

The Authority

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ADMINISTRATIVE REVIEW

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ADMINISTRATIVE ACTION, Arbitrary and capricious, Failure to follow regulations; ADMINISTRATIVE REVIEW, Termination of benefits; FAIR HOUSING, Section 8; SECTION 8, Discrimination, Termination of benefits

Section 8 voucher recipient, Elizabeth Anderson (Tenant), appealed the Lowell Housing Authority's (Housing Authority) decision to terminate the Tenant's Section 8 assistance after denying a reasonable accommodation for a mental illness. After moving into her apartment, the Tenant began dating her landlord, Brian Wenckus (Landlord), off and on for approximately six years. A year after the dating relationship ended, the Landlord asked to stay at the Tenant's apartment temporarily. Concerned about the Housing Authority's two-week limit on a guest's stay, the Tenant asked the Landlord to move out multiple times, to no avail. Six months after he moved in, the Landlord became physically abusive and the Tenant obtained a restraining order against him. The next month, the Housing Authority informed the Tenant that the Landlord filed a complaint claiming the Tenant failed to pay her rent. Upon investigation, the Housing Authority found that the Tenant violated the conditions of her housing subsidy by allowing the Landlord to stay beyond two weeks, and terminated the Tenant's housing subsidy. The Tenant requested a hearing, conducted by Mary Maciejewski (Hearing Officer). During the hearing, the Tenant presented evidence that she suffered from Post-Traumatic Stress Disorder (PTSD) due to past domestic abuse, and asked that her voucher not be terminated because she could not get the Landlord to leave. After the hearing, the Tenant's counsel sent a request for reasonable accommodation with supporting documentation of the Recipient's

mental illness to the Housing Authority. The Hearing Officer conducted a post-hearing evaluation of the documents in addition to re-considering the testimony and evidence presented during the hearing. By written decision the Hearing Officer terminated the Tenant's Section 8 benefits, finding that the Tenant failed to show that PTSD was a factor in failing to remove her Landlord. The Tenant then sued in state court, making seven claims against the Housing Authority, Hearing Officer and the Executive Director. The Tenant's first five claims under § 1983 alleged inadequate pre-hearing notice, lack of an impartial hearing officer, failure to call a first-hand witness at the hearing, inadequate decision, and an arbitrary and capricious decision by the Hearing Officer. The Tenant's final claims arose under the FHA and alleged discrimination on the basis of a disability and failure to make a reasonable accommodation. The Housing Authority removed the case to federal court and moved for summary judgment.

The trial court granted summary judgment in favor of the Housing Authority on six of the claims yet granted summary judgment in favor of the Tenant on one claim. The court based its decision regarding the first five claims on the hearing due process rights established by Supreme Court precedent and codified in the United States Housing Act. The court granted summary judgment on the fourth count *sua sponte* in favor of the Tenant. The court ruled that the hearing decision was inadequate, noting that while HUD regulations do not require a full opinion or formal findings of fact, the Hearing Officer's decision letter specifically referenced evidence presented after the hearing. The Tenant did not have an opportunity to respond to the post-hearing evidence. All other counts were in favor of the Housing Authority. Discussing the First count, the court ruled that the pre-hearing notice was adequate because it recited the obligation the Tenant allegedly violated, it stated the relevant allegations, and there was no due process requirement that each source of evidence to be presented at the hearing had to be listed in the notice.

On Tenant's second claim, the court found that there was no actual bias or personal animosity on the part of the Hearing Officer, and granted summary judgment on this claim in favor of the Housing Authority. The Tenant's third claim arose from the failure of the Hearing Officer to call a firsthand witness during the Hearing, which in turn forced the Tenant to testify against herself. The court dismissed this claim finding that Recipient had an opportunity to call witnesses and chose not to. Fourth, the court ruled that the hearing decision was inadequate, noting that while HUD regulations do not require a full opinion or formal findings of fact, the Hearing Officer's decision letter specifically referenced evidence presented after the hearing. Because the Tenant did not have an opportunity to respond to the post-hearing evidence, the court granted summary judgment on the fourth count *sua sponte* in favor of the Tenant. The Court rejected the Tenant's arbitrary and capricious and disability discrimination claims as without merit and granted summary judgment in favor of the Housing Authority. Finally the court remanded the case back to the Housing Authority for a hearing with a new hearing officer, if the Housing Authority decided to pursue termination of benefits.

ATTORNEY'S FEES

Gurman, et al. v. Metro Hous. & Redevelopment Auth., et al., 11-CV-0228 PJS/JJG, 2012 U.S. Dist. LEXIS 110256 (D. Minn. Aug. 7, 2012).

ATTORNEY'S FEES, Amount of award, Rule 11; CIVIL PROCEDURE, Pleading; SECTION 8, General

Mikhail Gurman, on behalf of himself and several similarly situated Section 8 recipients (Recipients), sued the Metro Housing and Redevelopment Authority, four of its employees and its Board (collectively, Housing Authority), its law firm Landrum and Dobbins, LLC including individual attorney Mary Dobbins (Authority Counsel), and the Carver County Community Development Agency including one employee (Community Development Agency) over suspension and reduction of Section 8 benefits. Although the court ultimately noted several straight-

forward, viable due process and defamation claims arising out of the reduction and suspension of Section 8 subsidies, the Recipients' attorneys filed an initial 59-page complaint and ultimately amended the complaint to include 938 separate claims. The court admonished the Recipients' attorneys for filing a complaint that violated Rule 11 of the Federal Rules of Civil Procedure, but permitted the Recipients to file an amended complaint to eliminate the plainly meritless claims. Despite the warning from the court, the Recipients submitted an amended complaint that still contained 634 separate claims, many of them frivolous. The Housing Authority moved to dismiss for failure to state a claim. Additionally, although the amended complaint dropped all claims against the Authority Counsel, the Authority Counsel filed a motion for sanctions against the Recipients' attorneys. Due to the length of the complaint, the court ordered the parties to an early settlement conference. Additionally, the court issued an order for the Recipients' attorneys to show cause as to why they should not be sanctioned under Rule 11. The parties ultimately settled the case and the court dismissed the lawsuit with prejudice. The court then addressed the three outstanding motions: the court's show-cause order, the Authority Counsel's motion for sanctions, and the Recipients' motion for attorney's fees.

