IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARA AMONE INDIVIDUALLY, AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED, Plaintiffs, vs. STEPHANIE AVEIRO, IN HER OFFICIAL CAPACITY AS THE EXECUTIVE DIRECTOR OF THE HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAII, ET AL., Defendants.	Civ. No. 04-00508 (ACK/BMK)

ORDER DENYING DEFENDANTS' COUNTER-MOTION FOR SUMMARY JUDGMENT; GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNTS II, IV, V, VI; NOT ADDRESSING COUNT I; AND GRANTING INJUNCTIVE RELIEF

BACKGROUND

I. Factual History

Section 1437a of the United States Housing Act, also known as the Brooke Amendment, requires that shelter costs for tenants residing in federally subsidized public housing projects not exceed 30% of a tenant's income. 42 U.S.C. § 1437a(1) (2004). Where tenants are directly responsible for the payment of utility services, the supporting federal regulations require public housing authorities ("PHAs") who operate public housing programs to provide tenants with an allowance for the reasonable utilities

consumed by an energy-conservative household of modest circumstance. 24 C.F.R. § 965.501 et seq. (2005). Thus, when utility allowances are calculated properly, the shelter costs for tenants who consume a reasonable amount of utilities do not exceed 30% of their income. (Complaint at 1).

Section 504 of the Rehabilitation Act (29 U.S.C. § 794(a) (2004)) and its supporting regulations 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 his or her disability. To ensure that disabled tenants are not deprived of the benefits that they are entitled to under the United States Housing Act, the United States Department of Housing and Urban Development has promulgated regulations requiring PHAs to establish criteria and procedures for granting relief to "elderly, ill, or disabled residents" whose special needs require them to consume utilities in excess of the amounts provided for in the standard utility allowance. 24 C.F.R. § 965.508 (2005). PHAs are required to notify all tenants of the right to receive such relief and the criteria and procedures that will be used to determine whether the tenants are eligible for adjustments. 24 C.F.R. § 965.508.

Plaintiff Mara Amone ("Plaintiff") is a disabled individual who resides in public housing. (Ex. 1 of Pls.' Statement of

Facts in Opp.). As a result of her disability, she uses an oxygen machine for breathing at night, a nebulizer, and an air conditioner. (Ex. 1 of Pls.' Statement of Facts in Opp.). Plaintiff's monthly income is $572 and her monthly rent is $124, but her actual utility bill is as much as $174 monthly. (P.'s Mot. for Class Certification at 6; Complaint at 10). From the time that Plaintiff moved into the apartment where she currently resides until recently, the utility allowance that she received was $41. (P.'s Mot. for Class Certification at 6-7). Because of the insufficiency in the utility allowance that she has been receiving, she has been paying approximately one-half of her income for rent rather than one-third. (P.'s Mot. for Class Certification at 7).

On August 18, 2004, Plaintiff filed her Complaint against Defendants Stephanie Aveiro, in her official capacity as the Director of the Housing and Community Development Corporation of Hawaii ("HCDCH"), and HCDCH. HCDCH is a PHA in Hawaii, which receives federal funds to administer public housing programs across the state. Plaintiff alleges that Defendants failed to comply with the requirements of the United States Housing Act § 1437a(1) and the United States Department of Housing and Urban Development's ("HUD") supporting regulation (24 C.F.R. § 965.508) by (1) failing to provide notice to tenants of public housing informing them that if they were disabled and required increased

utility usage as a result of their disability, they may be entitled to an increase in their utilities allowance; and (2) failing to establish and implement rules and procedures to determine what the increased allowance would be. As a result, Plaintiff alleges that Defendants violated her rights under Section 504 of the Rehabilitation Act (29 U.S.C. § 794(a)), the Americans with Disabilities Act (42 U.S.C. § 12132), the Fair Housing Act (42 U.S.C. § 3604(f)(2)), and 42 U.S.C. § 1983 by failing to provide her with the benefits afforded to non-disabled residents, namely shelter costs that do not exceed 30% of her income. Plaintiff alleged that she is representative of a class of, similarly situated, present and past disabled federal public housing.

On March 2, 2005, the Court issued an Order certifying the class in this action and defining the class 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." At the February 28, 2005 hearing regarding Plaintiff's Motion for Class Certification, counsel for Defendants conceded that as of the August 18, 2004 filing of the Complaint, rate adjustments for disabled tenants were not in

place and Defendants had not made any individual adjustments to the utility allowances for disabled residents whose special needs required them to consume utilities in excess of the amounts provided for in the standard utility allowances. (Pls.' Statement of Facts at ¶¶ 5-8). Prior to the filing of the Complaint, Defendants had also not provided residents with any notice of the availability of adjustments to the utility allowance for disabled residents. (Pls.' Statement of Facts at ¶8).

Plaintiffs provide a Freedom of Information Act Request for information from Plaintiffs' counsel, dated September 30, 2003, to Robert J. Hall ("Hall"), Executive Director of HCDCH. Paragraph (8) requests, "Records from 1997 to present regarding the annual and interim reviews of utility allowances required by 24 C.F.R. § 965.507, indicating: (1) the dates the reviews were conducted; (2) the effect of each review on the utility allowances (i.e. whether the utility allowance increased, decreased, or remained the same); and (3) the basis for the revision or lack of revision to the utility allowances for each review." (Ex. 3 of Pls.' Statement of Facts at ¶8). On November 5, 2003, Hall responded, "HCDCH has not reviewed utility allowances for public housing projects since 1997." (Ex. 4 of Pls.' Statement of Facts at ¶8).

