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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

No. 03-4252

HAZEL GOLDEN,  
PLAINTIFF-APPELLANT,

v.

CITY OF COLUMBUS; CHERYL ROBERTO, DIRECTOR OF PUBLIC  
UTILITIES FOR THE CITY OF COLUMBUS,  
DEFENDANTS-APPELLEES.

Appeal from the United States District Court  
for the Southern District of Ohio

Argued October 27, 2004  
Columbus, Ohio

Filed April 18, 2005

Before: KEITH, CLAY, and BRIGHT,\* Circuit Judges.

CLAY, Circuit Judge:

Plaintiff Hazel Golden appeals the judgment below, in which the district court: (1) granted summary judgment to Defendants the City of Columbus, Ohio, and the City's Director of Public Utilities, Cheryl Roberto<sup>1</sup> (collectively the

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\* The Honorable Myron H. Bright, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

<sup>1</sup> At the time Golden filed this action, the Director of Public Utilities was John Douth. Golden sued Douth in his official and

“City”) on Golden’s claims that the City’s denial of water service to tenants whose predecessors left delinquent water accounts at the premises violates the *Due Process Clause of the Fourteenth Amendment* and the Equal Credit Opportunity Act, 15 U.S.C. § § 1691 *et seq.* (the “ECOA”); (2) dismissed Golden’s claim that the same constitutes a violation of the *Equal Protection Clause of the Fourteenth Amendment*; and (3) dismissed Golden’s motion for class certification. For the following reasons, we REVERSE the district court as to Golden’s equal protection claim and AFFIRM as to her due process, ECOA, and class certification claims.

### **BACKGROUND**

Prior to 1991, the City of Columbus, Ohio, permitted both tenants and landlords to contract for water service. Although the landlord would be ultimately liable for unpaid water bills, a tenant could establish a water account in her own name by directly contracting with the City. In 1990, officials at the City’s Department of Public Utilities became concerned that permitting tenants to directly contract for water service had the effect of impeding the collection of unpaid water bills. The City code at the time did not require either the City or the contracting tenant to notify the landlord when an account was created, or when an account became delinquent. Landlords complained when they were left to settle accounts they never knew were delinquent after the nonpaying tenants had vacated. These complaints caused further delays in payment. City utilities officials concluded that the City could better insure efficient payment of water bills if it alerted landlords to delinquencies as they occurred.

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personal capacities. The district court dismissed the claims against Douth in his personal capacity, a decision Golden does not appeal. After Douth retired, the district court substituted his replacement, Cheryl Roberto, as a defendant pursuant to *Rule 25(d)(1) of the Federal Rules of Civil Procedure*.

Utilities officials also lamented the fact that the City code did not authorize the City to deny service at premises encumbered by delinquent accounts. If a tenant vacated an apartment, leaving a delinquent account, the code nevertheless permitted a new tenant to move in and establish a new water account, even if the landlord had not yet satisfied the delinquency. Officials concluded that this frustrated bill collection by depriving the City of its most effective bill collection tool. With these problems in mind, the Columbus City Council amended the code in 1991. As amended, the pertinent sections now read:

The [City] will directly bill a tenant for water and sewer service if the property owner, or authorized agent of the property owner, along with the tenant, sign a written agreement authorizing direct billing of the tenant. Once a written agreement is signed, the [City] will simultaneously mail, to both the owner and the tenant, copies of any bills and notices concerning delinquent water and sewer charges . . . .

Direct billing of a tenant shall be in no way construed as to relieve the owner of the real estate premises of liability for water and sewer service charges. No direct billing of a tenant will be allowed where all delinquent water and sewer charges are not paid in full up until the date the direct billing agreement is accepted by the City, or where water or sewer service has been terminated for real estate premises.

Columbus City Code §§ 1105.045(D), (E) (the “policy” or “City’s policy”).

Plaintiff Hazel Golden moved into a single-family residence at 2209 Hamilton Avenue in Columbus in either

October or December of 2000.<sup>2</sup> The lease between Golden and her landlord, David Matthews, states that the tenant is responsible for the payment of all utilities. However, according to Golden, her rent included water service while she was to pay separately for gas and electricity. At the time Golden began renting from Matthews, he was party to a direct billing agreement with the prior tenant, Sarah Dean, which Dean and Matthews had entered into pursuant to the City's policy.

Starting in late December 2000, the City began sending bills and notices to 2209 Hamilton Avenue addressed to "Sarah E Dean." On December 28, 2000, the City sent a Notice of Delinquency for service provided to Sarah Dean between August 10, 1999 and November 7, 2000. This was followed on February 12, 2001, by a Water Turn-Off Notice; on February 16, 2001, by a bill; on February 22, 2001, by another bill; and on March 8, 2001, by termination of water service to the residence. Service recommenced on March 9, 2001, at the request of the City's Code Enforcement department. Golden alleges that she contacted Code Enforcement after first contacting the City, which explained to her that under the policy, water service would not be restored until the account was paid. This pattern repeated itself during March and early April, with the City again terminating water service on April 9, 2001, and recommencing it the next day at the request of Code

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<sup>2</sup> The record is unclear as to precisely when Golden moved in. In her deposition, Golden said that she moved in "approximately October of 2000." (J.A. at 662.) Yet the lease between Golden and her landlord is dated December 17, 2001. *Id.* at 687. This date cannot be correct since Golden's claims all relate to terminations of water service at the 2209 Hamilton Avenue residence during early 2001. Adding to the confusion, the City cites October 2000 as the date Golden moved in, Brief of Appellee at 4, while Golden relies on December 17, 2000. Brief of Appellant at 4. Inexplicably, the district court concluded that Golden began renting on January 17, 2001. (J.A. at 62).

Enforcement. The City terminated service for a third time on April 23, 2001. Golden maintains that the termination permanently deprived her of water service while the City maintains that it recommenced service on May 9, 2001 without interruption until October 2001 when Golden moved out.

Each of the mailings sent to Golden's residence during the period December 2000 through May 2001 arrived in an enveloped marked "THIS IS YOUR WATER BILL." *See* J.A. at 157, 161. Each notice of delinquency and turn-off notice explains that customers have a right to request a hearing to contest the termination of service but this information is printed on the notice itself, not on the envelopes. The City's Water Customer Service Coordinator, Susan Young, stated in an affidavit that on February 2, 2001, the City sent a bill or a notice addressed to "Water Customer." J.A. at 158. The City does not dispute that all other bills and notices were addressed to "Sarah E Dean."

Matthews and Golden signed a direct billing agreement on March 16, 2001. Golden maintains that she sent the agreement to the City but received no response. J.A. at 737-38 (Golden Depo.). In any event, Matthews apparently did not pay the balance Dean owed - which would have been necessary to make Golden eligible for direct billing under the policy - and the record reflects that bills and notices sent after March 16, 2001 were still addressed to Dean. *See* J.A. at 158-75. Finally, Golden admits that the City left a notice of shut-off on her door contemporaneous with terminating service but alleges that the notice did not inform her of a right to contest the termination of service.

### **PROCEDURAL HISTORY**

On July 25, 2001, Golden and an earlier plaintiff, Nikki Mara, filed a class-action complaint in district court. The complaint, brought under *42 U.S.C. § 1983*, alleged that the City's practice of terminating tenants' water service without notice and the possibility of a hearing amounted to a

denial of tenants' *Fourteenth Amendment* right to procedural due process. The complaint further alleged that the City's policy, which denies water service to premises encumbered by delinquent accounts, violated tenants' rights under the *Equal Protection Clause of the Fourteenth Amendment* and under the Equal Credit Opportunity Act ("ECOA"), *15 U.S.C. § 1691 et seq.* The complaint also alleged that the City's termination of plaintiffs' water service constituted a breach of the City's common law duty to serve; Golden does not appeal the district court's dismissal of this claim. The relief sought in plaintiffs' complaint included a declaratory judgment and damages. The original plaintiffs filed a motion for class certification, the denial of which Golden appeals. Additionally, Golden appeals the grant of summary judgment to the City on her procedural due process and ECOA claims and the dismissal of her equal protection claim.

## **DISCUSSION**

### **I. Due Process**

#### *A. Standard of Review*

This Court reviews a district court's decision to grant summary judgment *de novo*. *E.g., Cockrel v. Shelby County Sch. Dist.*, *270 F.3d 1036, 1048 (6th Cir. 2001)*. Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *FED. R. CIV. P. 56(c)*. The district court, and this Court in its review of the district court, must view the facts and any inferences reasonably drawn from them in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, *475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. Accordingly, we view the facts in the light most favorable to Golden.

*B. Merits of the Due Process Claim*

The text of the *Fourteenth Amendment's Due Process Clause* makes clear that the state need not afford due process every time it takes an action that impacts negatively on citizens' lives. The amendment makes a narrower guarantee: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." *U.S. CONST. amend. XIV*. Golden contends that the City denied her due process because her expectation of continued water service is "property" within the meaning of the *Due Process Clause*; alternatively, she asserts that water is a "basic necessity of life" and all necessities of life are "property." Brief of Appellant at 13-16. The district court rejected both theories.<sup>3</sup> The court found that Golden did not enjoy a contractual relationship with the City to support a claim of entitlement; nor could she point to a statute that created such an entitlement. (J.A. at 78.) Finally, the court dismissed Golden's "basic necessity for life" rationale, concluding that whether water is "a basic necessity for life is irrelevant to the question of whether water service is a property interest under the *Fourteenth Amendment*." *Id.* at 87.

In the absence of a claim that governmental action impinged on the other interests it protects - life and liberty - it is well established that the *Due Process Clause of the Fourteenth Amendment* regulates only those "actions of government that work a deprivation of interests enjoying the stature of 'property' within the meaning of the *Due Process Clause*." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978); *see also Bd. of Regents v. Roth*, 408 U.S. 564, 569, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). But while the Constitution does

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<sup>3</sup> In her complaint, Golden did not plead that she had a property interest in water service; in its answer, the City did not raise the issue either. But the district court instructed the parties to prepare supplemental briefs on the question. (J.A. at 17-18.)

unequivocally protect “property,” nowhere does it define the term. To resolve this question, as the Supreme Court held in the seminal case of *Board of Regents v. Roth*, the courts are to turn elsewhere: “Property interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Roth*, 408 U.S. at 577. Thus for Golden to have a constitutionally recognized property interest in the benefit of water service, she “must have more than an abstract need or desire for it[,] . . . more than a unilateral expectation of it. [She] must, instead, have a legitimate claim of entitlement to it.” *Id.* The Supreme Court has identified two bases for such non-unilateral legitimate claims of entitlement: state statutes and contracts, express or implied, between the complaining citizen and the state or one of its agencies. *Id.* at 577-78; see also *Perry v. Sindermann*, 408 U.S. 593, 601-602, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972) (recognizing an express or implied contract as sufficient to support a legitimate claim of entitlement); *Goldberg v. Kelly*, 397 U.S. 254, 262, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970) (recognizing a state welfare code as supporting a legitimate claim of entitlement).