The court sanctioned the Recipients' attorneys pursuant to both the court's show-cause order and the Authority Counsel's motion. Applying the Rule 11 requirement that an attorney certify that the arguments made have merit and that a reasonable attorney would believe the arguments to have merit, the court determined that the Recipients' attorneys violated Rule 11 because many of the Recipients' claims filed in the complaint were not plausible and others were frivolous. Additionally, the court concluded that the sanctioned party could be forced to pay the opposing parties' attorney's fees and awarded the Authority's Counsel \$15,000 in attorney's fees. Regarding the Recipients' motion for attorney's fees, the court noted that the parties previously agreed to limit the attorney's fees to work done on the due process claims, capped at \$50,000. The Housing Authority argued that, since the Recipients' attorneys were sanctioned due to their frivolous claims, they should be barred from collecting any attorney's fees. The court rejected this argument, finding that the

Recipients did prevail on some claims. Although the court had difficulty determining the exact costs and fees excluding the work done related to the multiple frivolous claims, the court awarded \$30,000 in attorney's fees and costs to the Recipients based on reasonable fees awarded to plaintiffs in similar due process suits settled prior to substantial discovery.

BANKRUPTCY

In re 51-53 W. 129th St. HDFC, Inc., 12-10502, LEXIS 3297 (Bankr. S.D.N.Y. 2012).

BANKRUPTCY, Automatic stay

51-53 West 129th Street Housing Development Fund Corporation, Inc. (Debtor) petitioned for bankruptcy. The Debtor is a Housing Development Finance Corporation (HDFC), a corporation created for the express purpose of providing low-income housing at the property located at 51-53 West 129th Street, New York, New York (Property). HDFCs are organized and incorporated pursuant to Article XI of the New York Private Housing Finance Law (PHFL), and the City of New York (City) oversees the maintenance and transfer of properties owned by HDFCs in order to preserve affordable and low-income housing. If an HDFC does not maintain its property, the City provides the necessary services to tenants. When the City forecloses on an HDFC-owned property, it transfers the property to another not-for-profit corporation so that the building can continue to provide affordable housing. The Debtor purchased the Property from the City pursuant to the requirements of the PHFL and the New York Not-for-Profit Corporation Law (NFPC). The deed conveying the property required the Debtor to follow local rules and regulations, including those involving the transfer of property of HDFCs. The Debtor was behind in paying its real property taxes and water and sewer bills, reportedly owing over \$800,000. On February 15, 2011, the City obtained a judgment of foreclosure on the Debtor's Property. In that same month, the Debtor also sought court approval to sell the Property for \$1.5 million to a purchaser with whom it had entered into a contract in June 2010, but both the district court and the appellate court denied the Debtor's Proposed Sale. Before the City could transfer

the Property, the Debtor filed its Chapter 11 Bankruptcy Petition (Petition), resulting in an automatic stay that prevented the City from transferring the foreclosed Property. The City moved to dismiss the Debtor's Petition, or in the alternative, to vacate the automatic stay.

The bankruptcy court granted the City's motion to lift the stay, but declined to dismiss the case until the Property had been transferred. The court found that state law did not allow the Debtor's proposed sale because the NCPL required the Debtor to obtain court approval to sell HDFC property. The bankruptcy court stated that it did not have the power to review the decisions of the district and appellate courts. The court granted the City's motion to lift the stay in order to protect the City's tax liens, because the Debtor lacked the ability to pay off the liens. The City was also entitled to stay relief because of the provision in the deed that applied city laws and regulations to the Property.

CIVIL PROCEDURE

Brandon v. Cox, 284 Va. 251; 2012 Va. LEXIS 179 (Va. June 7, 2012).

CIVIL PROCEDURE, Appellate review, Record on appeal; LEASES, Termination; SECTION 8, General

Torri Brandon (Participant), a Section 8 participant, appealed a lower court judgment in favor of Richard Cox and Horner & Newell, Inc. (Landlord) after the Landlord kept the Participant's security deposit after the Participant had to terminate her lease prematurely. The Landlord agreed to terminate the Participant's lease and notified her in writing that she did not have an outstanding balance; however, the Landlord retained the Participant's security deposit of \$995.00 in order to satisfy an alleged rent obligation of the Housing Authority. The Participant initiated a lawsuit against the Landlord for the return of her security deposit, and the trial court ruled in favor of the Landlord. Approximately one week later, the Participant filed a motion for reconsideration and a supporting memorandum and, several weeks later, the Participant

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filed an appeal. The Participant also filed a proposed written statement of facts, which did not mention the motion for reconsideration or state that the Participant ever raised the argument at the trial or that the judge ruled on the argument. The court of appeals affirmed the lower court ruling and the Participant appealed again.

The appellate court affirmed the trial court ruling on the grounds that the Participant failed to preserve her argument for appeal during the trial court hearing and therefore waived the argument. The court reasoned that the purpose of the statute that required the Participant to preserve her argument during trial was to provide the trial court judge with an opportunity to rule intelligently on the alleged error and to provide the appellate court with the same record that the trial court relied on. The court found that the Participant's statement of facts did not establish that the Participant provided this opportunity to the trial court. Additionally, the court found that the Participant had a second opportunity to preserve her argument when she filed her written motion for reconsideration, but she failed to do so. As a result, the Participant did not establish a basis for review by the appellate court. The court also declined to hear the Participant's appeal under a permissible statutory exception because the record did not indicate the type of grave injustice that is often associated with this exception, such as the absence of a required element, a conviction based on a void sentence, or a capital murder conviction based on insufficient evidence. The majority of the court rejected a dissenting judge's conclusion that the case fell within the scope of an exception because the Participant was a low-income Section 8 participant, and it would therefore be a grave injustice to allow the Landlord to withhold the Participant's security deposit in the absence of a legal or contractual entitlement.

CLASS ACTION

Thompson v. Altoona Hous. Auth., 3:10-CV-312, 2012 U.S. Dist. LEXIS 108975 (W.D. Pa. Aug. 3, 2012).

CLASS ACTION, Adequate representation, Class representation, Common questions,

Numerosity, Termination of tenancy; PUBLIC HOUSING, Eligibility determinations, Eviction

Section 8 voucher recipients Ashley Thompson, Deborah Stills, and David Stills (Recipients) filed a motion for class certification, after having initially filed in their own right challenging certain termination practices of the Altoona Housing Authority (Housing Authority), as violations of due process and other civil rights. The Housing Authority opposed the certification on the grounds that the proposed class did not meet the requirements for certification under the law.