Paragraph (9) requested "Notices of proposed utility allowance and surcharge schedules and revisions thereof given to public housing residents since 1997 as required by 24 C.F.R § 965.502(c)." (Ex. 3 of Pls.' Statement of Facts at ¶9). Hall responded, "No notices were given." (Ex. 4 of Pls.' Statement of Facts at ¶9). Paragraph (10) requested, "Records for each project in the HCDCH inventory since 1997 indicating the criteria and procedures required to be adopted by HCDCH pursuant to 24 C.F.R. § 965.508 for making adjustments in the utility allowance for residents with special needs (e.g. illness, disability, etc.) who use greater than normal amounts of utilities because of their special needs." (Ex. 3 of Pls.' Statement of Facts at ¶10). Hall's response stated, "No adjustments were made." (Ex. 4 of Pls.' Statement of Facts at ¶10).

Paragraph (11) requested, "Notices required by 24 C.F.R. 965.508 given to residents of HCDCH projects since 1997, indicating the criteria and procedures for making adjustments in the utility allowance for residents with special needs." (Ex. 3 of Pls.' Statement of Facts at ¶11). Hall responded, "No adjustments were promulgated." (Ex. 4 of Pls.' Statement of Facts at ¶11). Finally, paragraph (12) requested, "Records indicating the number of residents in HCDCH projects that have received an adjustment in their utility allowance based on special needs since 1997, along with the amounts of such

adjustments." (Ex. 3 of Pls.' Statement of Facts at ¶12). Hall responded, "No adjustments were made." (Ex. 4 of Pls.' Statement of Facts at ¶12).

At the Hearing, Counsel for Defendants would not concede that disabled residents had never received the required notice. Defendants' counsel stated that "if this was a motion for summary judgment, . . .we would have provided testimony from the client and witnesses that . . . we have almost 50 or so managers of our public housing. They are all instructed to give residents, disabled or healthy, the appropriate notices regarding their benefits, entitlements, et cetera. So indeed, if this was a motion for summary judgment, I would present facts to challenge their assertion that residents never received notice." (Ex. 2 of Pls.' Statement of Facts at 20).

Defendants claim that after Plaintiff filed her suit, HCDCH reviewed its records of disabled public housing residents in relation to 24 C.F.R. § 965.508. (Defs.' Mem. in Opp. to Mot. for Class Certification at 6). Based on its review, HCDCH claims that it presently has a listing of 1,388 residents identified in its records as disabled. (Defs.' Mem. in Opp. to Mot. for Class Certification at 6). However, Defendants further claim that not all of the listed disabled residents requested reasonable accommodation for their disability or supplemental accommodation for excess consumption of electricity. (Defs.' Mem. in Opp. to

Mot. for Class Certification at 6). Defendants allege that the records indicate that approximately only 300 of the listed disabled residents requested some form of accommodation and of that number approximately 30 residents are utilizing an air conditioner for their disability in their housing unit, which may entitle them to a supplemental utility allowance. (Defs.' Mem. in Opp. to Mot. for Class Certification at 6).

Defendants argue that since the filing of the Complaint, Defendants have undertaken corrective measures that render Plaintiffs' claims for relief moot. (Defs.' Counter-Motion at 2). Defendants have updated the supplemental utility allowances. (Defs.' Counter-Motion at 2). Defendants prepared a modified notice for individual relief pursuant to 24 C.F.R. § 965.508. (Defs.' Counter-Motion at 3). The notice was reviewed by Plaintiffs' attorney and was included by Defendants in the December 4, 2004 rent notice to all public housing residents. (Defs.' Counter-Motion at 3). Defendants state that only one resident applied, in response to the December 4, 2004 notice, for the supplemental utility allowance. (Defs.' Counter-Motion at 4). Finally, Defendants are in the process of promulgating amendments to HCDCH's administrative rules, which allegedly will comply with 24 C.F.R. §965.508, et seq. (Defs.' Counter-Motion at 4). Defendants state that "[i]t is anticipated that the rules will be formally adopted shortly after the public hearing on the

proposed amendments scheduled for May 23, 2005." (Defs.' Counter-Motion at 4). Moreover, Defendants allege that they are already complying with the provisions of 24 C.F.R. §965.508 even though the amended rules have not been adopted. (Defs.' Counter-Motion at 4). Defendants state that "HCDCH's annual review of the utility rates and allowances will be a matter of record and subject to periodic review of its operations by HUD." (Defs.' Counter-Motion at 4-5).

Plaintiffs do not contest that Defendants have undertaken some corrective measures. However, Plaintiffs argue that corrective measures cannot be effective until the proposed rules are actually adopted, which requires the Governor's signature. (Pls.' Statement of Facts in Opp. at ¶1). Moreover, Plaintiffs argue that Defendants have not demonstrated that they are notifying new residents of the criteria and procedures for obtaining a utility allowance. (Pls.' Statement of Facts in Opp. at ¶1). Plaintiffs also state that the December 4, 2004 notice sent out by HCDCH was in connection with the comment period for the proposed rule change and was not notice of a new rule. (Pls.' Statement of Facts in Opp. at ¶2). Plaintiffs contend the December 4th notice was also defective because it did not provide the entire 30 day notice and comment period required by 24 C.F.R. § 965.502(c).