Golden concedes that she is not a customer and therefore does not enjoy a contractual relationship with the City for the provision of water services. Brief of Appellant at 12, 14. Instead she relies on the Supreme Court’s decision in *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978), for the proposition that all inhabitants of a city, even those who are not customers of the public utility provider, have a legitimate claim of entitlement to provision of utility service. Brief of Appellant at 13. This interpretation of *Craft* is off the mark. In *Craft*, the Court considered utility customers’ procedural due process claim against the City of Memphis for terminating the customers’ service without affording them an opportunity to contest

charges about which there was a bona fide dispute. *Craft*, 436 U.S. at 5. The Court found in favor of the complaining customers, because “in defining a public utility’s privilege to terminate for nonpayment of proper charges, Tennessee decisional law draws a line between utility bills that are the subject of a bona fide dispute and those that are not.” *Id.* at 9. A thorough review of Tennessee case law, *see id.* at 9-11, revealed that the state only permitted termination of service because of non-payment of undisputed charges and that “an aggrieved customer may be able to enjoin a wrongful threat to terminate, or to bring a subsequent action for damages or a refund.” *Id.* at 11. The availability of “such local-law remedies” to utility customers who dispute charges in good faith “is evidence of the State’s recognition of a protected interest.” *Id.* Thus *Craft* is plainly limited to utility customers; moreover, as *Roth* requires, the decision is completely determined by state law. *See generally id.*; *see also Myers v. City of Alcoa*, 752 F.2d 196, 198 (6th Cir.) (recognizing that the holding in *Craft* depended entirely on Tennessee law), *cert. denied*, 474 U.S. 901, 88 L. Ed. 2d 225, 106 S. Ct. 271 (1985).

Golden’s reliance on a decision of this Court, *Mansfield Apartment Owners Ass’n. v. City of Mansfield*, 988 F.2d 1469 (6th Cir. 1993), is similarly misplaced. In *Mansfield*, this Court cited *Craft* for the point that “it is well settled that the expectation of utility services rises to the level of a ‘legitimate claim of entitlement’ encompassed in the category of property interests protected by the due process clause.” *Id.* at 1474 (citing *Craft*, 436 U.S. at 10). But as the district court below observed, the complainants in *Mansfield* were property owners who had accounts with the City of Mansfield’s utility department; it was appropriate, therefore, for the *Mansfield* Court to apply *Craft*. Without evidence of a contractual relationship between Golden and the City, or of a statutory entitlement to water service, it is not appropriate to do so here. But Golden presents no such evidence, which, at least as to the existence of a contract, is not surprising. The

City's policy, established by the 1991 amendment to the Code, effectively barred Golden from establishing a contract with the City until Matthews paid the balance left unpaid by Dean. Indeed, it is abundantly clear that Matthews is to blame for Golden's predicament and ought to have been held to account under Ohio's landlord-tenant law.<sup>4</sup> If Golden's representation of the lease terms is true, Matthews reneged on his promise to pay for water out of her rent. Further, it is undisputed that the City Code makes Matthews liable for delinquent accounts at premises he owns. *See* Columbus City Code § 1105.045(E). However, a landlord's failure to uphold his end of a bargain, even coupled with his failure to comply with a city's code provision regarding the payment of water bills, does not constitute a violation of the *Due Process Clause* by the city.

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<sup>4</sup> Golden stated in an affidavit that she called the City when she first moved into the house at 2209 Hamilton Avenue in order to transfer the water account from Sarah Dean's name to her name. J.A. at 736 (Golden Depo.). The City sent her a direct billing agreement and informed her that she and Matthews would need to sign it. *Id.* at 736-37. The record does not reflect when Golden received the agreement from the City, but it is clear that the signed agreement is dated March 16, 2001. *Id.* at 691. Further, Golden maintains that she sent the completed agreement back to the City as instructed but received no response. *Id.* at 738. It is undisputed, however, that Golden received bills and notices from December 28, 2000 through mid-March 2001 addressed to Sarah Dean. Although she did not contact the City when a bill or notice came in the mail, Golden maintains that she would call Matthews whenever she received one; his response would be a promise to come by and pick the bill or notice up, but according to Golden, "it got to the point where he didn't [pick them up]." *Id.* at 739. The parties do not dispute that Matthews never paid the amount owed by Dean, nor apparently the amount charged to the residence while Golden was a tenant there.

As to the second possible foundation for a property interest cognizable under the *Fourteenth Amendment* - state statutory or common law - Golden cites to no Ohio statutes or case law in support of her argument that she has a legitimate claim of entitlement to water service. We observe *infra* that other circuits have held certain provisions common to landlord-tenant statutes to be sufficient for this purpose. This circuit has not yet considered such an argument. We have applied *Craft* in a case involving the due process claims of property owners who were water customers. See *Mansfield*, 988 F.2d at 1473-74 (holding that customers' expectation of continued utility service constituted a protected property interest). And, in an unpublished opinion one year before *Mansfield*, we were similarly faithful to *Craft*, rejecting a homeowner's claim that Ohio law guaranteed water services to its residents. *Cadle v. City of Newton Falls*, 1992 U.S. App. LEXIS 10267, No. 91-3717, 1992 WL 88904, \*4-5 (6th Cir. 1992) (unpublished opinion). But neither *Mansfield* nor *Cadle* offers guidance on whether a tenant who is precluded from directly contracting for water service and from obtaining water service at all, due to nonpayment by both the prior tenant and the landlord, may state a claim for deprivation of a property interest without due process of law.

In two cases, the Eleventh Circuit has held that tenants may state such a claim under provisions of Florida's landlord-tenant law. See *James v. City of St. Petersburg*, 33 F.3d 1304, 1306-1307 (11th Cir. 1994) (*en banc*) (finding a protectable property interest based on Florida law to the effect that a landlord could not terminate a tenant's utility service but finding that because neither tenant nor landlord had established a contract with the utility, which either were allowed to do, the interest did not attach); *DiMassimo v. Clearwater*, 805 F.2d 1536, 1539-40 (11th Cir. 1986) (finding a property interest because "it is clear that Florida's Landlord and Tenant Act . . . would not sanction the withdrawal of water services from . . . tenants by their landlords because such action would constitute either the

failure to provide necessary facilities for sustaining life or the constructive eviction of tenants contrary to statutory directives for such action”). The Ninth Circuit has issued a similar ruling pursuant to provisions of Oregon’s landlord-tenant law. *See Turpen v. City of Corvallis*, 26 F.3d 978, 979 (9th Cir.), cert. denied, 513 U.S. 963, 130 L. Ed. 2d 339, 115 S. Ct. 426 (1994). These circuits have taken the novel approach of recognizing a property interest in a tenant’s right - under landlord-tenant law - to bring an action to enjoin her landlord from constructively evicting her by terminating water service or declining to pay for it. *DiMassimo*, 805 F.2d at 1539; *Turpen*, 26 F.3d at 979. Depriving tenants of this important remedial right by failing to give proper notice before water service terminates, the courts reasoned, is a due process violation. *DiMassimo*, 805 F.2d at 1539; *Turpen*, 26 F.3d at 979.

We express no opinion as to whether these precedents weigh in Golden’s favor because Golden does not rely upon any provisions of Ohio’s landlord-tenant law in this appeal, nor did she do so in the district court. Despite the clear command of the Supreme Court’s cases regarding what constitutes a cognizable property interest for *Fourteenth Amendment* purposes, Golden rests her case on the bare assertion that because water is “an absolute necessity of life,” the City’s termination of her service was unconstitutional. As much as we may agree with Golden’s premise as a policy matter, the law precludes us from adopting her conclusion. As support for the necessity-of-life rationale, Golden relies on the now-discredited case of *Koger v. Guarino*, 412 F. Supp. 1375 (E.D. Pa. 1976), in which the district court flatly stated, without support, that “water service is an entitlement to which the requirements of due process attach.” *Id.* at 1384. *Koger* appears to be the only reported federal case standing for such a proposition. Although Golden invokes *Davis v. Weir*, 497 F.2d 139 (5th Cir. 1974) for the same point, the city in that case conceded that “due process demands pre-termination notice to the actual user [of water].” *Id.* at 143. In *Davis*,

therefore, the Fifth Circuit did not consider whether the mere use of water service, without more, constitutes a legitimate claim of entitlement to continued service for purposes of the *Fourteenth Amendment*. *Id.* at 143. In any event, it is clear that the plaintiff in *Koger* contested the termination of his water service on substantive, rather than procedural, due process grounds. *See Koger*, 412 F. Supp. at 1383-84. Moreover, the Third Circuit rejected *Koger*'s substantive due process analysis in *Ransom v. Marrazzo*, 848 F.2d 398 (3d Cir. 1988), concluding that a municipality's denial of water service, if it implicates any federal right, implicates only the procedural protections of the *Fourteenth Amendment*, not its substantive guarantees.<sup>5</sup> *See Ransom*, 848 F.2d at 411-12.

In conclusion, we return to the Supreme Court's command in *Roth*: "Property interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 577. While there may be relevant "rules or understandings" under Ohio law, *see* discussion *supra*, Golden does not point us to any. Because she bears the burden of doing so, we affirm the district court's grant of summary judgment to the City on this claim.<sup>6</sup>

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<sup>5</sup> The *Ransom* court did not consider the plaintiffs' procedural due process claims because they were moot. *See Ransom*, 848 F.2d at 409-11.

<sup>6</sup> Because Golden has not demonstrated that she was deprived of a property interest within the meaning of the *Fourteenth Amendment*, we need not determine whether the City afforded her due process prior to terminating water service to her residence.

## II. Equal Protection

### A. Standard of Review

We review the dismissal of a claim under *FED. R. CIV. P. 12(b)(6) de novo*. E.g., *Gao v. Jenifer*, 185 F.3d 548, 552 (6th Cir. 1999). A motion to dismiss for failure to state a claim is a test of the plaintiff's cause of action as stated in the complaint, not a challenge to the plaintiff's factual allegations. *Id.* Thus this Court must assume that all allegations are true and dismiss the claim "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," i.e., that the legal protections invoked do not provide relief for the conduct alleged. *Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir. 1996) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)); see also *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974); *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). In addition, "while liberal, this standard of review does require more than the bare assertion of legal conclusions." *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1109-1110 (6th Cir. 1995) (citing *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir. 1993)). "In practice, 'a ... complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory.'" *Allard*, 991 F.2d at 1240 (quoting *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988)); see also *Ana Leon T. v. Federal Reserve Bank*, 823 F.2d 928, 930 (6th Cir.) (*per curiam*) (holding that the statement of mere legal conclusions is not entitled to liberal *Rule 12(b)(6)* review), *cert. denied*, 484 U.S. 945, 98 L. Ed. 2d 360, 108 S. Ct. 333 (1987).

