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DISTRICT OF HAWAII

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MARA AMONE individually, and on)
behalf of all persons similarly)
situated,)

Plaintiff,)

v.)

STEPHANIE AVEIRO, in her)
official capacity as the)
Executive Director of the)
Housing and Community)
Development Corporation of)
Hawaii; HOUSING AND COMMUNITY)
DEVELOPMENT CORPORATION OF)
HAWAII, a duly organized and)
recognized agency of the State)
of Hawaii.)

Defendants.)

CIVIL NO. CV04-00508 ACK/BMK
Class Action

**NOTICE OF MOTION; PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT; MEMORANDUM IN
SUPPORT OF MOTION; CERTIFICATE
OF SERVICE**

HEARING

DATE: May 31, 2005
TIME: 9:30 a.m.
JUDGE: Hon. Alan C. Kay

NOTICE OF MOTION

TO: MARK BENNETT
Attorney General
JOHN WONG, ESQ.
MARGARET LEONG, ESQ.
Office of the Attorney General
Kekuanao'a Building, Room B-2
465 South King St.
Honolulu, Hawai'i 96824

Attorneys for Defendants

PLEASE TAKE NOTICE that the following Motion for Partial Summary Judgment will be heard before the Honorable Alan C. Kay in his courtroom in the United States Courthouse, 300 Ala Moana Boulevard, Honolulu, Hawaii on Tuesday, May 31, 2005, at 9:30 a.m., or as soon thereafter as counsel can be heard.

DATED: Honolulu, Hawaii, April 8, 2005.




SHELBY ANNE FLOYD
THOMAS E. BUSH
GAVIN THORNTON
Attorneys for Plaintiffs

Defendants have engaged in discrimination against the Plaintiff class in violation of the Fair Housing Act ("FHA"), Section 504 of the Rehabilitation Act ("Section 504"), and the Americans with Disabilities Act ("ADA"). Defendants have thus violated Plaintiffs' federal rights and summary judgment must be granted on Count I (violation of the Housing Act), Count II (violation of Section 504), Count IV (violation of the FHA), Count V (violation of the ADA), and Count VI (violation of federal rights under 42 U.S.C. § 1983).

This Motion is based upon the concise statement of undisputed material facts in support of this Motion, the attached memorandum of law, declarations and exhibits filed in support of this Motion, and such other matters as may be brought before the Court and/or presented prior to and at the hearing on this Motion, all of which are incorporated herein.

DATED: Honolulu, Hawaii, April 8, 2005.



SHELBY ANNE FLOYD
THOMAS E. BUSH
GAVIN THORNTON
Attorneys for Plaintiffs

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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

The relevant facts in the case are not disputed. Defendant Housing and Community Development Corporation of Hawaii ("HCDCH") is a public housing authority ("PHA") subject to the requirements of the U.S. Housing Act and its supporting regulations. Defendant Stephanie Aveiro is HCDCH's Executive Director. Defendants are required by federal law to provide their tenants who pay for all or a portion of their own utilities, with a utility allowance. The Plaintiff class consists of disabled persons that currently reside, or have resided within the last two years, in an HCDCH public housing project in which residents receive utility allowances, whose special needs arising from their disability require them to consume utilities in excess of the amount provided for in the standard public housing utility allowances.

Federal law mandates that Defendants provide adjustments in the utility allowances for residents who have special needs arising from a disability that require them to consume utilities in excess of the amount provided for in the standard public housing utility allowances, preventing such residents from being charged in excess of the maximum rents permitted by the U.S. Housing Act. Defendants must also provide notice of the availability of such adjustments. Defendants have failed to comply with these federal mandates and as a result have

denied the Plaintiff class of the benefits accorded to non-disabled tenants under the U.S. Housing Act, namely the benefit of the public housing maximum rents. Defendants have thus breached federal rights guaranteed Plaintiffs, and summary judgment must be granted regarding Plaintiffs' claims under Count I (U.S. Housing Act), Count II (Section 504 of the Rehabilitation Act), Count IV (Fair Housing Act), Count V (Americans with Disabilities Act), and Count VI (42 U.S.C. § 1983).