The court determined that the Recipients' proposed class met the five requirements for class certification and, accordingly, certified the class. First, the court found that the proposed class met the standard for numerosity. At the time of the decision, the Recipients were able to identify thirty-three households that had their benefits terminated by the Housing Authority. The court noted that the class also included hundreds of past and future individuals faced with potential termination that made simple joinder impractical. The court rejected the Housing Authority's argument that the thirty-three identified were the only group that should be counted toward numerosity, and held that, combined, the two groups composing the proposed class satisfied the numerosity requirement. Second, the court found that there were questions of law that were common to the proposed class and thus the commonality requirement was satisfied. In this case, all members of the class were allegedly harmed by the Housing Authority's policies. Thus, there was no question that the Recipients' proposed class met the typicality standard. Third, the court found that the claims of the named representatives in the Recipients' proposed class were typical of those in the class because the Housing Authority's termination proceedings allegedly injured the Recipients. The court held that the Recipients, therefore, typified the proposed class and the requirement was met. Fourth, the court found that the Recipients, as the named parties in the proposed class, would fairly and adequately protect the interest of the class as a whole. The Court noted that the Recipients and proposed class had similar socio-economic backgrounds. Then, looking to the relevant case law, the court found that the Recipients met the two requirements for adequacy

because the Recipients had retained qualified counsel and because the interests of the Recipients aligned with the interests of the rest of the proposed class. Finally, the court found that a class action was the appropriate vehicle for pursuing the Recipients' allegations. The court found that, since the alleged termination practices affected all members of the potential class equally, the outcome of the case would affect all member of the class. Concluding that the Recipients' proposed class satisfied the legal requirements for a class action, the court certified the class.

CONTRACT

Cathedral Square Partners Ltd. P'ship, et al. v. S. Dakota Hous. Dev. Auth., CIV 07-4001, 2012 U.S. Dist., LEXIS 87293 (D.S.D. June 22, 2012).

CIVIL PROCEDURE, Third party complaint; CONTRACT, Dispute, Rent increase; FAIR HOUSING, Housing authority; U.S. DEP'T OF HUD, Housing assistance payments, Sovereign immunity

Cathedral Square Partners, West Park Ltd., 46th Street Partners LP, and Riverview Park Ltd., Section 8 landlords (Landlords), sued the South Dakota Housing Authority (Housing Authority) claiming the Housing Authority breached their Housing Assistance Payment contracts (HAP contract) by shifting the burden of proof for annual rent increases to the Landlords. The court granted summary judgment for all Landlords except West Park, whose HAP contract was materially different from the other Landlords. The text of West Park's HAP contract failed to provide for automatic annual rent increases and instead required West Park to submit a formal request with the Housing Authority for each increase. Additionally, each rent increase request required a rent comparability study paid for by West Park. West Park argued that it was futile to request an increase since the Housing Authority denied the request every year and the studies were cost-prohibitive. The court found that the Housing Authority had issued one rent increase over the fifteen years, and thus, the court held that West Park was not entitled to summary judgment. Also, during the initial case, the Housing Authority attempted to file a third-party complaint

against HUD for breach of contract; however, the court held that the "sue-and-be-sued clause" in the United States Housing Act only allowed HUD to be sued for certain offenses. Finding the Housing Authority's breach of contract claim was outside the scope of suable offences, it dismissed the complaint on the grounds of sovereign immunity. West Park moved for reconsideration and submitted a notice of supplemental authorities that West Park argued materially changed the law related to its contract. West Park also explained that the one rent increase granted by the Housing Authority was budget-based and not a substitute for the annual rent increase using automatic adjustment factors. The Housing Authority also moved for reconsideration of the grant of HUD's motion to dismiss the third-party complaint, based on HUD's concession in another case that the sue-and-be-sued clause did waive sovereign immunity with respect to third-party claims. The parties submitted a joint motion for prospective relief to avoid re-litigation of the issues based on the breach of contract rulings regarding the other Landlords.

The court granted both motions to reconsider, vacated the summary judgment against West Park, and allowed the Housing Authority to proceed with its complaint against HUD. Citing the supplemental authority provided by West Park, the court found that a genuine issue of material fact was now at issue. Regarding the dismissal of the Housing Authority's third-party complaint, the court considered HUD's statements in *Greenleaf L.P. v. Illinois Hous. Dev. Auth.*, 2010 WL 3894126 (N.D.Ill.2010), that sovereign immunity is waived for third-party breach of contract actions. After looking to the case law, the court deferred to the Agency's interpretation in the *Greenleaf* case. The court concluded that the new evidence was enough to grant the motion for reconsideration and allowed the Housing Authority to move forward with its claim against HUD. The court denied the joint motion for prospective relief without prejudice because the parties did not request it in the original pleadings, and the court held that the *res judicata* effect of the prior judgment could satisfy dispute over the breach of contract claims without providing prospective relief.

In the Matter of Coyle v. Rhea, 2012 N.Y. Misc. LEXIS 3998, 2012 NY Slip Op 32176U (N.Y. Sup. Ct. Aug. 13, 2012).

CIVIL PROCEDURE, Dismissal; CONTRACT, Breach, Consequential damages, Damages, Dispute; RECEIVERSHIP, General

Lorraine Coyle, the court-appointed receiver of rent for multiple properties under foreclosure (Receiver), sued John Rhea in his capacity as the chair of the New York City Housing Authority (Housing Authority) for \$244,171 in unpaid rent subsidies owed on several properties. The properties in question were comprised of Section 8 subsidized units, where a large portion of the rent was paid directly by the Housing Authority to the landlord. To receive those payments, the Receiver was required to abide by the terms of the Housing Assistance Payments contract. In particular, the Receiver was required to maintain the properties in accordance with housing quality standards. Any complaints about the housing quality standards from the residents were lodged with the Housing Authority, which was then supposed to notify the Receiver. Failure to correct the problem within twenty days could result in the suspension of payments from the Housing Authority to the Receiver until the problem was fixed. The Receiver promptly notified the Housing Authority of her receivership appointment. Additionally, she requested all payments be made to her. For ten months, the Housing Authority continued to send all money to the original owner despite acknowledging receipt of the notice. All the money sent to the original owner was forwarded to the Receiver. Additionally, all housing quality violation notices continued to be sent to the original owner. In December 2010, the Housing Authority stopped making payments, apparently due to questions as to the rightful landlord. In response, the Receiver again sent documents proving her appointment. In addition, the Receiver requested all the housing quality violation notices sent over the past months and she immediately took steps to fix the problems. Despite the communication, the Housing Authority continued to withhold payment until June of 2011, with the arbitrary exception of payment for a single apartment made during one month. After the Receiver filed her complaint, the Housing Authority immediately paid \$203,027, but withheld the remaining

\$41,144 due to housing quality standards violations. The Receiver continued the suit to recover the remaining sum.

The court found that the Receiver was entitled to immediate payment of the remaining \$41,134.85. The Receiver argued that the Housing Authority could not withhold payment since she was never made aware of the housing quality violations, and thus had no opportunity to rectify the issues. This lack of knowledge was due to the fact that the Housing Authority persisted in sending the notices to the original owner. The court found that the Housing Authority was notified on several occasions of the change in management from the original owner to the Receiver. Thus, the court determined that the Housing Authority had ample communication of the correct location to send the notices. Furthermore, the court established that beginning in March of 2012 the subsidies were once again being paid in full. For this reason, the court determined all of the aforementioned housing quality violations were rectified. As the Receiver had no actual notice of the violations and took steps to rectify the issues as soon as possible, the court found that she was entitled to payment of the outstanding balance.