Plaintiffs dispute Defendants' allegation that they are

already complying with the provisions of 24 C.F.R. §965.508. (Pls.' Statement of Facts in Opp. at ¶4). Plaintiffs state that since January 2005, Plaintiff Amone has requested adjustments on two occasions without response from HCDCH. (Pls.' Statement of Facts in Opp. at ¶4). Plaintiffs provide a copy of a letter dated January 19, 2005, submitted to the project office of Amone's housing development, from Amone's physician, Leo A. Cortez, M.D., regarding her medical conditions and the resulting accommodations that she requires. (Ex. A of Pls.' Statement of Facts in Opp.). Because her utility allowance had not been adjusted, Amone submitted an additional copy of the letter along with a HCDCH Request for Reasonable Accommodations, dated March 21, 2005. (Ex. B of Pls.' Statement of Facts in Opp.). Finally, Plaintiffs contend that Defendants have offered no evidence that any adjustments have been made. (Pls.' Statement of Facts in Opp. at ¶4).[1]

Defendants state that "the facts show clearly that 1) that at the time of the February 28, 2005 hearing on the Plaintiff's Motion for Class Certification, Plaintiff Amone's file contained no documentation of a disability requiring any accommodation; 2)

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[1] At the hearing, Defendants' counsel stated that since the February 28, 2005 hearing, six additional residents requested and have been granted accommodations for their disabilities and appropriate adjustments to their utility allowances have been made. Defendants' counsel further represented that as of May 26th or 27th Plaintiff Amone was also granted an adjustment to her utility allowance.

that Plaintiff's counsel admitted that Amone never responded to the December, 2004 Notice (Transcript of Proceedings Before the Honorable Alan C. Kay, Senior United States District Judge; February 28, 2005, at p. 11) . . ." (Defs.' Reply at 5).

The class now seeks Summary Judgment as to Counts I (Housing Act), II (Rehabilitation Act), IV (Fair Housing Act), V (Americans with Disabilities Act), and VI (Section 1983) of the Complaint and requests that the Court (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.[2]

II. Procedural History

On August 18, 2004, Plaintiff filed her Complaint.[3]

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[2] The Court notes that Plaintiff's Motion for Class Certification indicated that she also sought to establish the right to compensatory damages for the alleged violation of her rights. (P.'s Mot. for Class Certification at 7). However, at the February 28, 2005 hearing, Plaintiff's counsel represented that Plaintiff was not asking the Court to certify a class as to damages, rather the proposed class seeks to establish an entitlement to "adjustments." Class members who currently reside in HCDCH public housing will seek to establish the right to receive an adjustment in their prospective rent while the class members who are no longer residing in public housing will simply request a ruling as to whether they were/are entitled to an adjustment. The past residents will then be required to file their own individual suits to recover any amounts to which they are entitled.

[3] At the February 28, 2005 hearing, counsel disclosed that there is an additional related action pending in this Court before Chief Judge David Alan Ezra (Smith v. Housing and Community Development Corporation of Hawaii, No. CV 04-00309 (DAE/KSC)) as well as an additional related action in the Circuit Court of the

On November 4, 2004, Plaintiff filed a Scheduling Conference Statement.

On November 8, 2004, Defendants filed a Scheduling Conference Statement.

On November 29, 2004, Defendants filed an Answer to Plaintiff's Complaint.

On December 14, 2004, a settlement conference was held but settlement was not reached.

On January 3, 2005, Plaintiff filed her Motion for Class Certification.

On January 7, 2005, Defendants filed an Opposition to Plaintiff's Motion for Class Certification.

On February 14, 2005, Plaintiff filed her Reply to Defendants' Opposition to Plaintiff's Motion for Class Certification.

On February 28, 2005, a hearing was held regarding Plaintiff's Motion for Class Certification and the Court Granted

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Third Judicial Circuit of the State of Hawaii (Smith v. Housing and Community Development Corporation of Hawaii, No. CV 04-10069K). Counsel also represented that the actions pending before Judge Ezra and in the Third Judicial Circuit are based on a larger class action of which the proposed class in this action is a part and that the action in the Third Judicial Circuit is seeking to recover damages. The proposed class in this action is distinguished from the larger class because of the separate causes of action resulting from the class members' status as disabled persons. Plaintiffs' counsel states that "[m]otions for class certification in the related cases have yet to be filed." (Pls.' Mot. for Partial Summ. J. at 5 n.2).

the Motion.

On March 2, 2005, the Court issued an Order Granting Plaintiff's Motion for Class Certification.

On April 8, 2005, Plaintiffs filed a Motion for Partial Summary Judgment.

On May 10, 2005, Defendants filed a Counter-Motion for Summary Judgment and an Opposition to Plaintiffs' Motion for Partial Summary Judgment.

On May 19, 2005, Plaintiffs filed a Reply to Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment and an Opposition to Defendants' Counter-Motion for Summary Judgment.

On May 23, 2005, Defendants filed a Reply to Plaintiffs' Opposition to Defendants' Counter-Motion for Summary Judgment.