II. UNDISPUTED MATERIAL FACTS

Section 1437a(a) of the Housing Act, also known as the Brooke Amendment, imposes a ceiling for rents charged to low-income people living in public housing projects. The Brooke Amendment provides that a low-income family "shall pay as rent" a specific percentage of its income, which in practice is roughly 30% of a family's income.¹ The U.S. Department of Housing and

¹ The Brooke Amendment in its present form reads as follows:

§ 1437a. Rental payments

(a) Families included; amount.

(1) Dwelling units assisted under this Act shall be rented only to families who are low-income families at the time of their initial occupancy of such units. Reviews of family income shall be made at least annually. Except as provided in paragraph (2) and subject to the requirement under paragraph (3), a family shall pay as rent for a dwelling unit assisted under this Act (other than a family assisted under section 8(o) or (y) [42 USCS § 1437f(o) or (y)] or paying rent under section 8(c)(3)(B) [42 USCS § 1437f(c)(3)(B)]) the highest of the following amounts, rounded to the nearest dollar:

Urban Development ("HUD") and the courts have long considered "rent" to include a reasonable amount for the use of utilities. See 24 C.F.R. §§ 965.501-965.508; *Dorsey v. Housing Authority of Baltimore City*, 984 F.2d 622, 624 (4th Cir. 1993); *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987).

To ensure that the rents for public housing tenants who pay for their own utilities do not exceed the rent ceiling provided for in the Brooke Amendment, HUD promulgated regulations requiring Public Housing Authorities ("PHAs") to establish and provide a utility allowance that approximates "a reasonable consumption of utilities by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment." 24 C.F.R. § 965.505(a). PHAs are required to regularly review and update the utility allowances in order to remain in compliance with the Brooke Amendment's rent ceiling. See 24 C.F.R. § 965.507. Additionally, to ensure that disabled residents are not denied the benefits of the public housing program and the rent ceilings

(A) 30 per centum of the family's monthly adjusted income;

(B) 10 per centum of the family's monthly income; or

(C) if the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of such payments which is so designated.

imposed by the Brooke Amendment, PHAs are required to provide individual adjustments in the utility allowances to disabled residents whose special needs require them to use special equipment that consumes additional utilities (e.g., an air conditioner or oxygen concentrator might be necessary for someone with breathing difficulties). 24 C.F.R. § 965.508. Pursuant to HUD regulations, PHAs are required to establish criteria and procedures for granting such adjustments. *Id.* Additionally, PHAs must notify all public housing residents of the criteria and procedures, and of their right to receive individual adjustments based on their disability. *Id.*

Defendants have failed to comply with the requirements of the U.S. Housing Act and its supporting regulations regarding adjustments to the utility allowances for disabled public housing residents whose special needs require them to consume utilities in excess of the amounts provided for in the standard utility allowances. At the February 28, 2005 hearing on Plaintiff's Motion for Class Certification in this case, counsel for Defendants conceded that as of the date that this lawsuit was filed, Defendants were not in compliance with the requirements of 24 C.F.R § 965.508. See Separate and Concise Statement of Facts ("SCSF") No. 12. Defendants conceded that rate adjustments for disabled tenants were not in place prior to the filing of the lawsuit. See SCSF No. 13. Prior to the filing of Plaintiffs' complaint, Defendants had not provided residents with any notice

of the availability of adjustments to the utility allowance for disabled residents. See SCSF No. 14. Additionally, Defendants had not made any individual adjustments to the utility allowance for disabled residents whose special needs required them to consume utilities in excess of the amounts provided for in the standard utility allowances See SCSF No. 15. In a review of its records for disabled tenants in public housing, HCDCH identified at least 30 public housing tenants who required the use of an air conditioner because of their disability, but who were not provided with adjustments to their utility allowances. See SCSF No. 16.