### B. Merits of the Equal Protection Claim

Golden's complaint asserts an equal protection claim in rather general terms: "Defendants . . . violated Plaintiffs' right to equal protection under the *Fourteenth Amendment* ...." J.A. at 12 (Compl. P 60). The pertinent factual

allegations are similarly general: “Defendants have established policies and customs and/or patterns and practices of requiring Plaintiffs and other consumers of and applicants for water service to comply with conditions different from similarly situated customers in order to restore water service, including but not limited to refusing to provide water service accounts to applicants who are not landowners.” *Id.* (Compl. P 56). The City contends that the district court properly dismissed the claim because the only dissimilar treatment it can be read to allege is dissimilar treatment as between landlords and tenants. Because landlords and tenants are not similarly situated, the City’s argument runs, Golden’s complaint fails to state a claim upon which relief can be granted. It is true that the district court dismissed Golden’s complaint in part on this basis. However, the remainder of the district court’s analysis belies the City’s contention that the complaint only alleges dissimilar treatment as between tenants and landlords.

The district court’s opinion demonstrates that it dismissed Golden’s claim on the assumption that the complaint alleged two forms of discrimination - first, as between tenants and landlords and, second, as between those tenants whose circumstances permitted them to enter direct billing agreements and those whose circumstances did not. *See J.A.* at 69-74. We think the district court’s reading of the complaint was reasonable. Indeed, the parties apparently read the complaint in the same broad fashion; both parties briefed the tenant versus tenant classification as well as the tenant versus landlord classification in their motions before the district court. *See J.A.* at 111-15 (Defendant’s Motion for Partial Dismissal), 208-10 (Plaintiff’s Motion in response). In the end, the district court considered, and dismissed, Golden’s equal protection claim under both theories. *See id.* at 69-74. We note that in the context of determining whether a § 1983 plaintiff has adequately pleaded the capacity in which she seeks to hold the defendant liable, we employ a “course of proceedings” test such that our interpretation of the complaint

will be informed by the manner in which the parties and the district court interpreted it. *Moore v. City of Harriman*, 272 F.3d 769, 772-73 (6th Cir. 2001) (*en banc*), *cert. denied*, 536 U.S. 922, 153 L. Ed. 2d 776, 122 S. Ct. 2586 (2002). We decline, therefore, to accept the City's representation that Golden alleges dissimilar treatment as between two classes of tenants for the first time on appeal, *see* Brief of Appellee at 19, for this would be obviously inconsistent with the course of the proceedings so far. We read the complaint as alleging that the City treated two classes of tenants dissimilarly and two classes of residents, tenants and landlords, dissimilarly. We hold that, as to the former theory, Golden states a claim upon which relief can be granted under our case law.

Several circuits, including ours, have considered whether the *Equal Protection Clause* permits a municipality to deny water service to a residence where the prior inhabitant failed to pay water bills. *See O'Neal v. City of Seattle*, 66 F.3d 1064 (9th Cir. 1995); *Ransom v. Marrazzo*, 848 F.2d 398 (3d Cir. 1988); *DiMassimo v. City of Clearwater*, 805 F.2d 1536 (11th Cir. 1986); *Sterling v. Vill. of Maywood*, 579 F.2d 1350 (7th Cir. 1978), *cert. denied*, 440 U.S. 913, 59 L. Ed. 2d 462, 99 S. Ct. 1227 (1979); *Craft v. Memphis Light, Gas & Water Div.*, 534 F.2d 684 (6th Cir. 1976), *aff'd on other grounds*, 436 U.S. 1, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978); *Davis v. Weir*, 497 F.2d 139 (5th Cir. 1974). Because there is no fundamental right to water service, *see* discussion *supra* Part I; *see also Mansfield Apartment Owners Ass'n v. City of Mansfield*, 988 F.2d 1469, 1477 (6th Cir. 1993), we apply rational basis scrutiny to the City's water policy. *O'Neal*, 66 F.3d at 1067; *DiMassimo*, 805 F.2d at 1541.

Golden alleges that the City's policy irrationally treats one group of tenants (those whose landlords owe the City for water service) differently from another group of tenants (those whose landlords do not).<sup>7</sup> Brief of Appellant at 21.

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<sup>7</sup> Even if the prior tenant had a direct billing agreement with the City, the landlord is ultimately liable for any unpaid water bills.

According to Golden, the City's classification scheme has a determinative effect on a tenant's chances of securing water service. One class established by the City's policy is comprised of tenants who move into properties where there is no unpaid balance on the water account; these tenants will receive water service. The other class is comprised of tenants whose properties are encumbered by the water debts of the prior tenant; these tenants will be deprived of water service until they or their landlords, who are liable for the debt, pay the amount owed. Although it is true that *no* tenant in the City may establish a direct billing agreement with the City without first securing her landlord's consent, *see* Columbus City Code § 1105.045(D), Golden maintains that the City's policy nevertheless divides tenants in an irrational manner because it denies water service only to those tenants whose predecessors or landlords failed to pay the water bills. We agree.

This Court held nearly thirty years ago that a water service policy in Memphis, similar to the policy at issue here, violated water applicants' equal protection rights by irrationally dividing applicants into those who were permitted to contract for water and those who were not. *Craft v. Memphis Light, Gas & Water Div.*, 534 F.2d 684, 689-90 (6th Cir. 1976), *aff'd on other grounds*, 436 U.S. 1, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978). In *Craft*, the dividing line between applicants permitted to contract for service and applicants not permitted to contract was whether a water applicant's predecessor owed an unpaid balance at the property; if so, the applicant could not establish an account until the debt was paid. *Craft*, 534 F.2d at 689. In *Craft*, this Court relied on the then-contemporary Fifth Circuit case of *Davis v. Weir*, 497 F.2d 139 (5th Cir. 1974), which invalidated an analogous Atlanta policy. *Davis*, 497 F.2d at 144-45. The *Davis* court concluded that "the Water works has divided those who apply

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Thus, any amounts owed to the City at the time that a new tenant moves in are owed by the landlord

for its services into two categories: applicants whose contemplated service address is encumbered with a pre-existing debt (for which they are not liable) and applicants whose residence lacks the stigma of such charges.” *Id. at 144*. The court rejected Atlanta’s defense that its policy facilitated the collection of unpaid bills at apartment buildings, holding that “the City has no valid governmental interest in securing revenue from innocent applicants who are forced to honor the obligations of another or face constructive eviction from their homes for lack of an essential to existence - water.” *Id. at 145*. The court acknowledged that Atlanta’s policy facilitated debt collection but concluded that “[a] debt collection scheme . . . that divorces itself entirely from the reality of legal accountability for the debt involved, is devoid of logical relation to the collection of unpaid water bills from the defaulting debtor.” *Id. at 144-45*.

The *Davis* court’s reasoning remains intact in the Fifth Circuit, was adopted by this circuit in *Craft*, and has been adopted by the Ninth and Seventh Circuits. *See O’Neal v. City of Seattle*, 66 F.3d 1064, 1067-1068 (9th Cir. 1995); *Sterling v. Vill. of Maywood*, 579 F.2d 1350, 1355 (7th Cir. 1978). At least one circuit, the Third, has rejected *Davis*, concluding that “the classification of service eligibility according to the presence or absence of encumbrances on the property survives rational relationship scrutiny” because while it may be an irrational means of collecting debt from the *debtor*, it is a rational way of accomplishing “the more general goal of collecting debts, period.” *Ransom v. Marrazzo*, 848 F.2d 398, 412-13 (3d Cir. 1988). Having the benefit of both the Third and Fifth Circuits’ approaches to consult, the Ninth Circuit “rejected the *Ransom* court’s technical narrowing of the legislative purpose and agreed with the Fifth Circuit’s opinion in *Davis*.” *O’Neal*, 66 F.3d at 1067-68.

Even if we preferred the Third Circuit’s approach to the question, we are bound by *Craft*, as that case is still good law in this circuit. Nevertheless, the City asserts that its

policy is materially distinguishable from those at issue in *Craft*, *Davis*, and *O'Neal*. The City contends that “the only classification [its policy] makes is between property owners and tenants.” Brief of Appellee at 20. According to the City, all tenants are treated equally since all tenants must obtain their landlords’ consent before establishing a direct billing agreement. The City further argues that its policy does not require tenants to pay bills for which they are not liable; instead, the policy imposes financial liability on landlords only. These points, while true, are irrelevant. The critical issue is whether terminating a tenant’s water service is a rational means of collecting the landlord’s water service debt. We hold that it is not.

We do not see a meaningful distinction between the policy before us and those held unconstitutional in *Craft*, *Davis*, *Sterling*, and *O'Neal*. Moreover, to the extent there are distinctions, we see no reason to depart in this case from the Fifth Circuit’s rationale in *Davis* - a rationale which we adopted as our own in *Craft*.<sup>8</sup> In practical terms, as Golden’s own experience shows, the City’s policy works as follows. A tenant moves into an apartment; water is available at the time the tenant moves in, so there is no reason for the tenant to question its future availability. However, at some point later the City terminates water service to the residence for the sole reason that the landlord owes the City for the prior tenant’s water usage. When the new tenant inquires with the City, she learns that water service will recommence only once her landlord has satisfied the debt that he alone owes. This is a debt collection scheme “that divorces itself entirely from the

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<sup>8</sup> In addition, we are not persuaded by the Eleventh Circuit’s equal protection rationale in *DiMassimo v. City of Clearwater*, 805 F.2d 1536 (11th Cir. 1989), a case the City urges us to follow. In *Dimassimo*, the court rejected an equal protection claim similar to Golden’s. The Eleventh Circuit did not consider our opinion in *Craft*, nor the Fifth Circuit’s opinion in *Davis*. For the reasons stated in our discussion, we adhere to those opinions.

reality of legal accountability for the debt involved,” *Davis*, 497 F.2d at 144-45, because the person directly penalized by the scheme is not the debtor but an innocent third party with whom the debtor contracted.

The City submits that because the policy does not explicitly require tenants to pay their predecessors’ debts, but instead imposes that obligation on landlords, it is constitutional. Whether the City’s goal is that it be repaid by the person who owes the debt or by the tenant who is directly affected by its collection scheme is immaterial for constitutional purposes. Neither goal gives “the City license to pursue payment by refusing water service to an unrelated, unobligated third party, whether that third party be the new tenant or any other stranger to the prior service agreement.” *O’Neal*, 66 F.3d at 1068. We conclude, as the Ninth Circuit did in *O’Neal*, that “pursuing payment from the prior tenant and the landlord would be rationally related to the City’s goal; refusing service to an unobligated new tenant is not.” *Id.* To be sure, the City has at its disposal various means to recover from the landlord or the prior tenant without jeopardizing the new tenant’s water service. In fact, after the events that prompted Golden to bring this action, the City implemented one obvious approach. Under a rule adopted by the Director of Public Utilities, tenants facing termination of water service - or, we may assume, seeking to reinstate service already terminated - may pay their rent into an escrow account maintained by the Municipal Court for Franklin County. We express no opinion as to whether the particulars of this new rule<sup>9</sup> pass constitutional muster;<sup>10</sup> we refer to it only to

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<sup>9</sup> A 2002 version of the rule is reprinted in the Joint Appendix. See J.A. at 603-605 (City of Columbus Dep’t of Pub. Utils. Rule and Regulation No. 2002-01).