NRP Holdings LLC v. City of Buffalo, 11-CV-472S, 2012 LEXIS 97027 (W.D.N.Y. July 12, 2012).

CONTRACT, Dispute, Promissory estoppel; DUE PROCESS, Protected interest; EQUAL PROTECTION, General; RICO, General

NRP Holdings LLC and NRP Properties LLC (collectively, Developers) sued the City of Buffalo and several city employees (collectively, the City) under state contract and tort law, the Racketeer Influenced and Corrupt Organizations Act (RICO), and the United States Constitution, after the City ended its involvement with the subsidized housing development project it was working on with the Developers. The Developers alleged that the City's mayor attempted to force them to give a service contract to a specific organization, and when they chose to give the service contract to another organization, the City ended the project. The Developers alleged that they had a

contract with the City to work together to construct affordable single-family homes within City limits, as evidenced by a letter from the Executive Director of the City's Office of Strategic Planning (Director). The City denied that the letter created a contract with the Developers. The City moved to dismiss the complaint, arguing that there was no contract between the parties, no racketeering activity or pattern thereof, and no constitutional violations. The Developers moved to strike the City's reply.

The court granted the City's motion to dismiss in part, denied the City's motion to dismiss in part, and denied, as moot, the Developers' motion to strike the City's reply. On the contract claim, the court agreed with the City that no legal contract existed between the City and the Developers, finding that the Director's letter did not indicate intent to be bound or to negotiate in good faith to a final contract, but merely showed support for tax credits for the project. However, the court next found that the Developers had adequately pled the elements of promissory estoppel, finding that it was plausible that the Director could have the necessary authority to engage in contract negotiations, especially since he also held a position in the urban renewal agency charged with such authority, and thus denied the City's motion to dismiss the Developers' promissory estoppel claim. The court then dismissed the Developers' claim of tortious interference with contract because of its previous conclusion that the letter did not constitute a valid contract, and furthermore, because this tort occurs when a defendant interferes with a plaintiff's business relations with a third party, facts not alleged here. Next, the court denied the City's motion to dismiss the Developers' RICO claim, finding that the Developers had sufficiently alleged that the City used its power to extort the value of its preferred contractor's services and that there was a pattern of such extortion in the City's conduct regarding other projects. The court granted the City's motion to dismiss the Developers' Due Process claim because the Developers' interest in being awarded the project was merely a contract right and not a property interest. Finally, the court dismissed the Developers' claim that the City deprived it of Equal Protection by intentionally treating the Developers differently from other developers similarly situated without a rational basis. The court extended to government-contractor relationships the recent

Supreme Court decision eliminating "class of one" Equal Protection claims against a government for discretionary decisions in government employment cases, and found that the City's decision not to hire the Developers was a discretionary employment act.

Zheng v. City of New York, 2012 NY Slip Op 5091, 19 N.Y.3d 556, 973 N.E.2d 711, 950 N.Y.S.2d 301, 2012 N.Y. LEXIS 1783 (N.Y. June 26, 2012).

CIVIL PROCEDURE, Stay of proceedings; CLASS ACTION, Scope of review; CONTRACT, Consideration, Dispute, Enforcement; FEDERAL SUBSIDY, General

Jasmine Zheng, as the named member of a class action suit (collectively, Tenants), appealed an appellate court decision affirming the dismissal of the Tenants' claim in favor of the City of New York, the New York City Department of Homeless Services, the New York City Human Resources Administration, and the agency Commissioners (collectively, City). The Tenants initially sued the City in March of 2011 after the City notified the Tenants that it was discontinuing a rental assistance program for homeless residents (Program). In 2007, the Program was implemented to assist homeless adults and families achieve housing independence by providing private landlords with rental subsidies on the Tenants' behalf. In order to participate in the program, the City would draft and provide the eligible Tenant with four documents that included a certification letter, a participation statement of understanding, a landlord statement of understanding, and a lease rider. The Tenant would then sign a lease with the landlord, of which the City was not a party. Four years after the Program was implemented, the state and federal governments withdrew their financial contribution toward the program for the upcoming 2011 fiscal year, despite the City's resistance. As a result, the City closed the Program to new applicants, and notified approximately fifteen thousand current participants, that it would stop providing rental subsidies in April of 2011. One month before the Program was slated to end, the Tenants brought a class action suit against the City, seeking specific performance of an alleged contract, injunctive and declaratory relief, and alleging that the City was

contractually obligated to maintain the rent subsidies until the Tenants' leases expired, and for a second year if the Tenants were eligible. The City cross-moved to dismiss and the Tenants moved for preliminary injunction. The court denied both motions but granted the Tenants a temporary order restraining the City from discontinuing the subsidies until the Tenants could appeal. When the Tenants appealed in May of 2011, the City moved to dismiss and to vacate the stay on the injunction. The appellate court denied the City's motion on the injunction and granted the Tenants' request to maintain the temporary injunction during the bench trial, but ultimately, the court affirmed the trial court's finding and dismissed the action. The court noted that the Program was essentially a social benefit program, not a contract, and therefore the City did not have any obligation to maintain the rental subsidies. The Tenant appealed, contending the lower court misapplied the case law and abused its discretion by reaching a conclusion that was not supported by the record.

The court affirmed the lower court's judgment that no enforceable contract existed. The court further concluded that the lower court applied the case law correctly and did not abuse its discretion. First, the court observed the standard set by case law for reviewing manifestations of mutual assent and explained that the existence of a binding contract was not dependent on the subjective intent of either party. The court reasoned that the lower court's determinations that the City did not intend to be bound and understood the program documents differently, did not constitute improper reliance on subjective evidence because the court ultimately considered these findings under the totality of the circumstances. Next, the standard provided that if the interpretation of a written document was insufficient to establish the party's intent the court was to consider permissible inferences from other communications and conduct. The court reasoned that since the City and the landlords did not execute any of the Program documents, the court did not have a clear, unambiguous, written document to support the enforcement of any terms. Therefore, the lower court properly evaluated the history of the Program and the surrounding circumstances. The standard further provided that the existence of evidence, other than written documents, created a question of fact, and the

court's determination of assent based on communications and actions between the parties, when viewed in totality, brought the determination within the scope of fact finding. As a result, the lower court did not abuse its discretion because there was sufficient evidence in the record to support the conclusion that the City's objective manifestations, when properly viewed under the totality of the circumstances, did not create an enforceable contract. The dissent found that an enforceable contract existed because the language in the Program documents supported the Tenants' claim. The dissent also concluded that the question of whether the City intended to contract was a question of law because the court was able to determine the City's intent through language used in the Program documents. As a result, the dissent would not have looked to other conduct, actions, and permissible inferences, or limited its review of the lower court's determination to the record evidence. The dissent would have reversed the lower court's judgment and entered judgment in favor of the Tenants.