On May 31, 2005, a hearing on the parties' motions was held.

STANDARD

The purpose of summary judgment is to identify and dispose of factually unsupported claims and defenses. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Summary judgment is therefore 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 of material fact and that the moving party is entitled to judgment

as a matter of law."[4] Fed. R. Civ. P. 56(c).

"A fact is 'material' when, under the governing substantive law, it could affect the outcome of the case. A genuine issue of material fact arises if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'"[5] Thrifty Oil Co. v. Bank of America Nat'l Trust & Sav. Ass'n, 310 F.3d 1188, 1194 (9th Cir. 2002) (quoting Union School Dist. v. Smith, 15 F.3d 1519, 1523 (9th Cir. 1994)) (internal citations omitted). Conversely, where the evidence "could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 289 (1968)).

The moving party has the burden of persuading the Court as to the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The moving party may do so with affirmative evidence or by "'showing' – that is pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325. All evidence

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[4] Affidavits made on personal knowledge and setting forth facts as would be admissible at trial are evidence. Fed. R. Civ. P. 56(e). Legal memoranda and oral argument are not evidence and do not create issues of fact. See British Airways Bd. v. Boeing Co., 585 F.2d 946, 952 (9th Cir. 1978).

[5] Disputes as to immaterial issues of fact do "not preclude summary judgment." Lynn v. Sheet Metal Workers' Int'l Ass'n, 804 F.2d 1472, 1478 (9th Cir. 1986).

and reasonable inferences drawn therefrom are considered in the light most favorable to the nonmoving party. See, e.g., T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987). The Court's role is not to make credibility assessments. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Accordingly, if "reasonable minds could differ as to the import of the evidence," summary judgment will be denied. Id. at 250-51. Once the moving party satisfies its burden, however, the nonmoving party cannot simply rest on the pleadings or argue that any disagreement or "metaphysical doubt" about a material issue of fact precludes summary judgment. See Celotex, 477 U.S. 322-23; Matsushita Elec., 475 U.S. at 586; California Arch. Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987). Nor will uncorroborated allegations and "self-serving testimony" create a genuine issue of material fact. Villiarmo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002); see also T.W. Elec. Serv., 809 F.2d at 630. The nonmoving party must instead set forth "significant probative evidence tending to support the complaint." T.W. Elec. Serv., 809 F.2d at 630. Summary judgment will thus be granted against a party who fails to demonstrate facts sufficient to establish an element essential to his case when that party will ultimately bear the burden of proof at trial. See Celotex, 477 U.S. at 322.

DISCUSSION

I. Defendants' Counter-Motion for Summary Judgment

Defendants argue that since the filing of the Complaint, Defendants have undertaken corrective measures that render Plaintiffs' claims for relief moot. However, as this Court explained in its March 2, 2005 Order, the United States Supreme Court has established a stringent standard for mootness. See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 189 (2000); U.S. v. W.T. Grant Co., 345 U.S. 629, 633 (1953) (establishing that a case may be moot if the defendant can demonstrate that "there is no reasonable expectation that the wrong will be repeated."); see also NEWBERG AND CONTE, 1 NEWBERG ON CLASS ACTIONS § 2:14 (4th ed. 2002) ("The specific relief sought by a plaintiff may come about by the defendant's voluntary cessation of the challenged conduct, but even when accompanied by assurances of future good conduct, this voluntary action will not render the controversy moot unless the defendant meets a heavy burden to show that its change of heart is permanent and that the defendant will not return to its old ways.").

In Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 174 (2000), environmental groups brought suit, pursuant to the citizen suit provisions of the Clean Water Act, against the holder of a National Pollutant Discharge Elimination System permit. Id. at 173. After the institution of the litigation,

the defendant achieved substantial compliance with the terms of its discharge permit. Id. However, the district court found numerous permit violations and imposed a penalty of $405,800 while denying injunctive relief. Id. The United States Court of Appeals for the Fourth Circuit vacated the decision and held that the case became moot once the defendant fully complied with the terms of its permit. Id. The United States Supreme Court reversed the judgment of the Court of Appeals and held that "[a] defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." Id. at 174. The Court held that the defendant's compliance and later closing of its facility did not moot the case because the prospect of future violations remained a disputed factual matter. Id.

The Court explained that "[i]t is well settled that '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.'" Id. at 189 (quoting City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982)). The Court continued, "If it did, the courts would be compelled to leave the defendant . . . free to return to his old ways." Id. (internal citations and quotation marks omitted). The Court explained that the standard for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: "'A case might become moot if subsequent events made it absolutely clear that

the allegedly wrongful behavior could not reasonably be expected to recur.'" Id. (internal citations omitted). Finally, the Court explained that "the 'heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to occur again lies with the party asserting mootness." Id. (citation omitted).

Here, Defendants argue that since the filing of the Complaint, Defendants have undertaken corrective measures that render Plaintiffs' claims for relief moot. (Defs.' Counter-Motion at 2). Defendants have updated the supplemental utility allowances. (Defs.' Counter-Motion at 2). Defendants prepared a modified notice for individual relief pursuant to 24 C.F.R. § 965.508. (Defs.' Counter-Motion at 3). The notice was reviewed by Plaintiffs' attorney and was included by Defendants in the December 4, 2004 rent notice to all public housing residents. (Defs.' Counter-Motion at 3). Defendants state that only one resident applied, in response to the December 4, 2004 notice, for the supplemental utility allowance. (Defs.' Counter-Motion at 4).