On August 18, 2004, this lawsuit was filed seeking declaratory and injunctive relief.² Only after the lawsuit was filed, did Defendants develop a schedule of utility allowance adjustments for disabled residents requiring medically prescribed

² Two related cases have been filed seeking relief for HCDCH's failure to provide adequate utility allowances. *Smith v. Housing and Community Development Corporation of Hawaii*, NO. CV04 00309 DAE KSC, filed on behalf of all public housing tenants who pay their own utilities, seeks equitable relief for HCDCH's failure to adjust utility allowances provided to residents as utility rates increased and relief from the resulting rent overcharges. A companion case, *Smith v. Housing and Community Development Corporation of Hawaii*, Civil No. 04-10069K, was filed in the Third Circuit, seeking reimbursement for the unlawful charges. While those two actions seek relief on behalf of all public housing tenants who pay their own utilities, the present action seeks relief only for a subgroup of those tenants, namely disabled tenants of HCDCH public housing projects in which residents receive utility allowances, whose special needs arising from their disability require them to consume utilities in excess of the amount provided for in the standard public housing utility allowances. Motions for class certification in the related cases have yet to be filed.

equipment. See SCSF No. 17. In December 2004, Defendants purportedly sent current public housing residents notices regarding the availability of adjustments to the utility allowances for disabled residents requiring the use of medically prescribed equipment, though no such notice was provided to individuals no longer residing in public housing. See SCSF No. 18. On March 2, 2005, this court entered an order certifying the class in this action as "disabled persons that currently reside, or have resided within the last two years, in an HCDCH public housing project in which residents receive utility allowances, whose special needs arising from their disability require them to consume utilities in excess of the amount provided for in the standard public housing utility allowances." Order Granting Plaintiff's Motion for Class Certification at 26.

As a result of Defendants' failures to comply with the U.S. Housing Act and its supporting regulations, Defendants have charged such residents rents in excess of those authorized by the Brooke Amendment, denying them the benefits of the public housing program, and thereby violating 42 U.S.C. § 1983 ("Section 1983"), the Fair Housing Act, Section 504 of the Rehabilitation Act ("Section 504"), and the Americans with Disabilities Act ("the ADA").

III. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate 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); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In deciding whether there is a genuine issue of material fact, the court is to view the record in the light most favorable to the party opposing the motion, giving the non-movant the benefit of all favorable inferences that can reasonably be drawn from the record and the benefit of any doubt as to the existence of any genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-59 (1970). To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action. *Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 248.

IV. LEGAL ARGUMENT

A. Defendants Have Violated Plaintiffs' Federal Rights Under 42 U.S.C. § 1983

Count VI states a claim against Defendants for violating Plaintiffs' rights under 42 U.S.C. § 1983. Section 1983 allows private individuals to enforce violations of federal statute by agents of the State. *Maine v. Thidoutot*, 448 U.S. 1 (1980). In *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), the United States Supreme Court

specifically held that public housing residents can maintain a cause of action under § 1983 against state agents who violate Section 1437a of the Housing Act and the Brooke Amendment.

Wright is controlling authority.

As in *Wright*, the Plaintiffs before this Court have been wronged by Defendants' failure to provide them with appropriate utility allowances. Defendants admittedly failed to comply with 24 C.F.R. § 965.508, which required Defendants: (1) to provide adjustments of the utility allowance to disabled residents whose special needs require them to consume excess utilities; (2) to establish criteria and procedures for granting such adjustments; and (3) to provide notice of the criteria and procedures, and of tenants right to receive individual adjustments based on their disability. Defendants have thus violated Plaintiffs' federal rights, and Plaintiffs are entitled to declaratory and injunctive relief under § 1983.

B. Defendants Have Violated Plaintiffs' Federal Rights Under the Housing Act

In Count I, Plaintiffs have a direct cause of action under the Housing Act for Defendants' admitted violations of the Housing Act.

Under *Cort v. Ash*, 422 U.S. 66 (1975), a court must consider four questions to determine whether a private remedy is implicit in a federal statute where not expressly provided: (1) whether the plaintiff is one of the class "for whose especial benefit the statute was enacted", (2) whether "there is any

indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one'", (3) whether it is consistent with the underlying legislative scheme to imply a private right of action, and (4) whether the cause of action is traditionally one relegated to state law.

As to the first question, the U.S. Supreme Court's decision in *Wright* "makes it unmistakable that section 1437a was enacted for the special benefit of precisely the class of plaintiffs before the court in this case, namely, low-income public housing residents." See *Castleman v. United States Dep't of HUD*, 1988 U.S. Dist. LEXIS 10242 (W.D. Mo. 1988) at 9.