<sup>10</sup> Neither do we construe this new rule as mooted the present controversy. We have no way of knowing whether the new rule is permanent or temporary and the City does not contend that it moots

illustrate that cities in this circuit are not without means to recover water service debts merely because the *Equal Protection Clause of the Fourteenth Amendment* bars them from terminating the water service of a tenant whose landlord owes water bills.

### **III. Equal Credit Opportunity Act**

#### *A. Standard of Review*

The district court granted summary judgment to the City on Golden's ECOA claim. We therefore review the district court's judgment on this point *de novo*. *E.g.*, *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1048 (6th Cir. 2001). In addition, we view the relevant facts in the light most favorable to Golden. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

#### *B. Merits of the ECOA Claim*

Golden asserts that the policy, which authorizes direct billing of a tenant only if (1) the landlord agrees in writing

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Golden's equal protection claim. As a general rule, "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 609, 149 L. Ed. 2d 855, 121 S. Ct. 1835 (2002) (quoting *Friends of the Earth, Inc., v. Laidlaw Environmental Servs., Inc.*, 528 U.S. 167, 189, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000)). "[A] heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again *lies with the party asserting mootness.*" *Adarand Const., Inc. v. Slater*, 528 U.S. 216, 222, 145 L. Ed. 2d 650, 120 S. Ct. 722 (2000). Because the City does not assert mootness, it follows that its adoption of the new rule does not moot Golden's equal protection claim.

and (2) any existing balance on the account is immediately paid, violates the ECOA, 15 U.S.C. § 1691(a)(1). Golden's theory of liability is that the policy has the effect of rejecting a higher proportion of female and minority applicants for water service than other applicants. See Brief of Appellant at 24. This theory is based on the findings of Golden's expert witness to the effect that women and minorities are under-represented in the population of homeowners in the City. According to Golden, because the policy permits only homeowners to directly contract for water service, the policy has a disparate impact on anyone who is under-represented among homeowners. The district court assessed the statistical evidence furnished by the expert in support of Golden's disparate impact claim and concluded that this evidence did not make the type of comparison necessary to state such a claim. Finding that Golden had failed to make out a *prima facie* case of disparate impact discrimination, the court granted summary judgment to the City. We affirm.

The ECOA provides, in relevant part: "It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction on the basis of race, color . . . sex or marital status." 15 U.S.C. § 1691(a)(1). We make the following assumptions for purposes of resolving Golden's ECOA claim. First, we assume that Golden is an applicant, that the City is a creditor, and that a transaction for water service is a credit transaction. Second, we assume that disparate impact claims are permissible under ECOA.<sup>11</sup>

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<sup>11</sup> Neither the Supreme Court nor this Court have previously decided whether disparate impact claims are permissible under ECOA. However, it appears that they are. 196 F.R.D. 315, 325-26 (M.D. Tenn. 2000), modified on other grounds, 296 F.3d 443 (6th Cir. 2002) (discussing cases in the federal district courts, one court of appeals case, and ECOA's legislative history and concluding that "there is clear support for the use of a disparate impact theory in an ECOA case"). See also S. Rep. No. 94-589 (instructing that "judicial constructions of anti-discrimination legislation in the

To prove her claim that the City's policy has a disparate impact on women and minorities, Golden must show that the policy "has a significantly greater discriminatory impact on [women and minorities]." *A.B. & S. Auto Service, Inc. v. South Shore Bank of Chicago*, 962 F. Supp. 1056, 1060 (N.D. Ill. 1997) (citation omitted). The conventional way to do this is "to compare representation of the protected class in the applicant pool with representation in the group actually accepted from the pool." *Cherry v. Amoco Oil Co.*, 490 F. Supp. 1026, 1030 (N.D. Ga. 1980). "If the statistical disparity is significant, then [the] plaintiff is deemed to have made out a *prima facie* case." *Id.* In some cases, a plaintiff may rely on general population characteristics if it is reasonable to assume that the applicant pool is representative of the general population. However, "this assumption is not valid in every case. Plaintiff must demonstrate why the use of general population statistics would be valid." *A.B. & S. Auto Service, Inc.*, 962 F. Supp. at 1061 (citing *Cherry*, 490 F. Supp. at 1031 n. 9).

From what we are able to discern, Golden has not attempted to identify the actual applicant pool for water service in Columbus and has instead relied upon characteristics of the City's general population. As just mentioned, this approach is permissible in cases where the plaintiff demonstrates that any possible applicant pool would be representative of the population as a whole. Golden has not offered evidence or argument on this score. Golden relies on the work of an expert whose conclusion that the City's policy has a disparate impact on women and minorities depends on which groups of residents he chose to compare. Without explanation or citation to authority, Golden contends

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employment field," such as in cases where the Supreme Court has sustained disparate impact claims, should serve as guidelines in ECOA cases); Gwen A. Ashton, *The Equal Credit Opportunity Act from a Civil Rights Perspective: The Disparate Impact Standard*, 17 ANN.REV.BANKING L. 465, 478-81 (1998).

that it was appropriate for the expert to compare the demographics of all renters to the demographics of all homeowners as a proxy for a comparison between the actual pool of applicants for water service in Columbus and the subset of the pool who succeed in securing service. We disagree.

The parties agree on two critical points: first, in order to be eligible to apply for water service, an applicant must live in a residential unit - whether a house or an apartment - that has its own water meter; and, second, those eligible to apply for water service without needing to secure anyone else's approval include not only people who own residences with water meters but also those who live with people who own residences with water meters.<sup>12</sup> In reality, then, the applicant pool for water service in the City of Columbus is comprised of people who either rent a residence with a water meter, own such a residence, or live with someone who owns such a residence. Those who, all things being equal, will secure water service from the City without having to obtain another's approval are people who either own a residence with a water meter or live with the owner of such a residence. If there were a statistically significant disparity between the representation of women and minorities in the first group and their representation in the second group, a finding that the policy has a disparate impact on women and minorities would be appropriate. *E.g., Cherry, 490 F. Supp. at 1030.* The expert's statistics do not address this question, however. The expert's comparison between all renters and all homeowners does not indicate one way or the other whether the proportion of women and minorities in the actual applicant pool is larger, in a statistically significant sense, than the proportion of women and minorities in the group of successful applicants.

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<sup>12</sup> The City denominates people who own residences with water meters as "heads of households." Golden does not dispute that the City contracts with people who live with heads of households, e.g., spouses of heads of households.

Moreover, Golden does not attempt to explain why the group of all renters is an accurate proxy for the actual applicant pool and the group of all homeowners an accurate proxy for the group of successful applicants for water service. We need not inquire further because the law requires Golden to proffer such an explanation. *See A.B. & S. Auto Serv., Inc.*, 962 F. Supp. at 1062 (observing that plaintiff must show that the actual applicant pool bears “approximately the same characteristics as the general population surveyed”). We note parenthetically, however, that the group of all renters is obviously over-inclusive if designed to serve as a useful proxy for the actual applicant pool because it includes many renters who live in a large subset of residences that do not have individual water meters, i.e., apartments. In this respect, the expert’s approach was not sensitive to a baseline qualification all applicants for water service in Columbus must meet. As the Supreme Court has said in the context of employment discrimination, “when special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.” *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n.13, 53 L. Ed. 2d 768, 97 S. Ct. 2736 (1977). In addition, the expert’s proxy for the group of successful applicants, i.e., all homeowners, is under-inclusive because it excludes a group of residents who are eligible to apply for water service without having to obtain approval from another, i.e., those who live with owners of residences that have water meters.

With these points in mind, we conclude that the comparison relied upon by the expert in fashioning Golden’s disparate impact claim does not, at least not in a discernible way, indicate that the City’s policy has a disparate impact on women and minorities. Since Golden does not attempt to illuminate any hidden meaning the expert’s comparison may have, we must affirm the district court’s grant of summary judgment to the City.

#### **IV. Class Certification**

##### *A. Standard of Review*

We review a district court's denial of class certification for abuse of discretion. *Alkire v. Irving*, 330 F.3d 802, 810 (6th Cir. 2003); *In re Am. Med. Sys.*, 75 F.3d 1069, 1079 (6th Cir. 1996). As the party seeking class certification, Golden bears the burden of proof. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982); *In Re American Med. Sys., Inc.*, *supra*, at 1079.

##### *B. Merits of the Class Certification Claim*

As we reiterated recently, “in order to obtain class certification, [a] plaintiff must first satisfy *Rule 23(a)*'s requirements of numerosity, commonality, typicality, and adequacy of representation.” *Coleman v. GMAC*, 296 F.3d 443, 446 (6th Cir. 2002). The district court concluded that Golden failed to prove numerosity. *FED. R. CIV. P. 23(a)(1)*. This conclusion was not an abuse of the court's discretion; we therefore affirm.

To prove numerosity, Golden must demonstrate that the putative class is “so numerous that joinder of all members is impracticable.” *FED. R. CIV. P. 23(a)(1)*. We have observed that “there is no strict numerical test for determining impracticability of joinder.” *In Re American Med. Sys., Inc.*, 75 F.3d at 1079 (citing *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 523 n.24 (6th Cir.), *cert. denied*, 429 U.S. 870, 50 L. Ed. 2d 150, 97 S. Ct. 182 (1976)). Indeed, “the numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations.” *Gen. Tel. Co. of the Northwest, Inc., v. EEOC*, 446 U.S. 318, 330, 64 L. Ed. 2d 319, 100 S. Ct. 1698 (1980). Nevertheless, while “the exact number of class members need not be pleaded or proved, impracticability of joinder must be positively shown, and cannot be speculative.” *McGee v. East Ohio Gas Co.*, 200 F.R.D. 382, 389 (S.D. Ohio 2001) (quotation and citations omitted); *see also* 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND

PROCEDURE § 1762 (3d Ed. 2001) (observing that the party seeking class certification “bears the burden of showing impracticability and mere speculation as to the number of parties involved is not sufficient to satisfy *Rule 23(a)(1)*”).

