability.". . .In this case, the other misconduct included trading cigarettes for a detainee's display of her breasts; licking a minor stepdaughter's nipples during horseplay; asking "deeply personal and inappropriate questions" to members of the public; engaging in verbal sexual harassment; having consensual sexual contact at the office; and abusing work hours to conduct personal business or ask women out on a date. While this behavior is troubling, it is not enough to put a supervising official on notice that a deputy might use his position and authority to separate a woman from her boyfriend at the park and coerce her to engage in sexual contact with him.

The court concluded "A reasonable officer in Sheriff Dunning's position would not have known that he needed to more closely supervise his deputies, including Cooper, or they might sexually assault a member of the public." Furthermore, a reasonable supervisor in the Sheriff's position "would not know that a failure to specifically train Cooper not to sexually assault a woman would cause Cooper to engage in that behavior."

Accordingly, the Sheriff was entitled to qualified immunity in his individual capacity.

LINK

Insurance: Municipal Insurer Cannot Avoid Coverage Where Covered Acts Occurred both Before and During Coverage Period

Argonaut Great Central Insurance Company v. Lincoln County, no. 18-2930 (8th Cir. Mar. 17, 2020).

Where the County's law enforcement recklessly ignored evidence which might have exonerated a man convicted of murder, the municipality's insurer could not avoid coverage merely because some of the problematic conduct occurred before the policy's coverage period began.

Russell Faria (Faria) arrived at his home in Troy, Missouri around 9:30 pm on December 27, 2011 to find his wife Betsy murdered, suffering over 55 stab wounds including a knife stuck in the side of her neck. He called 911, telling dispatchers that he thought his wife (who was terminally ill with cancer) had committed suicide. After officers secured the scene, Faria voluntarily went to the police station and waived his Miranda rights before speaking to officers. He submitted to a polygraph test and was released from custody. In early January 2012, Lincoln County (County) filed homicide and related charges against Faria. He was held in jail for a prolonged period because he could not afford bail, was convicted of murder in November 2013 and sentenced to life in prison. While his appeal was pending, the Missouri Court of Appeals granted Faria's motion to remand for a new trial based on newly discovered evidence. He was retried in a bench trial and acquitted of the murder charge in November 2015.

In July 2016, Faria brought suit, alleging in Count I that a particular police officer violated his Fourth Amendment rights by arresting him, seizing him and holding him without probable cause in December 2011. Other Counts alleged that the officer's and prosecuting attorney's action in the second seizure and incarceration in January 2012 violated the Fourth Amendment. He also alleged the County conspired to violate his Fourth and Fourteenth Amendment rights by seizing him and denying him substantive due process, and brought a *Monell* claim against the County based upon the prosecutor's actions in her official capacity. Within these counts were factual allegations that the various County actors fabricated evidence, ignored exonerating evidence, and failed to investigate another more obvious suspect who had been named as the new beneficiary of Betsy's life insurance policy in the days before her murder.

Argonaut Great Central Insurance Company (Argonaut) had issued an insurance policy to the County, including its officers and employees, effective January 1, 2012 to December 31, 2013. The policy indemnified the County when it was legally obligated to pay damages resulting from a covered wrongful act committed during the course and scope of law enforcement activities, or which arose out of the use of law enforcement premises while conducting law enforcement activities. The policy excluded coverage for claims arising from "dishonest, malicious, fraudulent or criminal act[s], . . . or a knowing violation of [the] law." The policy also noted that if another policy applied, the Argonaut policy would be "excess" coverage and Argonaut would have no corresponding duty to defend. As relevant, a public insurer called Missouri Public Entity Risk Management Fund (MOPERM) previously provided liability insurance coverage to the county, from January 1, 2011, through January 1, 2012.

Argonaut argued that it had no duty to defend because of exclusions in the policy for malicious conduct and because the relevant conduct occurred in 2011 before Argonaut was the insurer, making its policy in excess to the allegedly "primary" MOPERM policy. The district court disagreed, finding that because Argonaut could not establish the impossibility of coverage, it had a duty to defend the County against Faria's lawsuit. The court found that Faria's complaint adequately pleaded that there were covered wrongful acts not barred by the exclusionary clauses and that the covered wrongful acts

occurred during the time the policy was in effect; although the County began actively investigating Faria during the latter part of 2011, the damage to Faria triggering coverage–the criminal charges and arrest–did not happen until January 4, 2012.