DISCRIMINATION

Atterbury v. Sanchez, No. CV 11-4932 SI, 2012 U.S. Dist. LEXIS 119019 (N.D. Cal. Aug. 22, 2012).

DISCRIMINATION, Disability, Retaliation; EQUAL PROTECTION, General; FAIR HOUSING, Section 8; FEDERAL COURTS, Jurisdiction

Danny Atterbury, a senior Section 8 participant with a disability (Participant), filed a *pro se* lawsuit against certain employees of his landlord and housing authority (collectively, Defendants), alleging that the Defendants violated the FHA, the ADA, various state laws, and the Participant's rights under the First, Fourth and Fourteenth amendments. The Participant complained that the garbage cans near his project-based unit were unsanitary and the other residents made a lot of noise when they dumped their garbage. The Participant further alleged that the Defendants refused to correct these problems, and also retaliated against him. The court granted the Defendants' motion to dismiss on the grounds that the Participant failed to establish subject matter jurisdiction. First, the court found that the

The Authority

Participant was unable to establish a claim under the FHA or the ADA because the basis for his claims concerned the garbage and unsanitary condition of the development, and was not based upon his disability. Finally, the court refused to exercise pendent jurisdiction over the Participant's state claims.

Jackson v. Metro. Council HRA Mgmt. Ass'n, No. 10-2370 (JRT/JJG), 2012 U.S. Dist. LEXIS 138862 (D. Minn. Sept. 27, 2012).

DISCRIMINATION, Section 8; HOUSING AUTHORITY, Lease violations, Section 8, Termination of lease; RES JUDICATA, General

Nadia Jackson (Participant), a Section 8 participant, filed a *pro se* lawsuit against the Metropolitan Council HRA Management Association (Housing Authority), for discrimination after the Housing Authority terminated her rental assistance benefits. After three years of participation in the Section 8 program, the Participant moved out of her apartment without giving the Landlord and the Housing Authority sixty days notice as required by the Housing Authority. After the Landlord notified the Housing Authority that the Participant moved without providing notice, the Housing Authority notified the Participant that it was terminating her rental assistance benefits. The Participant requested a hearing to challenge the termination. The Hearing Officer upheld the Housing Authority's decision to terminate the Participant's benefits, and the Participant did not appeal. After the hearing, the Participant continued to correspond with the Housing Authority requesting reinstatement of benefits. Approximately seven months after the hearing, a Housing Authority employee agreed that the termination was in error and reinstated the Participant to the program despite her previous failure to give proper notice. Six months later, the new potential landlord provided the Housing Authority with a copy of the Participant's federal tax return, which showed that the Participant earned over nineteen thousand dollars previously unreported to the Housing Authority. The Housing Authority terminated the Participant's benefits again, this time based on her failure to accurately report her income. The Tenant requested an informal hearing to challenge the second termination and the Housing

Authority scheduled an administrative hearing; however, the Participant did not attend the hearing or request to reschedule. The Participant *pro se* sued the Housing Authority in state court for alleged negligence, deprivation of due process, and retaliation. The state court granted summary judgment to the Housing Authority, finding no merit to the Participant's claims and noting that the Participant failed to participate in the administrative appeals process. The Participant then filed a twelve count complaint in federal court. The Magistrate Judge recommended that the court grant summary judgment to the Housing Authority because the Participant's claims were barred by res judicata, and the Participant failed to state a prima facie case for any of her claims. The Participant filed objections to the Magistrate Judge's recommendation.

The court affirmed the Magistrate's ruling, noting that the Participant's claims were already adjudicated in state court and the Participant failed to assert any facts that would create a genuine dispute of material fact. First, the court held that res judicata applied because the Participant's state action involved the same set of factual circumstances and parties as the federal action, the state court gave a final judgment on the merits, and the Participant chose the initial venue and had a full and fair opportunity to litigate her state and federal claims. Additionally, the court held that the Participant's Seventh Amendment objections did not apply because she failed to set forth facts sufficient to defeat summary judgment. The court rejected the argument that the lack of a jury trial made the state court ruling inapplicable to the doctrine res judicata. Second, the court found that the Participant did not provide a factual basis to establish a prime facie case of negligence. Moreover, the court rejected the Participant's objections to allegedly improperly notarized affidavits from the Housing Authority. The court held that the affidavits were admissible evidence and the objections were technical challenges, as opposed to objections to the factual content of the affidavits. Therefore, the court concluded that the Magistrate Judge reasonably used the affidavits to recommend summary judgment for the Housing Authority. Thus, the court rejected the Participant's objections and adopted the Magistrate Judge's recommendation and report.

Sinisgallo v. Town of Islip Hous. Auth., 12-CV-1733 ADS AKT, 2012 LEXIS 72123 (E.D.N.Y. May 23, 2012).

ADMINISTRATIVE ACTION, Judicial review; DISCRIMINATION, Disability; EVICTION, Criminal behavior, Due process; PRELIMINARY INJUNCTION, Irreparable harm, Likelihood of success; SECTION 8, Termination of benefits

Section 8 housing co-tenants, Kathie Sinisgallo and Steve Tsilimparis (Tenants) sued the Town of Islip Housing Authority, its Executive Director and its Hearing Officer (collectively Housing Authority) claiming that the Housing Authority's termination of the Tenants' Section 8 voucher violated the Tenants' constitutional due process rights under the US Housing Act, the Rehabilitation Act, the FHA and the ADA. The Tenants occupied a Section 8-funded apartment as co-tenants, with Sinisgallo listed as the primary tenant. The Social Security Administration recognized both Tenants as having diagnosed mental disabilities. In May 2011, another resident of the apartment complex shot the Tenants' cat with a BB gun, and Tsilimparis reacted by striking that resident. The next day the Tenants received notice that the Housing Authority was terminating their participation in the program. The Tenants were granted an informal hearing where the Housing Authority upheld the decision to terminate the Tenants' benefits. During a subsequent Administrative hearing, the Tenants argued that the conflict escalated because of Tsilimparis' mental disability and requested reasonable accommodation in the form of being allowed to stay in the program. The Tenants based this request on the fact that Tsilimparis had since changed his medication and there were no incidents after the original confrontation. The Hearing Officer returned a decision in favor of the Housing Authority, stating that the Tenants posed a threat to the health and safety of the other residents, thus Housing Authority had no duty to make a reasonable accommodation. Shortly thereafter, the Housing Authority began eviction proceedings in state court and the Tenants filed a federal court case claiming both a violation of their due process rights and failure of the Housing Authority to provide reasonable accommodation for the Tenants'

disabilities. The Tenants filed a motion for a preliminary injunction against eviction.