With respect to Golden’s equal protection claim - the only claim we sustain - the putative class of plaintiffs consists of tenants in Columbus whose water service was or will be terminated because of the landlord’s or prior tenant’s indebtedness. J.A. 9-10 (Compl.); 91 (Motion for Class Cert.). As proof of impracticability of joinder, Golden relies exclusively on one figure - the number of renters in Columbus, which, according to Golden, is 150,000. We have no reason to question this figure but we agree with the district court that merely referring to it does not suffice for purposes of proving numerosity under *Rule 23(a)(1)*. Golden must offer something more than bare speculation to link the gravamen of her claim for liability to the class of individuals she purports to represent. The gravamen of Golden’s equal protection claim is that the City irrationally terminates certain tenants’ water service. Golden does not allege that *all* tenants in Columbus are at risk of constitutional harm, only those whose predecessors or landlords are indebted to the City. Thus, reference to the total number of tenants in Columbus is not probative of the number of tenants reasonably likely to face the harm for which Golden seeks redress. Of course, the total number of tenants in Columbus is probative in the very limited sense that it represents the absolute maximum number of plaintiffs that could be in any class action brought by a tenant against the City. But the district court must engage in a “rigorous analysis” when evaluating the plaintiff’s proof of numerosity, *see Falcon, 457 U.S. at 161*. We cannot say the district court abused its discretion in concluding that such an unrefined measure as the total tenant population in Columbus is too speculative for purposes of the numerosity requirement. *See Alkire, 330 F.3d at 820* (holding that the plaintiff’s hypothesis that hundreds of people might be unconstitutionally incarcerated for failure to pay civil debts or

court costs was insufficient to prove numerosity); *Gevedon v. Purdue Pharma*, 212 F.R.D. 333, 337-38 (E.D. Ky. 2002) (holding, in a products liability case, that the total sales volume of the product in question is not in itself sufficient proof of numerosity).

Accordingly, we affirm the district court's denial of Golden's motion for class certification.

### **CONCLUSION**

We AFFIRM the district court's grant of summary judgment to the City with respect to Golden's claims under the ECOA and the *Due Process Clause of the Fourteenth Amendment*. We similarly affirm the court's denial of the motion for class certification. However, we REVERSE the district court's dismissal of Golden's equal protection claim. Accordingly, we remand for proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO

Case No. C2-01-710

NIKKI MARA, ET AL.,  
PLAINTIFFS,

v.

CITY OF COLUMBUS, ET AL.,  
DEFENDANTS.

**Memorandum Opinion and Order**

Plaintiff Hazel Golden brings this 42 U.S.C. § 1983 action against the City of Columbus (“the City”); the Department of Public Utilities, Division of Water (“Division of Water”); and John R. Douth, director of the Department of Public Utilities, in both his individual and official capacities. Plaintiff claims that defendants violated her right to due process of the law and the equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution. Plaintiff asserts a claim under the Equal Credit Opportunity Act (“ECOA”), 15 U.S.C. § 1691, *et seq.* Finally, plaintiff alleges that the Division of Water violated its common law duty as a public utility to serve a member of the public. This matter is before the court on defendants’ motion for partial dismissal and partial summary judgment. (Doc. 9). This motion is ripe for ruling.

I. Procedural and Factual Background

A. Procedural Background

This suit was initiated by Nikki Mara and Hazel Golden. The plaintiffs moved for class certification, but that motion was denied on March 7, 2002. *See* Doc. 27.

On February 15, 2002 plaintiffs’ counsel, the Equal Justice Foundation, moved for leave to withdraw as counsel for Mara because she apparently moved from her address but

failed to inform plaintiffs' counsel both that she was moving and of her forwarding address. Despite repeated attempts to contact Mara, plaintiffs' counsel has had no contact with her since at least September 27, 2001. On March 28, 2002 Magistrate Judge Abel granted the motion of plaintiffs' counsel, and gave Mara thirty days within which to obtain new counsel or file a notice stating her intent to represent herself. The clerk mailed this order to Mara's last known address, but it was returned by the United States Postal Service because she no longer resided at that address.

The court construes Mara's failure to inform her attorneys or this court of her forwarding address and her failure to communicate with her attorneys since September, 2001 as an abandonment of her claims. Accordingly, Mara is dismissed as a plaintiff in this action.

#### B. Factual Background

The remaining plaintiff, Golden, began renting her residence, located in Columbus, Ohio on or about January 17, 2001 and has resided there at all relevant times. In addition to serving as her residence, plaintiff also operates her business, Golden's Washing and Painting Service, from the property. According to the complaint, plaintiff's lease states that the water-service bill is the tenant's responsibility, but she alleges that her landlord did not sign a tenant direct-billing agreement with the Division of Water until March 16, 2001. Plaintiff does not allege that she contacted the Division of Water when she moved into the residence or ever ensured that her landlord had done so.

In February, 2001 the Division mailed a water-service bill to plaintiff's residence for water service that had been provided to the previous tenant, Sara Dean, who had not resided at the residence since at least January 17, 2001. The bill was in Dean's name. Plaintiff acknowledges receiving the bill, but, according to the complaint, she did not contact the Division of Water to inform it that she was now residing at the property or to inquire about the bill.

On March 8, 2001 plaintiff's water service was

“interrupted,” or terminated, as a result of unpaid water-service charges. According to the complaint, the notice that was left on plaintiff’s door prior to or contemporaneous with the water-service interruption did not inform plaintiff of her right to contest or appeal the service interruption, but instead stated that full payment was required to avoid the service interruption or to restore service.

Defendants contend that the delinquent bills sent to plaintiff’s address and the delinquency notices left at her address both informed her of her right to a pre-interruption hearing. A review of the record, which includes copies of these bills and notices, reveals that they do contain information about the right to a pre-termination hearing. *See* Defendants’ Motion, Young Aff., Exhs. F-J. The court notes that the bills and delinquency notices are in the name of Sara Dean. Defendants contend, however, that all bills, delinquent notices, and turn-off notices are sent in envelopes with the following message displayed: “This Is Your Water Bill.” *See* Defendants’ Motion, Young Aff. at ¶ 6 & Exh. A.

Plaintiff alleges that after the March 8, 2001 interruption, she contacted the Division of Water and informed it that she was the current resident and was not liable for Dean’s unpaid balance, but was willing to pay for her own water usage. According to the complaint, the Division of Water employee to whom plaintiff spoke did not inform her that she had a right to a hearing to contest the termination of the water service, but instead stated that the service would not be restored until she paid the outstanding balance.

Thereafter, plaintiff contacted the Office of Code Enforcement (“Code Enforcement”), which had the water service restored to her residence because the lack of water presented an immediate safety risk.

The water service was interrupted again on April 3, 2000 with the same result, and again on April 23, 2000 but with a different result. According to the complaint, after the April 23, 2000 water-service interruption, Code Enforcement

did not cause the water service to be restored, but instead informed plaintiff that she would have to vacate her residence because without running water it would be considered uninhabitable. The complaint does not state, however, if plaintiff was required to or did in fact vacate her residence.

It is undisputed that pursuant to Columbus City Code (“Code”) § 1105.045, the City will establish a water-service account in the name of property owners only; the City will not establish accounts in the names of rental tenants. The City will provide direct billing to a tenant if both the tenant and landlord sign a direct billing agreement. Even when a direct-billing agreement is in effect, the property owner is ultimately responsible for the property’s water-service account, and the Division of Water will simultaneously mail to both the landowner and the tenant copies of any bills and notices concerning delinquent water-service charges.

## II. Discussion

In her first cause of action, plaintiff alleges that defendants, pursuant to established custom and policy, violated her right to procedural due process because they terminated her water service without affording her prior notice or a meaningful opportunity to contest the termination of the water service. Plaintiff claims, in her second cause of action, that defendants likewise have an established policy and custom of treating water-service customers who do not own their residences different from applicants or customers who own their residences, thereby violating her right to equal protection of the law. The third cause of action is plaintiff’s claim that the Division of Water violated its “common law duty to serve.” Finally, in her fourth cause of action, plaintiff alleges that the City’s policy of not contracting with non-landowners violates the ECOA.

Plaintiff seeks compensatory and punitive damages. Specifically, she seeks damages associated with her inability to operate her business as a result of the water interruption, damages incurred as a result of having to obtain alternative sources of water, and damages for the emotional distress she

suffered as a result of the threat of “imminent homelessness.”

In addition, plaintiff seeks a declaration that defendants’ practices violate principles of equal protection, due process, and state law; and she seeks a permanent injunction preventing defendants from: (1) terminating water service without prior notice and a meaningful opportunity to contest termination; and (2) terminating or refusing to establish water service because of charges incurred by anyone other than the consumer of or applicant for water service.

#### A. Motion to Dismiss

Defendants move to dismiss the following claims and to dismiss this action as to the following defendants for failure to state a claim for relief pursuant to Fed. R. Civ. P. 12(b)(6): (1) all claims against the Division of Water; (2) all claims against Douth in his personal capacity; and (3) the second, third, and fourth causes of action.

##### 1. Standard of Review

Under Fed. R. Civ. P. 12(b)(6), a complaint may be dismissed for failure to state a claim only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The court must construe the complaint in a light most favorable to the plaintiff and accept all well-pleaded allegations in the complaint as true. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). A motion to dismiss under Rule 12(b)(6) will be granted if the complaint is without merit due to an absence of law to support a claim of the type made or of facts sufficient to make a valid claim, or where the face of the complaint reveals that there is an insurmountable bar to relief. *Rauch v. Day & Night Mfg. Corp.*, 576 F.2d 697 (6th Cir. 1978).

A complaint must contain either direct or inferential allegations with respect to all material elements necessary to sustain a recovery under some viable legal theory. *Weiner v. Klais & Co., Inc.*, 108 F.3d 86, 88 (6th Cir. 1997). The court is not required to accept as true unwarranted legal conclusions or factual inferences. *Morgan v. Church’s Fried Chicken*,

829 F.2d 10 (6th Cir. 1987).

## 2. Claims against the Division of Water

Defendants argue that all claims against the Division of Water should be dismissed because it is not a “person” capable of being sued. Plaintiff does not contest defendants’ assertion, nor does she object to the dismissal of the Division of Water.

Plaintiff’s concession is appropriate inasmuch as the Division of Water is not an independent entity, but instead is a sub-unit of the City and therefore is not *sui juris*. *See Papp v. Snyder*, 81 F. Supp. 2d 852, 857 n.4 (N.D. Ohio 2000); *Williams v. Dayton Police Dep’t*, 680 F. Supp. 1075, 1080 (S.D. Ohio 1987). This branch of defendants’ motion is granted. The Division of Water is dismissed as a defendant in this action.

## 3. Claims against Douth in his Personal Capacity

Defendants argue that plaintiff’s complaint fails to allege facts sufficient to state a claim against Douth in his personal capacity. Defendants’ argument is well-taken.

The difference between personal-capacity<sup>1</sup> actions and official-capacity actions is well established. “Personal-capacity suits seek to impose personal liability upon a governmental official for actions he takes under color of state law” whereas official-capacity suits “generally represent only another way of pleading an action against an entity of which an officer is an agent.” *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). In order to establish personal liability in a § 1983 action, the complaint must allege sufficient facts showing that the official, acting under color of state law, caused the deprivation of a federal right. *See id.* at 166; *see also Hafer v. Melo*, 502 U.S. 21, 25 (1991). Plaintiff has failed to allege sufficient facts to make such a showing.

The substance of plaintiff’s allegation against Douth is set forth in paragraph eight of her complaint, which states:

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<sup>1</sup> Personal-capacity actions are commonly referred to as individual-capacity actions.

Defendant John R. Doutt is the director of the Defendant City of Columbus Department of Public Utilities. He has decision making authority for defendants regarding termination of water service. He knew, or should have known, that Sixth Circuit law and all other applicable law required defendants to provide adequate notice and appeal procedures, both before and after termination of services, and forbade termination or denial of water service based on charges allegedly owed by third parties.