Defendants are also in the process of promulgating amendments to HCDCH's administrative rules, which will allegedly comply with 24 C.F.R. §965.508, et seq. (Defs.' Counter-Motion at 4). Defendants state that "[i]t is anticipated that the rules will be formally adopted shortly after the public hearing on the

proposed amendments scheduled for May 23, 2005." (Defs.' Counter-Motion at 4). Defendants contend that upon the final adoption of the amendments to HCDCH's administrative rules, there is no reasonable likelihood that Defendants failure to annually review the utility rates and allowances will recur. Moreover, Defendants allege that they are already complying with the provisions of 24 C.F.R. §965.508 even though the amended rules have not been adopted. (Defs.' Counter-Motion at 4). Defendants also state that "HCDCH's annual review of the utility rates and allowances will be a matter of record and subject to periodic review of its operations by HUD." (Defs.' Counter-Motion at 4-5).

Plaintiffs do not contest that Defendants have undertaken some corrective measures. However, Plaintiffs argue that corrective measures cannot be effective until the proposed rules are actually adopted, which requires the Governor's signature. (Pls.' Statement of Facts in Opp. at ¶1). Moreover, Plaintiffs argue that Defendants have not demonstrated that they are notifying new residents of the criteria and procedures for obtaining a utility allowance. (Pls.' Statement of Facts in Opp. at ¶1). Plaintiffs also state that the December 4, 2004 notice sent out by HCDCH was in connection with the comment period for the proposed rule change and was not notice of a new rule. (Pls.' Statement of Facts in Opp. at ¶2). Plaintiffs contend the

December 4th notice was also defective because it did not provide the entire 30 day notice and comment period required by 24 C.F.R. § 965.502(c).

Plaintiffs dispute Defendants' allegation that they are already complying with the provisions of 24 C.F.R. §965.508. (Pls.' Statement of Facts in Opp. at ¶4). Plaintiffs state that since January 2005, Plaintiff Amone has requested adjustments on two occasions without response from HCDCH. (Pls.' Statement of Facts in Opp. at ¶4). Plaintiffs provide a copy of a letter dated January 19, 2005, submitted to the project office of Amone's housing development, from Amone's physician, Leo A. Cortez, M.D., regarding her medical conditions and the resulting accommodations that she requires. (Ex. A of Pls.' Statement of Facts in Opp.). Because her utility allowance had not been adjusted, Amone submitted an additional copy of the letter along with a HCDCH Request for Reasonable Accommodations, dated March 21, 2005. (Ex. B of Pls.' Statement of Facts in Opp.). Finally, Plaintiffs contend that Defendants have offered no evidence that any adjustments have been made.[6] (Pls.' Statement of Facts in

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[6] At the hearing, Defendants' counsel stated that since the February 28, 2005 hearing, six additional residents requested and have been granted accommodations for their disabilities and appropriate adjustments to their utility allowances have been made. Defendants' counsel further represented that as of May 26th or 27th Plaintiff Amone was also granted an adjustment to her utility allowance. However, it still appears that the balance of the thirty residents who were identified as requiring an air conditioner have not been given adjustments. Given the status of

Opp. at ¶4). Plaintiffs argue that although the Defendants may be in the process of adopting the required rules, Defendants have not taken the necessary actions to cease their unlawful acts. (Pls.' Reply at 6).

Plaintiffs emphasize the fact that prior to the filing of this suit, Defendants were required by federal statute and U.S. Department of Housing and Urban Development regulations to provide adjusted utility allowances to disabled public housing residents, but they failed to do so. Plaintiffs argue that "Defendants[']' actions to date provide no indication that Defendants will treat [the] yet to be adopted rules any differently from the laws currently in place that Defendants violated. . . ." (Pls.' Reply at 12).

Defendants cite County of Los Angeles v. Davis, 440 U.S. 625 (1979), for the proposition that remedial actions taken during the pendency of litigation may render a plaintiff's case moot. While the Court recognizes the validity of this proposition, the Court finds Davis distinguishable from the case at issue here. In Davis, the United States Supreme Court found that the case had been rendered moot where the defendant had remained in compliance for a period of five years following the issuance of an injunction by the district court. Id. at 632. The Court

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the notification of their rights, it is questionable whether these residents are aware of their rights and/or that they need to apply for an allowance.

concluded that there could be no reasonable expectation that the defendant would use an invalidated civil service examination that had subsequently been replaced and that was only going to be used initially to address a temporary emergency shortage of workers. Id. at 632-33. The Court emphasized the fact that the earlier conditions were unique, no longer present, and unlikely to recur. Id. at 632. The case at hand is distinguishable from Davis because here Defendants have only recently begun to take corrective actions, these actions are not complete, and HCDCH's compliance with the applicable statutes and regulations remains at issue.

Defendants also rely on Troiano v. Supervisor of Elections in Palm Beach County, Florida, 382 F.3d 1276 (11th Cir. 2004). In Troiano, a group of visually impaired voters brought a class action suit against the county elections supervisor, alleging that the county's failure to make available auxiliary audio devices available in voting booths to assist visually impaired voters violated the Americans with Disabilities Act. Id. at 1278. The district court held that the case had been rendered moot because the requested audio components were furnished by the defendant and would be available in all future elections at all precincts. Id. The United States Court of Appeals for the Eleventh Circuit affirmed the district court's ruling that the case had been rendered moot.