The court granted the Tenants' motion for a preliminary injunction. Before addressing the merits of the motion for preliminary injunction, the court first addressed the fact that federal law generally prohibits federal courts from enjoining state court proceeding. The major exception to this is if the complainants are unable to bring their federal law claims in the state law proceedings. The court determined that failing to enjoin the state court claims would prevent the Tenants from bringing their federal claims, and thus the court may issue the preliminary injunction if the situation warrants it. Turning to the merits, the court found that the Tenants had satisfied the two-pronged test for determining if a preliminary injunction should be issued. First, the court found that the Tenants had established that without a preliminary injunction, they would suffer irreparable harm in the form of homelessness. Second, the court analyzed the likelihood of success on the merits. The court found that, while the Tenants' procedural due process claims were not likely to succeed because the Tenants had not produced sufficient evidence other than the Hearing Officers alleged partiality, the Tenants were likely to succeed on a claim that the Housing Authority had failed to provide the Tenants with a reasonable accommodation in light of the Tenants' mental disabilities. The court concluded the Tenants had valid disabilities that the Housing Authority could arguably accommodate to prevent further incidents. For these reasons, the court granted the motion for a preliminary injunction.

Williams v. Rhea, No. 10-CV-5440 (FB), 2012 U.S. Dist. LEXIS 99244 (E.D.N.Y. July 17, 2012).

CIVIL PROCEDURE, Mootness, Standing; DISCRIMINATION, Disability, Section 8, Standing; DUE PROCESS, Notice; HOUSING AUTHORITY, Discrimination, Termination of lease; SECTION 8, Discrimination, Termination of benefits

Section 8 participant Justin Williams (Tenant) sued the New York City Housing Authority (Housing Authority)

for alleged violations of federal and city anti-discrimination laws, and violations of the Tenant's due process rights when the Housing Authority failed to provide the Tenant with Section 8 materials in a format accessible to the Tenant, who was blind. The Tenant started receiving Section 8 benefits in 1995 and had lived in the same apartment since 1999. During this time, the Housing Authority had never sent the Tenant a copy of his Section 8 voucher, his recertification materials, or any other information, in a format that was accessible to him, such as Braille or an audio recording, despite the fact that the Housing Authority was aware that the Tenant was blind. In October of 2009, the Housing Authority informed the Tenant that the Housing Authority could not assist the Tenant with his annual recertification, and in February of 2010, the Tenant discovered that the Housing Authority had terminated the Tenant's Section 8 voucher the previous December. The Tenant then filed a lawsuit against the Housing Authority seeking declaratory and injunctive relief, damages, attorney's fees, and costs. After the Tenant filed the lawsuit, the Housing Authority reinstated the Tenant's benefits, and informed the Tenant that it would provide him with materials in an accessible format and assist him with recertification. The Housing Authority then moved to dismiss the Tenant's complaint, arguing that the Tenant lacked standing and that the Tenant's claims were moot.

The court denied the Housing Authority's motion to dismiss, finding that the Tenant had standing to bring claims against the Housing Authority and that the Tenant's claims were not moot. First, the court rejected the Housing Authority's argument that the Tenant was not facing a real and immediate threat of eviction or termination of his benefits and therefore did not have standing. Instead, the court found that the Tenant's claim was for discrimination, not the loss of his subsidy. As a result, the court concluded that the Tenant did have standing because the Act conferred on the Tenant a right to be free from discrimination by government entities and the Housing Authority's alleged discrimination against him was sufficient to establish a cognizable injury. Second, the court concluded that the Tenant's claim was not moot because the Housing Authority had not met its burden of showing that there was no reasonable expectation that the alleged wrongful behavior would not recur and

that its remedial actions had eradicated completely the negative effects of their alleged unlawful behavior. The court noted that although the Housing Authority asserted that it would stop engaging in the alleged unlawful practices, it nonetheless had continued to send the Tenant notices and recertification materials in the conventional written format even after the litigation on the Tenant's lawsuit began. As a result, the court found that there was no reasonable expectation that the alleged violations would not recur in the future. Accordingly, the court concluded that the Tenant's claim was not moot, and denied the Housing Authority's motion to dismiss.

Nikolich v. Vill. of Arlington Heights, Ill., 10 C 7395, 2012 LEXIS 84888 (N.D. Ill. June 20, 2012).

DISCRIMINATION, Disability; FAIR HOUSING, Zoning; ZONING, Variance

Daveri Development Group, LLC, along with other parties interested in the construction of an apartment facility for individuals with mental health issues (collectively, the Developer), sued the Village of Arlington Heights (Village) for allegedly violating the Fair Housing Act (FHA), the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act (Rehabilitation Act) by denying the Developer's application to construct the facility. When the Developer submitted to the Village a proposal for the apartment building, the Village advised the Developer that the proposed development would require the Village Board to approve eight variances from the Village's zoning code. The Developer filed an application with the Village that sought nine variances; these variances were of a magnitude that the Village had never before approved. The Village Board conducted a public meeting to discuss the Developer's application, with numerous residents of the Village speaking both for and against the proposed development. Some of those who spoke against the proposed development cited their concerns about the safety of the children in the community and possible declines in the value of nearby homes. That evening, the Village Board voted against approval of the application. The four board members out of seven who voted against the Developer's application gave a

zoning-related reason, such as the large number of variances and the degree of those variances. The Developer alleged that the Village's denial of its application constituted three types of discrimination under the FHA, ADA, and Rehabilitation Act: disparate treatment, disparate impact, and failure to accommodate by granting the variances and interacting with the Developer. The Village filed a motion for summary judgment.

The court granted the Village's motion for summary judgment. The court used the same analysis for each type of alleged discrimination because the same analysis applied under each statute. First, the court analyzed the Developer's disparate treatment claims. The court rejected the Developer's argument that the Village's lack of residential housing for people with disabilities and its zoning ordinances constituted direct evidence of intentional discrimination. According to the court, the lack of residential housing for people with disabilities did not show that the denial of the Developer's application was motivated by bias against those with mental disabilities. The court found that the zoning ordinances were neither facially unreasonable nor imposed solely on the Developer. The court rejected the Developer's argument that the comments of various residents at the public meeting were evidence of discriminatory intent, finding that the comments of a few citizens could not invalidate a legitimate government action, particularly where the Board members who voted against the application cited legitimate zoning concerns. The court also found that there was evidence that the Board would have rejected the variances even if the prospective residents were not people with mental health issues. Next, the court turned to the Developer's disparate impact claims. The court found that the purpose of disparate impact analysis was to attack broad public policies, not individual claims. Therefore, the court refused to apply a disparate impact analysis to this particular zoning decision. The court reasoned that it would make little sense if plaintiffs could challenge solitary zoning decisions under a disparate impact theory because every zoning denial has an exclusive impact on the applicant. Finally, the court considered the Developer's argument that the Village had failed to accommodate. The court determined that there was no failure to provide a reasonable accommodation because

the zoning ordinances would have prevented the Developer from building the apartment for those with and without mental health issues. The court found that in order for an accommodation to be deemed necessary, such an accommodation needed to ameliorate the effect of the disability. Applying this rule, the court concluded that the Developer sought the variances to make the project financially feasible, not to ameliorate the effect of the disabilities of prospective residents. Furthermore, the court determined that it would be inappropriate to require the Village to interact with the Developer because municipalities are subject to restrictions on contact between developers and board members. The court therefore concluded that the Developer had failed to state a claim for failure to provide a reasonable accommodation.