As to the second question, *Wright* makes it clear that Congress specifically intended that private individuals bring actions in federal court to enforce their rights under Housing Act section 1437a. *Id.*, 1988 U.S. Dist. LEXIS 10242 at 9-10.

For the third question, "*Wright* instructs that enforcement of section 1437a by HUD as well as by private individuals is consistent with the United States Housing Act, 42 U.S.C. §§ 1401 et seq., taken as a whole, of which section 1437a is a part." *Castleman*, 1988 U.S. Dist. LEXIS 10242 at 10.

As to the final question, tenants meet this factor because the cause of action is not one traditionally relegated to state law. See *Wright*, 479 U.S. at 429.

Based on the authority of *Cort v. Ash* and *Wright* and analysis of *Castleman*, Plaintiffs have a private right of action

under section 1437a of the Housing Act. Defendants have violated Plaintiff's federal rights under this act by failing to (1) provide adjustments of the utility allowance to disabled residents whose special needs require them to consume excess utilities; (2) establish criteria and procedures for granting such adjustments; and (3) provide notice of the criteria and procedures, and of tenants right to receive individual adjustments based on their disability. Plaintiffs are entitled to summary judgment as to Count I and must be granted declaratory and injunctive relief.

C. Defendants Have Violated Plaintiffs' Federal Rights Under Section 504 of the Rehabilitation Act

Count II states a claim against Defendants for violating Plaintiffs' rights under Section 504 of the Rehabilitation Act. Section 504, 29 U.S.C. § 794(a), and the supporting regulations at 24 C.F.R. Part 8 prohibit any program or activity receiving Federal financial assistance from discriminating against an otherwise qualified individual with a disability by denying the benefits of the program or activity, solely by reason of her or his disability.³ Section 504 provides

³ 29 U.S.C. § 794(a) provides in relevant part as follows:

"No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [29 USCS § 705(20)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service."

a private right of action where an individual alleges and proves discrimination based on a handicap. *Doe v. Attorney General of the United States*, 941 F.2d 780, 789 (9th Cir. 1991).

The elements of a cause of action under section 504 are as follows: (1) The plaintiff is a "handicapped person" under the Act; (2) The plaintiff is "otherwise qualified" for participation in the program; (3) The plaintiff is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely by reason of his handicap; and (4) The relevant program or activity is receiving Federal financial assistance. 29 U.S.C. § 794(a); *Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997). It is clear that these elements have all been met.

With regard to the first element of a cause of action under Section 504 because of the way that the class in this action is defined, all persons who fall within the class are disabled by definition and will automatically meet the first requirement that the plaintiffs be "handicapped persons" under

the Act.⁴ See Order Granting Plaintiff's Motion for Class Certification at 26.

The second requirement, that the plaintiffs be "otherwise qualified" for participation in the program, is similarly fulfilled. All class members were qualified to participate in the public housing program and receive the benefits of the rent ceiling of the Brooke Amendment since, by definition, all class members are or were public housing tenants. See Order Granting Plaintiff's Motion for Class Certification at 26.

Plaintiffs fulfill the third element of a Section 504 claim because they were denied the benefits of the U.S. Housing Act and the rent ceiling imposed by the Brooke Amendment solely by reason of their handicap. Except for the members of the plaintiff class, all other public housing tenants in HCDCH projects are, or should be, provided the benefit of rents, including the costs of utilities, set at roughly 30% of their income. 42 U.S.C. § 1437a(a); 24 C.F.R. §§ 965.501-965.508; *Wright*, 479 U.S. 418 (1987). To ensure that disabled tenants are

⁴ The plaintiff class has been certified as "disabled persons that currently reside, or have resided within the last two years, in an HCDCH public housing project in which residents receive utility allowances, whose special needs arising from their disability require them to consume utilities in excess of the amount provided for in the standard public housing utility allowances." Order Granting Plaintiff's Motion for Class Certification at 26. Section 504 of the Rehabilitation Act prohibits discrimination on the basis of "disability." 29 U.S.C. § 794(a).

not deprived of this benefit, HUD requires that PHAs notify residents that they may be entitled to utility allowance adjustments where their disability require them to consume utilities in excess of the amounts provided for in the standard utility allowances. 24 C.F.R. § 965.508. PHAs are further instructed to establish criteria and procedures for granting such adjustments. *Id.* Prior to the filing of this lawsuit, HCDCH was not in compliance with these regulations and had not provided any adjustments to the utility allowances for disabled tenants. See SCSF Nos. 12-13. Defendants have conceded that there were at least 30 public housing tenants that were not provided with the required adjustments to their utility allowances. See SCSF No. 16.