The Court finds that Troiano is also distinguishable from the matter at hand because in Troiano it was clear that all the relief sought by the plaintiff class had been obtained and there was no reasonable expectation that the equipment would not be available in the future. Conversely, in the matter at hand, it is not clear that the Defendants are in total compliance with the applicable statutes and regulations. Indeed, Plaintiffs contend that Defendants are still failing to provide utility adjustments when requested and have not shown that they are notifying new residents of the availability of such adjustments.

As the United States Supreme Court noted in Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 190 (2000), "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." The burden is a heavy one and Defendants here have not established that the unlawful conduct alleged by Plaintiffs has been fully addressed nor have they shown that there is no reasonable expectation that such conduct will recur. The Court accordingly DENIES Defendants' Counter-Motion for Summary Judgment.

II. Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs argue that as a result of Defendants' failures to comply with the United States Housing Act and its supporting

regulations, Defendants have charged such residents rents in excess of those authorized by the statute, 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").[7] The class now seeks Summary Judgment as to Counts I (United States Housing Act), II (Rehabilitation Act), IV (Fair Housing Act), V (Americans with Disabilities Act), and VI (Section 1983) of the Complaint and requests that the Court (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.

A. Section 1983

Count VI of the Complaint claims that Defendants violated Plaintiffs' rights under 42 U.S.C. § 1983. Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

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[7] The Court notes that at the May 31, 2005 hearing, Defendants' counsel stated that his clients are not contesting their violation of the applicable statutes or regulations.

shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." The statute creates a cause of action in favor of persons who have been deprived, under color of state law, of rights secured by the Constitution and the laws of the United States. Maine v. Thidoutot, 448 U.S. 1, 4 (1980).

In Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987), the United States Supreme Court held that "nothing in the Housing Act or the Brooke Amendment evidences that Congress intended to preclude . . . [a] § 1983 claim against [a state actor]" and that "the benefits Congress intended to confer on tenants are sufficiently specific and definite to qualify as enforceable rights." Id. at 429, 432. The Court concluded that public housing residents can maintain a cause of action under § 1983 against state agents who violate the rent ceiling imposed by the Brooke Amendment[8] to the Housing Act,

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[8] The Brooke Amendment reads:

§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 chapter . . . the highest of the following amounts, rounded to the nearest dollar:
(A) 30 per centum of the family's monthly adjusted income;

and the Department of Housing and Urban Development's implementing regulations. Id. at 432.

Here Defendants have admitted that they failed to comply with the requirements of the U.S. Housing Act and its supporting regulations. At the February 28, 2005 hearing regarding Plaintiff's Motion for Class Certification, counsel for Defendants conceded that as of the August 18, 2004 filing of the Complaint, rate adjustments for disabled tenants were not in place and Defendants had not made any individual adjustments to the utility allowances for disabled residents whose special needs required them to consume utilities in excess of the amounts provided for in the standard utility allowances. (Pls.' Statement of Facts at ¶¶ 5-8). Prior to the filing of the Complaint, Defendants also had not provided residents with any notice of the availability of adjustments to the utility allowance for disabled residents. (Pls.' Statement of Facts at ¶8).

Plaintiffs provide a Freedom of Information Act Request for information from Plaintiffs' counsel, dated September 30, 2003, to Robert J. Hall ("Hall"), Executive Director of HCDCH.

(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. 42 U.S.C. § 1437a.

Paragraph (8) requests, "Records from 1997 to present regarding the annual and interim reviews of utility allowances required by 24 C.F.R. § 965.507, indicating: (1) the dates the reviews were conducted; (2) the effect of each review on the utility allowances (i.e. whether the utility allowance increased, decreased, or remained the same); and (3) the basis for the revision or lack of revision to the utility allowances for each review." (Ex. 3 of Pls.' Statement of Facts at ¶8). On November 5, 2003, Hall responded, "HCDCH has not reviewed utility allowances for public housing projects since 1997." (Ex. 4 of Pls.' Statement of Facts at ¶8).

Paragraph (9) requested "Notices of proposed utility allowance and surcharge schedules and revisions thereof given to public housing residents since 1997 as required by 24 C.F.R § 965.502(c)." (Ex. 3 of Pls.' Statement of Facts at ¶9). Hall responded, "No notices were given." (Ex. 4 of Pls.' Statement of Facts at ¶9). Paragraph (10) requested, "Records for each project in the HCDCH inventory since 1997 indicating the criteria and procedures required to be adopted by HCDCH pursuant to 24 C.F.R. § 965.508 for making adjustments in the utility allowance for residents with special needs (e.g. illness, disability, etc.) who use greater than normal amounts of utilities because of their special needs." (Ex. 3 of Pls.' Statement of Facts at ¶10). Hall's response stated, "No adjustments were made." (Ex. 4 of

Pls.' Statement of Facts at ¶10).