Grayson, et al. v. Toledo Metro. Hous. Auth., et al.,
Case No. 3:74 CV 68, 2012 U.S. Dist. LEXIS 126483
(N.D. Ohio Sept. 6, 2012).

CLASS ACTION, General; DISCRIMINATION, Desegregation, Racial segregation; Segregation of public housing; PUBLIC HOUSING, Desegregation; U.S. DEPT OF HUD, General

India Grayson, as the named member of a class action suit (collectively, Residents), filed a motion to modify an affirmative action plan entered against the Lucas Metropolitan Housing Authority, formerly the Toledo Metropolitan Housing Authority, (Housing Authority), and HUD (collectively, Defendants), alleging the Defendants were not making progress toward desegregation under the existing plan. In the original lawsuit, the Residents alleged that the Defendants were segregating minorities from non-minorities when building and assigning housing. The court ruled in favor of the Residents and entered a judgment which ordered the Defendants to adhere to a plan designed to reduce racial segregation in Housing Authority projects, remedy the effects of past discrimination, and assure equal access to housing opportunity without regard to race, color, or national origin. The plan also included a modification provision which permitted modification of the plan upon agreement of the parties or by a showing that the Defendants were not making

progress toward the plan's objectives. Over thirty years after the initial lawsuit was filed, the Court approved the Residents' request for a class substitution, and the newly named Residents filed a motion to modify the original plan to account for and monitor current challenges, such as the Housing Authority's administration of Section 8 benefits. The Residents contended that, although the plan did result in the Defendants making some progress toward desegregation, the Defendants were not making progress toward desegregation under the existing conditions and had not achieved the court's goals. The Defendants opposed the Residents' motion.

The court denied the Residents' motion to modify the plan, finding that the Residents failed to meet their burden to establish that a modification of the plan was appropriate due to lack of progress toward the plan's objectives. The court concluded that the Residents failed to establish that the Defendants were not making progress toward the plan's first goal of reducing racial segregation in Housing Authority projects and its second goal of remedying the effects of past discrimination. The court determined that the plan required the Defendants to maintain specified ratios of minorities to non-minorities in family public housing locations and senior housing. The court found that Residents did establish that the original plan's ratios were outdated and ill-suited to address contemporary realities; however, the court found that the Residents' burden did not rest on the court's concrete determination that the plan's suggested ratios were outdated or whether the Defendants achieved the plan's objectives. Instead, the Residents had to establish that a modification of the plan was appropriate because the Defendants were not making progress toward the plan's objectives. The court further reasoned that it did not have the authority to order a modification of the plan to include the Housing Authority's administration of Section 8 benefits, because the Residents' request did not involve the enforcement of a federal law or the restoration of authority to the locally accountable officials. Finally, the court analyzed data from a twenty-two year period measuring the difference between the system's ratio and the individual project's ratio and found that the Housing Authority was making some progress towards desegregation. Accordingly, the court denied the Residents' motion and offered to assist

the parties in settlement negotiations.

Hardaway, et al. v. Equity Residential Mgmt., LLC, et al., No. DKC 11-1924, 2012 U.S. Dist. LEXIS 127051 (D. Md. Sept. 6, 2012).

DISCRIMINATION, Disability, Section 8;
CIVIL PROCEDURE, Pleadings; EVICTION,
Rent payment

Pro se claimants Angelene Hardaway (Participant), and her sister Lena Hardaway, sued Equity Residential and Silver Spring Gateway Residential (collectively, Property Manager), and the Property Manager's attorneys Shulman, Rogers, Gandal, Pordy, and Ecker, P.A. (Attorney) for alleged discrimination, fraud, and breach of the Participant's lease after the Property Manager attempted to evict the Participant for alleged past due rent and utilities. The Participant was disabled and received disability benefits. The Participant's sister resided in a different state and was the payee of the Participant's disability benefits. The Participant's sister used the Property Manager's online rent payment portal to pay the difference in rent plus the Participant's utility bills each month, which together totaled less than one hundred dollars. The Participant and the Participant's sister alleged that they became aware that the Property Manager's rental payment portal showed the Participant had an outstanding balance of over one thousand dollars. The Participant's sister paid the outstanding balance despite her belief that the fees were inaccurate and excessive. One month later, the Property Manager filed an eviction action against the Participant for nonpayment of rent. The Participant and the Participant's sister alleged that they always paid the rent in full and on time and attempted to resolve the matter by contacting the leasing agent. The leasing agent advised that the outstanding balance was for utility bills, but the Participant believed the Property Manager was engaged in a scheme to raise the Participant's rent and push the Participant out of the unit. In response, the Participant and the Participant's sister provided copies of canceled rent checks and paid utility bills to the leasing agent, but the leasing agent advised them to contact the Property Manager's Attorney. The Attorney agreed to review the Participant's receipts, but failed to follow up with the

Participant. The following month, the Property Manager filed another eviction action against the Participant alleging that it had not received the most recent month's rent from the Participant or from the Housing Opportunity Commission (Housing Authority). The Housing Authority contacted the Property Manager and learned the Property Manager was illegally applying the Participant's housing vouchers to her utilities. Citing discriminatory comments by Property management staff, the Participant and the Participant's sister filed multiple amended complaints and two separate lawsuits against the Property Manager and the Attorney in federal district court, demanding over five million dollars in damages for alleged violations of the ADA, the Rehabilitation Act, the FHA, and several state law claims including fraud and breach of the Participant's lease. The court consolidated the suits, and the Property Manager and Attorney moved to dismiss.

The court granted the motions to dismiss the federal claims on the grounds that the pleadings were insufficient. First, the court dismissed the ADA claim because the Participant did not provide any facts, beyond the Participant's receipt of disability benefits, to establish that she had a disability protected under the ADA or that the Property Manager and Attorney discriminated against the Participant due to her disability. The court also found that the Participant and her sister did not present sufficient facts that the private residential apartment building met the definition of a public accommodation, and the Property Manager's acceptance of housing vouchers was insufficient. Second, the court dismissed the Rehabilitation Act claim for failure to establish a disability, failure to allege misconduct connected to the disability, and failure to allege that the Property Manager received federal financial assistance. Third, the court dismissed the FHA claim because the complaint failed to explain the nature of the Participant's disability, the complaint did not allege a plausible nexus between the Participant's disability and the alleged discriminatory acts, and because the complaint set forth no facts suggesting that a reasonable accommodation was requested or denied. The court also granted the motions to dismiss the state claims, without prejudice, on the grounds that supplemental jurisdiction was not warranted.