On appeal, the Circuit considered two primary issues: whether there was a covered wrongful act, and whether the wrongful act occurred during the time the policy was in effect.

Wrongful Act: The Argonaut policy defined "wrongful act" as "any act, error or omission flowing from or originating out of a 'law enforcement activity,'" excluding malicious acts and knowing violations of the law. While Argonaut cited precedent where an insurer had escaped liability because all the acts alleged were intentional, the Circuit noted that here, Faria's petition also alleged that the defendants acted recklessly and incompetently during their investigation. Thus, the "knowing" clause or the "malicious" clause, or both, could not be the basis for preclusion of coverage.

> Here, the county procured insurance to shield itself against, among other things, possible constitutional claims against its officers and agents during the performance of their law enforcement duties. Such claims, normally brought pursuant to 42 U.S.C. § 1983, necessarily sound in recklessness, and counties would be uninsurable if Missouri insurance policies could only cover negligent conduct, as Argonaut claims. Argonaut's policy was procured to cover the kind of acts currently being alleged–"wrongful act[s]" arising out of "law enforcement activities." Most importantly, because the standard for the duty to defend this lawsuit is whether there is any possibility of coverage, Argonaut cannot hurdle this high bar based upon the alleged absence of a covered wrongful act. There is certainly a possibility that the county acted recklessly or with reckless disregard for Faria's constitutional rights during the course and scope of their law enforcement activities while investigating Betsy Faria's murder. Accordingly, Argonaut cannot escape the duty to defend on this basis.

Occurrence During Policy Period: The Circuit easily disposed of Argonaut's argument as to timing. Under Missouri law, an insurable event occurs when the victim is first damaged. While Faria alleged a constitutional violation based upon his initial "seizure," allegedly without probable cause, on December 28, 2011, the remaining counts all involved actions that occurred in 2012, including the most pertinent actions–Faria's arrest and his charge of murder in January 2012. Again, Argonaut could not show that there was no possibility that its coverage was in effect when Faria was damaged. It had duty to defend.

DISSENT: Judge Erickson disagreed. An analysis of the unambiguous policy language in conjunction with the complaint's allegations compels the conclusion that Argonaut does not have a duty to defend. The policy contained a "deemer" clause, which provided that "all acts, errors or omissions, committed by one or more insureds that are substantially the same or are in any way directly related–either logically, causally, or temporally–shall be deemed to constitute one 'wrongful act', regardless of the number

of claims or claimants." furthermore, policy applied "only if the 'wrongful act' was first committed . . . during the policy period."

> It is apparent that the first wrongful act was not committed during Argonaut's policy period, but instead while MOPERM was the county's liability insurer. By ignoring the existence of the alleged first "wrongful act" and instead relying on when most of the alleged misconduct occurred, or when "the most pertinent actions" took place, or when the charges against Faria were filed, the majority has rewritten the terms of the policy.
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> Because Faria has alleged injuries occurring during the time MOPERM provided liability insurance coverage to the county, Argonaut has no duty to defend according to the plain language set forth in the scope of its insuring agreement and because the policy contains an "other insurance" provision specifically informing the insured that it has no duty to defend if any other insurer has a duty to defend.

LINK

Takings: No "Final" Determination Where Plaintiffs Failed to Seek Formal Waiver of City Condominium Conversion Policy

Pakdel v. City and County of San Francisco, no. 17-17504 (9th Cir. Mar. 17, 2020).

The Ninth Circuit affirms a district court determination that San Francisco property owners who ignored the opportunity to seek a waiver of the City's "Lifetime Lease Requirement" condition for converting buildings to condominiums had not satisfied *Williamson County's* "finality" requirement.

In the City and County of San Francisco (the "City"), conversion of tenancy-in-common properties to individually owned condominiums was traditionally only allowed under a lottery system, resulting in a very limited number of conversions, far below the demand. To expedite the process, in 2013 the City replaced the lottery with the Expedited Conversion Program (ECP), which allowed such conversions on the condition that owner agreed to offer any existing tenants lifetime leases in units within the converted property. The so-called Lifetime Lease Requirement was designed to mitigate an adverse effect that the City feared would result from the accelerated conversion of tenancy-in-common properties into condominium properties under the ECP.