The fourth element of a Section 504 claim, that the relevant program or activity is receiving Federal financial assistance, is also satisfied. Defendants do not dispute that they have entered into a Annual Contributions Contract with HUD to manage and operate the federally subsidized public housing projects at issue. See SCSF Nos. 3 and 4.

Defendants have thus violated Plaintiffs' federal rights, and Plaintiffs are entitled to declaratory and injunctive relief under Section 504 of the Rehabilitation Act.

D. Defendants Have Violated Plaintiffs' Federal Rights Under the Americans with Disabilities Act

Count V states a claim against Defendants for violating Plaintiffs' rights under the Americans with Disabilities Act

("ADA"). The analysis to determine whether a cause of action exists under the ADA is almost identical to a Section 504 analysis. To prove a public program or service violates Title II of the ADA, a plaintiff must show: (1) he is a "qualified individual with a disability"; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability. See 42 U.S.C. § 12132; *Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997).

With regard to the first requirement, that the plaintiff is a qualified individual with a disability; as discussed above, the members of the plaintiff class automatically meet this criteria by falling within the definition of the class. Plaintiffs also fulfill the second requirement as discussed above, because they were denied the benefit of the maximum rent ceiling set forth in the Brooke Amendment of the Housing Act. The third requirement is also met since the discrimination was based solely the disabilities of plaintiff class. Where it not for those disabilities, plaintiffs, like the remainder of tenants in public housing, would or should have been afforded the benefit of the maximum rent ceilings set forth in the Brooke Amendment.

Defendants have thus violated Plaintiffs' federal rights, and Plaintiffs are entitled to declaratory and injunctive relief under the Americans with Disabilities Act.

E. Defendants Have Violated Plaintiffs' Federal Rights Under the Fair Housing Act

Count IV states a claim against Defendants for violating Plaintiffs' rights under the federal Fair Housing Act. The Fair Housing Act makes it unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of...that person." 42 USCS § 3604(f)(2). The requirements of the Fair Housing Act are similar to those of the ADA and Section 504.


As discussed above, it is clear that HCDCH's failure to provide adjustments to the utility allowances for disabled residents and its policy of charging disabled tenants rents in excess of those allowed in the Brooke Amendment discriminates against disabled public housing residents. HCDCH failed to comply with 24 C.F.R. 965.508, which explicitly requires that adjustments to the utility allowance be made for disabled residents whose special needs require them to consume excess utilities. See SCSF No. 12. HCDCH also failed to provide such adjustments for tenants even though they had been provided with information sufficient to indicate that at least 30 tenants would have qualified for adjustments. See SCSF No. 16. HCDCH's act of

failing to provide adjustments to the utility allowance for disabled residents is discriminatory on its face. Defendants have thus violated Plaintiffs' federal rights, and Plaintiffs are entitled to declaratory and injunctive relief under the Fair Housing Act.

V. CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that this Court grant summary judgment as to Counts I, II, IV, V, and VI of the Complaint and (1) declare that Defendants have violated Plaintiffs' rights and (2) enter a permanent injunction requiring Defendants to make appropriate adjustments to the HCDCH utility allowances in accordance with the U.S. Housing Act; 24 C.F.R. § 965.508; Section 504 of the Rehabilitation Act; the Fair Housing Act; and the Americans with Disabilities Act.

DATED: Honolulu, Hawaii, April 8, 2005.



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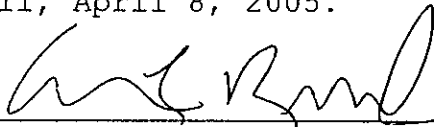
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was duly served upon the following party on this date, by depositing said copy, postage prepaid, first class, in the United States Post Office, at Honolulu, Hawaii, addressed as set forth below:

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DATED: Honolulu, Hawaii, April 8, 2005.



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