Paragraph (11) requested, "Notices required by 24 C.F.R. 965.508 given to residents of HCDCH projects since 1997, indicating the criteria and procedures for making adjustments in the utility allowance for residents with special needs." (Ex. 3 of Pls.' Statement of Facts at ¶11). Hall responded, "No adjustments were promulgated." (Ex. 4 of Pls.' Statement of Facts at ¶11). Finally, paragraph (12) requested, "Records indicating the number of residents in HCDCH projects that have received an adjustment in their utility allowance based on special needs since 1997, along with the amounts of such adjustments." (Ex. 3 of Pls.' Statement of Facts at ¶12). Hall responded, "No adjustments were made." (Ex. 4 of Pls.' Statement of Facts at ¶12).

Based on Defendants' admissions and the evidence contained in the record, the Court finds that no material questions of fact exist and that the Defendants violated the Plaintiffs' rights under Section 1437a of the United States Housing Act by depriving them of their statutory right to pay only the prescribed maximum portion of their income as rent. The Court accordingly GRANTS Plaintiffs' Motion for Summary Judgment as to Count VI of the Complaint.

B. United States Housing Act

In Count I of the Complaint, Plaintiffs assert a direct cause of action for violations of the United States Housing Act. Prior to the United States Supreme Court's Decision in Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987), the Circuits were split on the question of whether the United States Housing Act gave rise to a private right of action. See Aujero v. CDA Todco, Inc., 756 F.2d 1374, 1375 (9th Cir. 1985) (stating that it "is unsettled whether the USHA gives rise to a private right of action" and choosing not to reach the question of whether the Housing Act gave rise to an implied right of action). Because the United States Supreme Court held that public housing residents can maintain a cause of action under § 1983 against state agents who violate the rent ceiling imposed by the Housing Act and the Department of Housing and Urban Development's implementing regulations (Wright, 479 U.S. at 432), the Court need not address whether a direct cause of action can be implied from the United States Housing Act in order to grant Plaintiffs' requested relief.[9] The Court granted summary judgment in favor of Plaintiffs as to their § 1983 action for violation of their rights under the United States Housing Act and thus the relief requested in Count I (direct cause of action) has

[9] The Court notes that the declaratory and injunctive relief requested by the Plaintiffs under their section 1983 claim and their claim directly under the Housing Act is identical.

already been granted. The Court will not reach the merits of Count I because it has already found HCDCH liable to Plaintiffs on their § 1983 claim.

C. Section 504 of the Rehabilitation Act

In Count II of the Complaint, Plaintiffs allege that Defendants violated Section 504 of the Rehabilitation Act. Section 504, 29 U.S.C. § 794, provides that "[n]o otherwise qualified individual with a disability . . . 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. . . ." Thus, to maintain an action under Section 504, Plaintiffs must show: (1) they are individuals with disabilities; (2) they are otherwise qualified to receive the benefit; (3) they were denied the benefits of the program solely by reason of their disabilities; and (4) the program receives federal financial assistance. Weinreich v. Los Angeles County Metro. Transp. Auth., 114 F.3d 976, 978 (9th Cir. 1997).

Here several of the elements are satisfied by virtue of the class definition: 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. Thus, the first element is necessarily met because the class only includes disabled individuals. The second element is similarly satisfied because all members of the class are or would have been qualified to receive the benefits of the rent ceiling provided by Section 1437a of the United States Housing Act.

The third element is satisfied because Plaintiffs were denied the benefits of the 30% cap on their rents, provided by Section 1437a of the United States Housing Act, solely by reason of their disabilities because they were neither notified of the availability of adjustments nor granted adjustments to their utility allowances for the cost of excess utility usage resulting from their individual disabilities. Finally, Defendants do not dispute the fact that they entered into an Annual Contributions Contract with HUD to manage and operate the federally subsidized public housing projects at issue. (Pls.' Statement of Facts ¶4).

Based on Defendants' admissions and the evidence contained in the record, the Court finds that no material questions of fact exist and that the Defendants violated Section 504 of the Rehabilitation Act by denying Plaintiffs the benefit of the statutory rent cap provided by, Section 1437a of the United States Housing Act. The Court accordingly GRANTS Plaintiffs' Motion for Summary Judgment as to Count II of the Complaint.

D. Americans with Disabilities Act

In Count V of the Complaint, Plaintiffs allege that Defendants violated the Americans with Disabilities Act ("ADA"). Title II of the ADA, 42 U.S.C. § 12132, provides: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." Title II of the ADA was expressly modeled after Section 504 of the Rehabilitation Act. Weinreich v. Los Angeles County Metro. Transp. Auth., 114 F.3d 976, 978 (9th Cir. 1997).

To prove that 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. Id.

As above, several of the elements are satisfied by virtue of the class definition: 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. Thus, pursuant to the class description each class member is a qualified individual with a disability. Similarly, HCDCH has denied each class member the benefits of the Housing Act's statutory rent cap. Finally, the third element is satisfied because the utility allowances at issue are provided to assist residents' with special needs resulting from their disabilities.

Based on Defendants' admissions and the evidence contained in the record, the Court finds that no material questions of fact exist and that the Defendants violated Section 504 of the Rehabilitation Act by denying Plaintiffs the benefit of the statutory rent cap provided by, Section 1437a of the United States Housing Act. The Court accordingly GRANTS Plaintiffs' Motion for Summary Judgment as to Count II of the Complaint.