Peyman Pakdel and Sima Chegini (collectively, Plaintiffs) purchased an interest in a tenancy-in-common property in 2009 and soon thereafter rented their portion of the

property to a tenant, intending to occupy the property themselves at some point. When the ECP began, Plaintiffs and their co-owners applied to convert their property, agreeing to offer their tenant a lifetime lease as a condition of conversion. They received final approval from the City to convert, declining to request an exemption.

Nevertheless, at the eleventh hour, they balked. Refusing to execute the lifetime lease, they sued the City, contending under various theories that the lifetime lease requirement violates the Takings Clause of the Fifth Amendment. The district court dismissed because Plaintiffs had not first sought compensation for the alleged taking in state court, as required by *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). While the state-litigation requirement has since been eliminated by *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), and is no longer a proper basis for dismissal, Plaintiffs' failure to seek an exemption from the lifetime lease requirement meant they also failed to satisfy *Williamson County's* separate finality requirement, which survived *Knick* and thus continues to be a requirement for bringing regulatory takings claims such as Plaintiffs' in federal court. The district court held that their takings challenge was unripe and dismissed.

On appeal, the Ninth Circuit affirmed. The panel rejected Plaintiffs' request that it exercise its discretion to excuse them from the finality requirement. The panel concluded that none of the cases plaintiffs used to argue that they should be excused from the finality requirement presented circumstances analogous to those before it, and the panel saw no reason to invent a new rationale for exercising such discretion. The panel further rejected Plaintiffs' argument that they were exempt from the *Williamson County* ripeness requirements because the ECP Program effects a "private" taking, benefitting private individuals rather than the public.

The panel recounted that in *Williamson County*, the Supreme Court articulated two ripeness requirements for regulatory takings claims. First, under the finality requirement, a takings claim was "not ripe until the government entity charged with implementing the regulations ha[d] reached a final decision regarding the application of the regulations to the property at issue." Second, under the state-litigation requirement, a claim was not ripe if the plaintiff "did not seek compensation [for the alleged taking] through the procedures the State ha[d] provided for doing so." While this appeal was pending, *Knick* eliminated the state litigation requirement. But as the City maintained, Plaintiffs' takings claim was still unripe under the first *Williamson County* requirement, which prohibits a plaintiff from filing suit "until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue" *Knick* left this finality requirement untouched, so that aspect of *Williamson County* remains good law.

Plaintiffs argued that they had never satisfied the finality requirement. But the Circuit agreed with the City, finding that the Plaintiffs' takings claim remained unripe because they had never obtained a final decision regarding the application of the Lifetime Lease Requirement to their unit:

> The notice of tentative approval sent to Plaintiffs informed them of their right to appeal, stating: "This notification letter is to inform you of your right to appeal this tentative approval. IF YOU WOULD LIKE TO FILE AN APPEAL OF THE TENTATIVE APROVAL: You must do so in writing with the Clerk of the Board of Supervisors within ten (10) days of the date of this letter." Plaintiffs, however, did not even attempt to appeal.

DISSENT: Judge Bea stated that because the City had reached a final decision which denied plaintiffs' request to be excused from executing and recording a lifetime lease to their unit, he would vacate the district court's order dismissing the takings claim and remand the case for further proceedings:

The majority dismisses the City's rejection of the Plaintiffs' requests to be excused from the lifetime lease requirement and the unavoidable conclusion that this was a final decision by the City, because the majority finds the Plaintiffs' requests were "untimely and expressly waived." Majority Op. at 17. But such a holding is a merits ruling, rather than one about ripeness. The proper venue for evaluating, in the first instance, whether the Plaintiffs' claim may be defeated by waiver, equitable estoppel, or any other defense is in the district court on remand.

LINK

THIS JUST IN: JOHN GOTHERMAN-We pass along, from our colleague Garry Hunter at the Ohio Municipal League, his report that John Gotherman, who served for many years as the League's general counsel and was a leading Ohio municipal law practitioner, passed away on March 13, 2020. John was a highly esteemed IMLA member and was a Rhyne Award recipient. We join Garry and the Ohio League in recognizing John and expressing our sympathies to his wife Colleen.