Complaint at ¶ 8. In this paragraph, and in the remainder of the complaint, plaintiff does not allege that Doutt *personally* caused the deprivation of any of her federal rights. Accordingly, plaintiff's personal-capacity action against Doutt fails to state a claim upon which relief can be granted. *See Graham*, 473 U.S. at 166. This branch of defendants' motion to dismiss is granted.

#### 4. Equal Protection Claim

The allegation giving rise to plaintiff's equal protection claim is contained in paragraph fifty-six of the complaint, which states:

Upon information and belief, Defendants have established policies and customs and/or patterns and practices of requiring Plaintiff[] and other consumers of and applicants for water service to comply with conditions different from similarly situated customers in order to restore water service, including but not limited to refusing to provide water service accounts to applicants who are not landowners.

Complaint at ¶ 56; *see also* Memorandum Contra at p. 5 (“Defendants do not allow any tenant to hold water service in his or her name; instead, the service must be in the name of the property owner. Defendants are thus distinguishing between landlords and tenants and claim that there is a rational basis for this”). The court construes plaintiff's equal protection claim as alleging that the City's practice of not allowing tenants to establish water-service accounts in their

own name offends the Equal Protection Clause of the Fourteenth Amendment. For the reasons set forth below, plaintiff's claim is unavailing.

Inasmuch as the City's policy affects only economic interests, as opposed to fundamental constitutional rights, any classification created by the policy "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Put differently, the court must undertake a rational basis review of the policy. *See id.*; *O'Neal v. City of Seattle*, 66 F.3d 1064, 1067 (9th Cir. 1995) (applying rational basis analysis to plaintiff's claim that city's water-service policy violated principles of equal protection); *Craft v. Memphis Light, Gas & Water Div.*, 534 F.2d 684, 690 (6th Cir. 1976) (same); *Davis v. Weir*, 497 F.2d 139, 144 (5th Cir. 1974) (same).

Plaintiff argues that because water is a necessity of life it is therefore a "fundamental" need and therefore the City must have a compelling reason for treating landowners and non-landowners differently. Plaintiff's argument is without merit. The Sixth Circuit has specifically rejected the notion that the provision of water and sewer services by a municipality is a federally-protected right giving rise to a substantive due process right. *See Mansfield Apartment Owners Ass'n v. City of Mansfield*, 988 F.2d 1469, 1476-77 (6th Cir. 1993) (citing *Ransom v. Marrazzo*, 848 F.2d 398, 411-12 (3d Cir. 1988)). Inasmuch as the receipt of water from a municipality is not a federally protected right, it is not a fundamental right requiring strict scrutiny analysis.

Under the rational basis analysis, the court must determine whether the policy bears a rational relationship to a legitimate state interest. *See O'Neal*, 66 F.3d at 1067. If there are plausible reasons for the policy, the court's inquiry ends. *See Beach Communications*, 508 U.S. at 313-14. The *Beach Communications* Court instructed further that under rational basis review, the legislative policy is afforded a

strong presumption of validity and that the plaintiff bears the burden of negating “every conceivable basis which might support it.” *Id.* at 314-15 (internal quotation marks omitted). The Equal Protection Clause does not grant to courts a license “to judge the wisdom, fairness, or logic of legislative choices.” *Id.* at 313.

Defendants contend that distinguishing landowners from non-landowners, such as rental tenants, is rationally related to the legitimate governmental goal of ensuring that the ultimate responsibility for water-service bills resides with the individual who has property against which a lien may be sought and thereby satisfy any debt owed to the City. The court agrees.

The instant matter is similar to the situation before the Eleventh Circuit in *DiMassimo v. City of Clearwater*, 805 F.2d 1536 (11th Cir. 1986). In *DiMassimo*, the city provided utilities only to landowners or to tenants who had both the landowner’s permission to request that utilities be provided to them and the landowner’s agreement that he would retain ultimate responsibility for all utility service charges. Plaintiffs claimed that this policy violated, *inter alia*, their equal protection rights. The Eleventh Circuit affirmed the district court’s holding that the city’s policy did not violate the Equal Protection Clause.

The Eleventh Circuit held that a “landowner and [a] tenant are so dissimilarly situated that they may be treated differently under the City’s ordinances without offending the Fourteenth Amendment’s equal protection clause.” *Id.* at 1542. In discussing the rational basis analysis, albeit in the context of plaintiffs’ substantive due process claim, but equally apposite to the equal protection claim, the court held that the city’s ordinances met the rational basis standard “because a landowner, whose property is readily subject to liens and foreclosure may be rationally presumed to be more readily held to account as the ultimate guarantor of the bills than a tenant who may freely abandon the lease, leaving behind only his outstanding debts.” *Id.* at 1541. The court

noted further that “[a] financial deposit sufficient to provide the City with the same degree of security [as property] would indeed be burdensome to any potential tenant.” *Id.* at 1542. The court held, therefore, that the city had a legitimate interest in requiring the landowner to either apply directly for utilities or to authorize the city to contract with the tenant, while retaining ultimate responsibility for the utility charges.

This court likewise concludes that landowners and tenants are so dissimilarly situated that the City’s policy of contracting only with landowners passes muster under rational basis analysis. As stated, the Division of Water will provide direct billing to the tenant provided the landlord agrees, but under all circumstances the landowner remains ultimately responsible for any water-service charges. This policy is rationally related to the legitimate interest in maintaining a financially stable municipal utility. Again, as noted in *DiMassimo*, “a landowner, whose property is readily subject to liens and foreclosure may be rationally presumed to be more readily held to account as the ultimate guarantor of the bills than a tenant who may freely abandon the lease, leaving behind only his outstanding debts.” *Id.* at 1541; *see also Mansfield Apartment Owners Ass’n*, 988 F.2d at 1477-78 (holding that the city’s policy of holding landowners responsible for outstanding water-service bills satisfied rational basis test because passing ultimate responsibility onto landowner “is a reasonable regulation aimed at keeping the water system financially solvent”).

For the foregoing reasons, the City’s policy of contracting for water-service accounts with landowners only does not violate a non-landowner’s right to equal protection of the law as guaranteed by the Fourteenth Amendment.

There is a line of cases holding that a city that refuses to allow an individual, including rental tenants, to establish new water service if the contemplated property is encumbered by pre-existing debt (for which the applicant is not responsible) violates the Equal Protection Clause because it creates two classes of applicants for which there is no rational

basis, to wit: (1) applicants whose contemplated service address is encumbered with a pre-existing debt; and (2) applicants whose residence lacks the stigma of such charges. *See O’Neal*, 66 F.3d at 1067-68; *Craft*, 534 F.2d at 689-90; *Davis*, 497 F.2d at 139. In *Craft*, the Sixth Circuit held that the city lacked a rational basis for drawing such a distinction between these two groups of utility-service applicants because:

[A] collection scheme that divorces itself entirely from the reality of legal accountability for the debt involved, is devoid of logical relation to the collection of unpaid water bills from the defaulting debtor. The City has no valid governmental interest in securing revenue from innocent applicants who are forced to honor the obligations of another or face constructive eviction from their homes for lack of an essential to existence – water.

*Craft*, 534 F.2d at 690 (quoting *Davis*, 497 F.2d at 144-45).

This line of cases is inapposite to the instant matter. This is not a case in which the City’s policy creates two classes of similarly-situated applicants, one which the City will contract with and one with which the City will not. As stated, the City refuses to provide water-service accounts to all non-landowners, who are dissimilarly situated from landowners.

In summary, the City’s policy of refusing to contract with non-landowners for water service does not violate plaintiff’s right to equal protection of the law as guaranteed by the Fourteenth Amendment.

#### 5. Equal Credit Opportunity Act Claim

Plaintiff claims that the City’s policy of providing water-service accounts only to landowners violates the ECOA, 15 U.S.C. § 1691, *et seq.*, because the policy results in a “disparately high rejection of applications from women and minority applicants.” Complaint at ¶ 63. It appears that plaintiff seeks to establish her claim under a disparate impact theory, which is actionable under the ECOA. *See* 12 C.F.R.

§ 202.6, App. D. Staff Interpretations § 202.6-6(a)(2). Plaintiff has alleged sufficient facts to withstand defendants' motion to dismiss. Accordingly, this branch of defendants' motion is denied.

#### 6. State Common Law Duty to Serve

In her breach of the duty to serve claim, plaintiff alleges that the Division of Water violated its duty to serve because it terminated her water service in an arbitrary and unreasonable manner. Complaint at ¶ 61. In her memorandum contra, plaintiff also claims that the termination of her water service was discriminatory in nature. Although the Department of Water has been dismissed as a defendant, plaintiff argues that the City owes her a duty to serve and is therefore liable for breaching that duty.

The court need not determine whether the City has such a duty, however, because this court does not have jurisdiction to entertain this claim. In a recent opinion, Judge Marbley of this court determined that pursuant to Ohio Rev. Code § 4905.26, Ohio's Public Utility Commission ("PUCO") has exclusive jurisdiction to hear claims of this nature. *See McGee v. East Ohio Gas Co.*, No. 99-CV-813, 2002 WL 484480, at \*7-8 (S.D. Ohio Mar. 26, 2002) ("While it may be true that, at some point in history, the duty to serve was a common law duty, Title 49 appears to have superseded the common law"). For the reasons set forth in Judge Marbley's well-reasoned opinion, this court concludes that the PUCO has exclusive jurisdiction to entertain plaintiff's duty to serve claim. Accordingly, this branch of defendants' motion to dismiss is granted.

#### B. Motion for Partial Summary Judgment

Plaintiff claims that defendants terminated her water service without affording her prior notice or a meaningful opportunity to contest the termination, thereby violating her right to procedural due process as guaranteed by the Fourteenth Amendment. Defendants move for summary judgment on this claim, arguing that they provided plaintiff with adequate pre-deprivation process. The court need not

determine whether plaintiff was afforded adequate due process because, as explained below, it finds that she did not have a “property” interest in the water service that was being delivered to her residence.

Under Fed. R. Civ. P. 56(c), summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *See LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993); *Osborn v. Ashland County Bd. of Alcohol, Drug Addiction & Mental Health Servs.*, 979 F.2d 1131, 1133 (6th Cir. 1992) (per curiam). The party that moves for summary judgment has the burden of showing that there are no genuine issues of material fact in the case at issue, *LaPointe*, 8 F.3d at 378, which may be accomplished by pointing out to the court that the nonmoving party lacks evidence to support an essential element of its case. *Barnhart v. Pickrel, Schaeffer & Ebeling Co., L.P.A.*, 12 F.3d 1382, 1389 (6th Cir. 1993). In response, the nonmoving party must present “significant probative evidence” to demonstrate that “there is [more than] some metaphysical doubt as to the material facts.” *Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335, 339-40 (6th Cir. 1993). “[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis added). *See generally Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1310 (6th Cir. 1989).