E. Fair Housing Act

In Count IV of the Complaint, Plaintiffs allege that Defendants violated the Fair Housing Act ("FHA"). 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 U.S.C. § 3604(f)(2).

The United States Court of Appeals for the Ninth Circuit applies Title VII discrimination analysis in examining FHA

discrimination claims. Gamble v. City of Escondido, 104 F.3d 300, 304 (9th Cir. 1997). Thus, a plaintiff can establish an FHA discrimination claim under a theory of disparate treatment or disparate impact. Id. at 304-05. A plaintiff may also sue under section 3604(f)(3)(B) of the Fair Housing Act based on "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." Id. at 305 (quoting 42 U.S.C. § 3604(f)(3)(B)).

Here Plaintiffs do not explicitly address the theory under which they wish to recover. Plaintiffs do, however, argue that "HCDCH's act of failing to provide adjustments to the utility allowance for disabled residents is discriminatory on its face." (Pls.' Mot. for Partial Summ. J. at 16). This argument suggests that Plaintiffs are advancing a disparate treatment claim. However, "[p]roof of discriminatory motive is crucial to a disparate treatment claim." Id. at 305. Here Plaintiffs have not alleged that HCDCH's actions were based on discriminatory motive and thus such a claim would fail. However, "[d]emonstration of discriminatory intent is not required under disparate impact theory." Id. at 306.

To establish a FHA claim under a disparate impact theory, Plaintiffs must establish: (1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or

disproportionate impact on persons of a particular type produced by Defendants' facially neutral acts or practices. Id. Finally, Plaintiffs must "prove the discriminatory impact at issue; raising an inference of discriminatory impact is insufficient." Id. (internal citations and quotation marks omitted).

Here HCDCH's failure to provide adjustments to the utility allowances for disabled residents resulted in HCDCH charging disabled tenants rents in excess of those provided for by the United States Housing Act. This clearly has a disproportionate impact on disabled residents because only disabled residents, 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 allowance, are eligible for the allowance at issue here. The Court finds that no material questions of fact exist and that the Defendants violated Plaintiffs' rights under the Fair Housing Act. The Court accordingly GRANTS Plaintiffs' Motion for Summary Judgment as to Count IV of the Complaint.

F. Injunctive Relief

The United States Court of Appeals for the Ninth Circuit has held that a permanent injunction will be granted when liability has been established and there is a threat of continuing violations. MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 517 (9th Cir. 1993). Here liability has been established

under Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, the Fair Housing Act, and through section 1983 for violations of the United States Housing Act. The Court further finds that there is a threat of continuing violations because appropriate regulations have not yet been adopted and Defendants have not provided sufficient proof[10] that allowances are being provided when appropriate or that new residents are being informed of the availability of utility allowances. The Court accordingly GRANTS Plaintiffs' requested injunctive relief.

Conclusion

The Court DENIES Defendants' Counter-Motion for Summary Judgment because Defendants have not established that the unlawful conduct alleged by Plaintiffs has been fully addressed nor have they shown that there is no reasonable expectation that such conduct will recur.

Based on Defendants' admissions and the evidence contained in the record, the Court finds that no material questions of fact exist and that Plaintiffs have established Defendants' liability under Section 504 of the Rehabilitation Act, the Americans with

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[10] As noted above, while Defendants' counsel represented at the May 31, 2005 hearing that Plaintiff Amone and six others have now been granted adjustments to their utility allowances, it still appears that the balance of the thirty residents who were identified as requiring an air conditioner have not been given adjustments. Given the status of the notification of their rights, it is questionable whether these residents are aware of their rights and/or that they need to apply for an allowance.

Disabilities Act, the Fair Housing Act, and through section 1983 for violations of the United States Housing Act. The Court accordingly GRANTS Plaintiffs' Motion for Summary Judgment as to Counts II, IV, V, and VI of the Complaint. The Court will not reach the merits of Count I because it has already found HCDCH liable to Plaintiffs for their violation of the Housing Act under Plaintiffs' § 1983 claim.

Finally, the Court GRANTS Plaintiffs' requested injunctive relief because liability has been established under Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, the Fair Housing Act, and through section 1983 for violations of the United States Housing Act and because there is a threat of continuing violations. The Court accordingly Orders Defendants to make appropriate adjustments to the HCDCH utility allowances for those residents 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 in accordance with the United States Housing Act

and its supporting regulations.[11]

IT IS SO ORDERED.

DATED: MAY 31 2005, Honolulu, Hawaii.

UNITED STATES DISTRICT JUDGE

Order Denying Defendants' Counter-Motion for Summary Judgment; Granting Plaintiffs' Motion for Partial Summary Judgment as to Counts II, IV, V, VI; Not Addressing Count I; and Granting Injunctive Relief: MARA AMONE INDIVIDUALLY, AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED v. STEPHANIE AVEIRO, IN HER OFFICIAL CAPACITY AS THE EXECUTIVE DIRECTOR OF THE HOUSING AND COMMUNITY DEVELOPMENT CORPORATION OF HAWAII, ET AL., Civ. No. 04-00508 (ACK/BMK).

[11] The Court requests Plaintiff to prepare a form of injunction and submit it to the Court within 10 calendar days of the filing of this Order. The Court will entertain a motion to dissolve the injunction when Defendants are in full compliance with this Order.