In reviewing a motion for summary judgment, “this Court must determine whether ‘the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir. 1993) (quoting *Anderson*, 477 U.S. at 251-53). The evidence,

all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). See also *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456 (1992). However, “[t]he mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.” *Anderson*, 477 U.S. at 252. See also *Gregory v. Hunt*, 24 F.3d 781, 784 (6th Cir. 1994). Finally, a district court considering a motion for summary judgment may not weigh evidence or make credibility determinations. *Adams v. Metiva*, 31 F.3d 375, 378 (6th Cir. 1994).

“The Fourteenth Amendment places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of ‘property’ within the meaning of the Due Process Clause.” *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978). “The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of . . . property.” *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972).

In their motion for summary judgment, defendants did not argue that plaintiff had no property interest in the water service. Inasmuch as this requirement is a predicate to any procedural due process analysis, the court raised this issue by way of an Order requiring both parties to address the issue. After reviewing the parties’ supplemental briefs and the applicable case law, the court concludes that plaintiff did not have a property interest in the water service.

In *Roth*, the Supreme Court held:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. [S]he must have more than a unilateral expectation of it. [S]he must, instead, have a legitimate claim of entitlement to it . . . . Property

interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

*Id.* at 577. The Court suggested two sources that create property interests – state statutes or contracts, express or implied, between the individual and the state. *See id.* at 577-78. For the reasons set forth below, the Code does not provide plaintiff with a legitimate claim of entitlement to water service, nor was there any contractual relationship between the Division of Water and plaintiff.

It is plaintiff’s contention that the Code conferred upon her a property interest in water service to her residence. This contention is without merit.

Plaintiff argues that the source of her property interest in water service is found in section 1101.03 of the Code, which governs the termination of water service. Specifically, plaintiff relies on the following portion of section 1101.03:

The notice [of termination] shall also indicate the hearing rights afforded to any person affected by the termination notice by which the person may contest the water service termination.

§ 1101.03(b). Plaintiff also relies on the definition of “affected person” found in section 1101.03:

“[A]ffected person” shall include, but is not limited to, an owner, occupant, resident or tenant of the affected property.

§ 1101.03(c). Plaintiff argues, without support, that the availability of a hearing presupposes a property interest. That the Division of Water provides an affected person the right to a hearing does not, in and of itself, create a legitimate claim of entitlement to water service to someone affected by the termination of water service. Further, to the extent that plaintiff relies on the fact that she falls within the definition of “affected person” to support her claim that section 1101.03

provides her with a property interest, such reliance is misplaced. *See Marrero-Garcia v. Irizarry*, 33 F.3d 117, 123-24 (1st Cir. 1994) (rejecting plaintiff's argument that a regulatory definition was sufficient to establish a property interest in continued water service).

The Code specifically requires that the City charge a fee for providing water service. *See* Code, Charter §§ 118 & 119. It follows that a person who has not agreed to pay for water service is not entitled to receive water service under the Code. Therefore, the plaintiff, a non-customer of whom the Division of Water was not even aware, cannot rely on the Code as the source of a property right in water service.

The second source of a property right recognized by the *Roth* Court is a contract, express or implied, between the individual and the state. Plaintiff has not argued that she had any contractual relationship with the Department of Water. Any such argument would be remarkable inasmuch as plaintiff never informed the Division of Water that she was residing at her residence until the water service was terminated on March 8, 2001, despite having lived there for 2 months, during which time she acknowledges receiving water bills, albeit in the name of the former tenant. Plaintiff alleges that her landlord signed a direct-billing agreement on March 16, 2001, but she does not allege, nor is there any evidence to indicate, that this agreement was ever forwarded to the Division of Water.<sup>2</sup>

Plaintiff has neither a contractual nor a statutory basis to support her claim that she had a constitutionally-protected property interest in the water service to her residence. Because plaintiff has neither of these bases to support her claim, the court concludes as a matter of law that as a non-

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<sup>2</sup> Because there is no evidence that plaintiff, her landlord, and the City ever entered into a direct billing agreement, the court need not determine whether such an agreement would constitute a contract that creates a property interest in the continuation of water service.

customer, of whom the Division of Water was not aware, she did not have a legitimate claim of entitlement to water service. Plaintiff's "mere receipt of water for [two months] could not unilaterally create a legitimate claim of entitlement." *Coghlan v. Starkey*, 845 F.2d 566, 570 (5th Cir. 1988) (finding that the receipt of water service for *several years* did not unilaterally create a legitimate claim of entitlement).

In her supplemental brief, plaintiff argues that mere *use*, without more, of a public utility creates a legitimate claim of entitlement to the continued utility service. This argument is without merit. In support of her argument, plaintiff cites the Supreme Court's decision in *Craft*. The issue in *Craft* was what process was due to utility *customers* before their service could be terminated. Notwithstanding the fact that the plaintiffs in *Craft* were actual customers of the utility company, it is plaintiff's contention that the holding is not limited to just customers of a public utility, and in support she quotes a passage from the decision as follows: "public utilities . . . are obligated to provide service to *all the inhabitants* of the City of its location alike, without discrimination, and without denial, except for good and sufficient cause." Plaintiff's Supplemental Memorandum at pp. 1-2 (quoting *Craft*, 436 U.S. at 11). Plaintiff's interpretation of *Craft* is erroneous.

Neither the holding in *Craft*, nor any statement therein, supports an argument that all inhabitants of a city are entitled to free water service. The complete passage of the opinion selectively quoted by plaintiff illustrates this point: "MLG&W and other public utilities in Tennessee are obligated to provide service to all inhabitants of the city of its location alike, without discrimination, and without denial, except for good and sufficient cause, and may not terminate service except for nonpayment of a just service bill[.]" *Craft*, 436 U.S. at 11 (internal quotations and citations omitted). That a Tennessee public utility may deny service to its inhabitants for good cause and may terminate service for

nonpayment of a just service bill demonstrates that the public utility is under no obligation to provide utility service to all residents free of charge, but instead provides such service only to those who pay, i.e., customers. Accordingly, the *Craft* decision does not stand for the proposition that a public utility must provide service to all residents of the city regardless of whether they pay for the service, and correspondingly, the decision does not support the argument that all residents of a city have a property interest in a public utility's service just by residing in the city.

In further support, plaintiff relies on the Sixth Circuit's decision in *Mansfield Apartment Owners Ass'n*, 988 F.2d 1469. Plaintiff contends that the *Mansfield Apartment Owners Ass'n* court, relying on *Craft*, did not limit property interest in public utilities to customers. Specifically, plaintiff relies on the following statement: "the expectation of utility services rises to the level of a 'legitimate claim of entitlement' . . . ." *Id.* at 1474 (citing *Craft*, 436 U.S. 1). The *Mansfield Apartment Owners Ass'n* decision does not alter this court's conclusion that plaintiff herein had no property interest in the water service delivered to her residence.

The aggrieved party in *Mansfield* consisted of an apartment owners' association who challenged the city's policy of refusing to provide water service to landlords, who as the property owners, were ultimately responsible for the water-service charges attributed to their property, until the delinquent accounts of their former tenants were paid. There was no analysis of whether the apartment owners had a property interest in the water service, but instead the court simply stated that the expectation of water service is a constitutionally-protected property interest. *See id.* Inasmuch as the plaintiffs were property owners and actual water service customers, no analysis was needed. It was clear that they had a property interest in the water service. This case does not, however, support plaintiff's claim that mere users of water service have a constitutionally-protected property interest in continued water service.

Plaintiff relies on two other cases, which the court will briefly address. First, plaintiff cites *Lake v. City of Youngstown*, No. 4:93CV2559 (N.D. Ohio Jul. 14, 1994), an unreported decision from the Northern District of Ohio. *Lake* is inapposite because the plaintiffs therein actually contacted the water department and applied for water service, whereas here, plaintiff made no effort to contact the water department until the water service had been terminated. In addition, the court in *Lake* did not undertake any analysis of whether the plaintiffs had a property interest in the water service, but instead quoted from *Mansfield Apartment Owners Ass'n* and summarily concluded that the plaintiffs had a property interest. This conclusion, without more, is unpersuasive.

Second, plaintiff relies on a statement from the Fifth Circuit in *Davis* that “due process demands pre-termination notice to the actual user.” *Davis*, 497 F.2d at 143. As a complete reading of the passage quoted by plaintiff illustrates, there was no procedural due process claim before the appellate court. The *Davis* court’s blanket statement, without any analysis, that due process requires pre-termination notice to the actual user is not persuasive. Further, as discussed *infra*, the Fifth Circuit, in a subsequent opinion, specifically addressed the issue currently before this court and ruled that a mere water user has no property interest in water service.

There is a line of cases in which courts have employed the same property-interest analysis used by this court and concluded that individuals, such as plaintiff, who have no contractual relationship with the public utility and where there exist no statute or ordinance providing free utility service for all residents of the city, do not have a property interest in the utility service and therefore are not entitled to any procedural due process. In *Sterling v. Village of Maywood*, 579 F.2d 1350 (7th Cir. 1978), the plaintiff was a rental tenant whose landlord contacted the municipality’s water department and requested that the water service to plaintiff’s building be terminated. The following day, a water department meter reader went to plaintiff’s residence and suggested that she go

to the Village Hall and place the water service in her name. The next day, plaintiff received a water bill at her residence addressed to “occupant” which stated the amount due for past water service and indicated that the due date was approximately two weeks away. The bill also contained a note suggesting that the occupant place the account in her name to avoid termination of service. Two days later, without notice, plaintiff’s water service was terminated. Plaintiff brought suit against the municipality, claiming, *inter alia*, that it violated her due process rights when it terminated her water service without prior notice and an opportunity for a hearing.

The Seventh Circuit held that plaintiff had no property interest in the continued water service and therefore failed to state a procedural due process claim. Specifically, the court held that a tenant water user, who had no contractual relationship with the municipality and where there was no statute that provided her with an entitlement to water service, “ha[d] no basis upon which to claim that there ha[d] been a deprivation of any property within the meaning of the Fourteenth Amendment.” *Sterling*, 579 F. 2d at 1353 n.7.

The *Sterling* court distinguished other cases, including the Supreme Court’s decision in *Craft*, on the grounds that those cases dealt with the right of a utility *customer*, the person paying the bill, as opposed to the rights of a mere utility user. *See id.* The court also found unpersuasive a case relied upon by plaintiff herein, *Koger v. Guarino*, 412 F. Supp. 1375 (E.D. Pa. 1976), in which the district court stated that a water user has a legitimate claim of entitlement to continued service. The *Sterling* court correctly pointed out that the *Koger* court “merely stated that an interest existed without explaining the basis for the entitlement.” *Sterling*, 579 F.2d at 1354. This court likewise finds the *Koger* decision to be unpersuasive.

The Fifth Circuit held that a rental tenant who had received water service for four years without payment had no legitimate claim of entitlement to continued water service. *See Coghlan*, 845 F.2d 566. The court found that plaintiff

had no contractual relationship with the waterworks district and that there was no statute that established a general right to water service. *See id.* at 569-70. Without either basis to support her claim of a property right, the court concluded that “mere receipt of the water for several years could not unilaterally create a legitimate claim of entitlement.” *Id.* at 570.

Likewise, the First Circuit held that condominium residents who had received water service for four years without payment, but who did not have a contractual relationship with the water department and where there was no statute providing a general right to water service, had no property interest in continued water service. *See Marrero-Garcia*, 33 F.3d at 121-24.

The reasoning and holdings of these three cases demonstrate that plaintiff in the case at bar did not have any property interest in the continued water service to her residence. As discussed *supra*, she had no contractual relationship with the Division of Water and there is no provision of the Code purporting to provide general water service to the public at large without payment. Instead, plaintiff merely received water service at her apartment for two months. Her subjective expectation of continued water service does not give rise to a legitimate claim of entitlement to same. *See Marrero-Garcia*, 33 F.3d at 121-24; *Coghlan*, 845 F.2d at 569-70; *Sterling*, 579 F.2d at 1353 n.7; *see also Jackson v. Metropolitan Edison Co.*, 483 F.2d 754, 761 n.14 (“We do not believe that there is a property right to be furnished utility service without payment”); *Hendrickson v. Philadelphia Gas Works*, 672 F. Supp. 823 (E.D. Pa. 1987) (holding that non-customers and unauthorized users of a public utility had no constitutionally-protected property interest in the continuation of utility service).

Finally, in the course of her pleadings, plaintiff refers to water as a “basic necessity of life” and intimates that this renders it a constitutionally-protected property interest. That water is a basic necessity of life is irrelevant to the question of

whether water service is a property interest under the Fourteenth Amendment. *See Sterling*, 579 F.2d at 1354-55 (noting that the analysis of the importance of water as an absolute necessity of life “is irrelevant to the question of whether there is an entitlement”); *Jackson*, 483 F.2d at 761.

Plaintiff did not have a constitutionally-protected property interest in the water service that was being delivered to her residence. Accordingly, she was entitled to no procedural due process before that water service could be terminated. Defendants are entitled to summary judgment on plaintiff’s procedural due process claim.

### III. Conclusion

Defendants’ motion to dismiss is GRANTED IN PART and DENIED IN PART. The following claims and defendants are DISMISSED: (1) the Division of Water; (2) Doust in his personal capacity; (3) the equal protection claim; and (4) the common law duty to serve claim. Defendants’ motion to dismiss is DENIED as to plaintiff’s ECOA claim. Defendants’ motion for summary judgment is GRANTED, and plaintiff’s procedural due process claim is DISMISSED.

It is so ORDERED.

/s/ James L. Graham

JAMES L. GRAHAM

UNITED STATES DISTRICT JUDGE

Date: June 20, 2002

**UNITED STATES CONSTITUTION**

Section 1 of the Fourteenth Amendment provides, in relevant part, “nor shall any State \* \* \* deny to any person within its jurisdiction the equal protection of the laws.”

**COLUMBUS CITY CODE**

**1101.03 Termination of water service.**

(a) After twenty-one (21) days’ notice, except as provided in Section 1101.04, the director may terminate water services to any person or real estate using city water in violation of this chapter for any of the following conditions.

(1) Nonpayment of accounts pursuant to City Code Section 1105.12;

(2) Violation of any rule and regulation promulgated pursuant to City Code Section 1101.01;

(3) Violation of City Code Section 1105.038;

(4) Violation of City Code Chapter 1113.

(b) The notice shall indicate the basis upon which service is being terminated and date after which service will be terminated if the violations are not corrected, or applicable payment or payment agreements are not received by the division of water pursuant to City Code Section 1105.12. The notice shall also indicate the hearing rights afforded to any person affected by the termination notice by which the person may contest the water service termination. The notice shall be mailed or hand delivered to the address of the customer of record and to the service address.

(c) Any affected person desiring a hearing concerning a termination of water service under this section or billing dispute under City Code Section 1105.12(E) must request a hearing with the director by submitting a written and signed request to the division of water no later than ten (10) days after receipt of a termination notice, or ten (10) days after the due date of the bill in question, whichever date is later. Failure of an affected person to file a request for hearing within the allotted ten (10) day period shall constitute a waiver by that person of their right to a hearing under this section. A request for hearing shall include as a minimum: name, address and telephone number of affected person; date; a statement requesting a hearing; and a description of the nature of the dispute, including the location of the affected property. The director or his designee shall convene a hearing on the matter within ten (10) days of receiving the request for hearing. If a hearing cannot be scheduled within this ten (10) day period, then the water service termination shall be automatically stayed, pending the holding of a hearing on this matter. The director shall adopt regulations establishing procedures by which hearings will be conducted pursuant to this section. For the purposes of this section the meaning of “affected person” shall include, but is not limited to, an owner, occupant, resident or tenant of the affected property. (Ord. 3251-98 § 1.)

(d) This section is not applicable to emergency termination of water services pursuant to City Code Section 1101.06, water service termination for the purpose of enforcing the termination of sewer services pursuant to City Code Section 1145.83, voluntary termination of water services pursuant to City Code Section 1101.07, or disruption of water service due to routine or scheduled maintenance of the water system or emergency circumstances. (Ord. 2805-91.)

**1105.045 Unpaid charges a lien--Owner liable.**

A. Each water charge charged under or pursuant to Chapter 1105, Columbus City Codes, is made a lien upon the corresponding lot, parcel of land, building or premises served by a connection to the water system of the city, and if the same is not paid within sixty (60) days after it becomes due and payable, it shall be certified to the auditor of Franklin County, Ohio, who shall place the certified amount on the real property tax list and duplicate of the property served by the connection. A penalty charge of ten (10) percent on the amount that is due and payable shall be added to the certified amount, plus an administrative charge for handling as specified in Section 1105.09. The total certified amount shall be collected as other taxes are collected. The city shall provide the owner of property with written notice of the impending certification at least thirty (30) days prior to the certification. For any procedure not specified in this section, refer to Section 743.04 of the Ohio Revised Code.

B. The division may also collect unpaid water charges by actions at law, in the name of the city, from an owner, tenant, or other person who is liable to pay the charges.

C. The owners of real estate premises installing or maintaining water service shall be liable for all water charges incurred for service at said premises.

D. The division will directly bill a tenant for water and sewer service if the property owner, or authorized agent of the property owner, along with the tenant, sign a written agreement authorizing direct billing of the tenant. Once a written agreement is signed, the division will simultaneously mail, to both the owner and the tenant, copies of any bills and notices concerning delinquent water and sewer charges. This requirement shall affect contracts made on or after the effective date of this paragraph.

E. Direct billing of a tenant shall be in no way construed as to relieve the owner of the real estate premises of liability for water and sewer service charges. No direct billing of a tenant will be allowed where all delinquent water and sewer charges are not paid in full up until the date the direct billing agreement is accepted by the city, or where water or sewer service has been terminated for real estate premises.

F. The owner of real estate premises by installing or maintaining water service from the city is deemed to assent to all rules and regulations of the division of water and ordinance of the city pertaining to water service and distribution. (Ord. 2804-91.)

**1105.12 Billing, meter reading--Terms of payment.**

A. Billing. The city may render bills for water service on either a monthly or quarterly basis. (Ord. 35-85.)

B. Bill Calculations. All meter readings and billings may be in units of one hundred (100) or one thousand (1,000) cubic feet, cubic meters or gallons and there shall be no proration of rates, except rates which may be prorated at the time of a rate change. Monthly periods described in Sections 1105.04, 1105.05, 1105.055 and 1147.11 are based on a thirty (30) day period. The amount billed shall be established by dividing the applicable rate by thirty (30) days to derive a daily rate and multiplying the daily rate by the number of days in the billing period. (Ord. 459-94.)

C. Terms of Payment. The water rates prescribed in City Code Sections 1105.04, 1105.05, 1105.09 and 1105.10 are net.

If bills are not paid within twenty-eight (28) days from the date of billing a gross rate, which is the net rate plus ten (10) percent, shall apply. (Ord. 35-85; Ord. 3252-98 § 1 (part); Ord 1448-02 § 1.)

D. Termination for Nonpayment of Accounts. Water service may be terminated for nonpayment of any and all charges now and hereafter in force, whether charged by the city of Columbus division of water, city of Columbus division of sewerage and drainage, or any of the division's contracting political subdivisions. Termination of water service for nonpayment of account shall be pursuant to the provisions of City Code Section 1101.03.

Water service will not be resumed until all service charges due and payable have been collected or a suitable payment

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agreement has been received from the customer of record or the owner of the real estate.

The customer of record and the owner of the real estate shall be responsible for payment of all applicable service charges as defined in City Code Chapter 1105.

E. Billing Disputes. Customers of record and owners of the real estate wishing to contest any service charges for which they have been billed shall contact the division of water at the phone number and/or address provided on the bill, to discuss the matter with a division customer service representative. If the billing dispute is not resolved through discussion with division customer service representatives, the customer of record or owner of the real estate may file a request for a hearing on the matter with the director, pursuant to provisions set forth in City Code Section 1101.03(C). (Ord. 2805-91.)

**4509.99 Penalties.**

(A) Whoever violates any provision of this Housing Code is guilty of a misdemeanor of the third degree and shall be fined not more than five hundred dollars (\$500.00) or imprisoned for not more than sixty (60) days or both. Each day that any such person continues to violate any of the provisions of this Housing Code shall constitute a separate and complete offense. Receipt of notice under C.C. 4509.02 shall not be a prerequisite for prosecution for any violation of this Housing Code, providing a diligent effort was made under its provisions.

(B) Whoever violates any provision of any rules or regulation adopted by the administrator pursuant to authority granted by this Housing Code is guilty of a misdemeanor of the third degree and shall be fined not more than five hundred dollars (\$500.00) or imprisoned for not more than sixty (60) days or both. Each day that any such person continues to violate any rule or regulation adopted by the administrator pursuant to authority granted by this Housing Code shall constitute a separate and complete offense.

(C) Regardless of the penalty otherwise provided in this section, an organization convicted of a violation of the Columbus Housing Code, a misdemeanor of the third degree, shall be fined not more than three thousand dollars (\$3,000.00). (Ord. 1057-94; Ord. 1272-01 § 1 (part).)

**4521.01 Kitchen sink.**

In every dwelling unit there shall be a kitchen sink in good working condition, properly connected to a public water and sewer system or to a water and sewer system approved by the health commissioner, and which is capable of providing at all times a reasonable amount of heated and unheated running water. (Ord. 1254-75.)

**4521.02 Bathroom.**

Every dwelling unit, except as otherwise permitted under Section 4521.03, shall have a bathroom which affords privacy to a person within the room. The facilities of the bathroom shall include one (1) flush water closet, lavatory basin, and bathtub or shower in good working condition and properly connected to a public water and sewer system or to a water and sewer system approved by the health commissioner which provides at all times an adequate amount of heated and unheated running water. All bathroom doors shall provide an unobstructed opening adequate for safety. (Ord. 356-75.)