Jones v. US HUD, et al., 11 CV 0846 (RJD)(JMA), 2012 U.S. Dist. LEXIS 74265 (E.D.N.Y. May 29, 2012).

CIVIL PROCEDURE, Pleadings, Res judicata; DISCRIMINATION, General, Employment; FAIR HOUSING, Effects test; HOUSING AUTHORITY, Alternative accommodations, Fraud, Funds; U.S. DEPT OF HUD, General

Frederick Jones (Tenant) filed a *pro se* lawsuit against the U.S. Department of Housing and Urban Development (HUD), the New York City Department of Housing Preservation and Development (Housing Department), and Allen Affordable HDFC, a non-profit community group (Operator), for allegedly violating various federal and state laws in connection with the rehabilitation of the Tenant's apartment building. The Tenant was a resident and building superintendent in an apartment building that HUD selected for rehabilitation under a federal grant program in 2006. In preparation for the renovations, the Housing Department and HUD relocated all of the residents, and the Housing Department and the Operator terminated the Tenant's position as superintendent. The Tenant refused to relocate and the renovations were halted as a result. Over the next three years, the Tenant sued the defending parties five different times, alleging various violations of federal housing laws, which were each summarily dismissed. In 2011, the Tenant filed the present lawsuit, which alleged that the Housing Department and the Operator improperly attempted to evict him, improperly terminated his position as superintendent, intentionally discriminated against him, and sanctioned poor living conditions in violation of certain housing codes and regulations. The Tenant further alleged that the Housing Department and Operator violated the FHA, the False Claims Act, the Tenant's due process and equal protection rights, § 1983, and various state laws and regulations, and claimed that HUD allowed the other defendants to violate HUD regulations and the Fair Housing Act. The Housing Department filed a motion to dismiss for failure to state a claim upon which relief could be granted, and HUD moved to dismiss for lack of subject matter jurisdiction. The Tenant responded by filing a motion for leave to amend.

The court granted the Housing Department and HUD's motions to dismiss, denied the Tenant's motion for leave to amend, and dismissed the claim against the Operator *sua sponte*. Citing the doctrine of res judicata and the relevant case law, the court concluded that the Tenant's claims against the Housing Department and the Operator for improper termination and eviction were barred because they were either raised, or should have been raised, in the Tenant's previous lawsuits. The court then considered and dismissed the Tenant's FHA claims. Because Tenant was the sole resident not relocated and there were no other residents living in the apartment building when the deprivations allegedly happened, the court ruled that the Tenant was unable to establish disparate treatment discrimination. Next, the court dismissed the Tenant's claim under the False Claims Act, finding that the statute did not apply because the Tenant failed to identify what, if any, claims for payment the Housing Department made that would constitute fraud on the government. The court also dismissed the Tenant's equal protection claim after finding that the Tenant's allegation was inadequate because the Tenant could not establish discrimination by a government official. The court dismissed the Tenant's due process claim, ruling that the Tenant's allegation that the Housing Department mismanaged the building could adequately be challenged through an article 78 proceeding rather than in a constitutional claim. Having disposed of the Tenant's constitutional and federal law claims, the court dismissed the Tenant's § 1983 claim as a matter of law. As to the Tenant's claims that HUD violated its own policies by failing to properly supervise the Housing Department and the Operator, the court found that it lacked jurisdiction because the Tenant had another adequate remedies available in an action against the other private parties, and thus the Tenant could not rely on a waiver of sovereign immunity. Finally, the court dismissed the Tenant's state law claims for lack of pendant jurisdiction and denied the Tenant's motion for leave to amend because the Tenant had already filed five similarly meritless lawsuits. The court refrained from enjoining further filings by the plaintiff, but warned of the court's power to condition access to the courts upon prior judicial permission and to impose penalties.

DRUG-RELATED CRIMINAL ACTIVITY

Rivera v. Town of Huntington Hous. Auth., 12-CV-901 DRH ARL, 2012 U.S. Dist. LEXIS 74267 (E.D.N.Y. May 29, 2012).

DRUG-RELATED CRIMINAL ACTIVITY, General; HOUSING AUTHORITY, Section 8; PRELIMINARY INJUNCTION, General, Irreparable harm, Likelihood of success

Samantha Rivera (Recipient) sued the Town of Huntington Housing Authority (Housing Authority) seeking a preliminary injunction to reinstate her into the Section 8 program. In April 2011, the Recipient's daughter (Daughter) was pulled over while riding as a passenger in a friend's car. During the stop, officers conducted a search of the Daughter's bag and found an envelope containing white powder. When questioned, the Daughter stated that the envelope was not hers and she did not know what the substance was. When informed that the substance was cocaine, the Daughter responded that she did not use drugs. The officers arrested the Daughter and charged her with possession of a controlled substance. The Daughter never told the Recipient about the arrest. In December 2011, the Recipient received a letter that the Housing Authority terminated her from the Section 8 program due to her Daughter's arrest. The Housing Authority granted the Recipient a hearing to appeal the Housing Authority's decision, at which the Recipient was represented by counsel. After the hearing, the Hearing Officer issued a short decision affirming the Housing Authority's decision on the grounds that police had found cocaine in the Daughter's purse and that the Hearing Officer, therefore, could not overturn the termination of the Recipient's benefits. The Tenant appealed the Hearing Officer's decision, alleging that the decision to terminate the Recipient's Section 8 benefits violated the Recipient's due process rights by placing the burden of disproving criminal conduct on the Recipient. The Recipient requested a preliminary injunction to allow her to remain in the Section 8 program.

The court granted the Recipient's request for a preliminary injunction, allowing the Recipient to remain in her home, finding that the Recipient met her

burden to show both irreparable harm without the injunction, and the likelihood of success at trial. First, the court found that the Recipient would suffer an irreparable harm if she lost her Section 8 voucher. The court determined that the Recipient would be unable to pay rent and would face the very real possibility of homelessness. Applying the relevant case law, the court found that the threat of homelessness was an irreparable harm for the purposes of defining injunctive relief and thus, the Recipient satisfied the first requirement. Then the court analyzed the likelihood that the Recipient would succeed in a trial on her due process claims. The court found that a valid procedural due process claim has three components: there must be a valid property interest at stake, the government must have taken that interest away, and the taking must have been affected without due process of law. The court concluded that the first two components were clearly satisfied, as the Recipient had a property interest at stake in her Section 8 voucher and the Housing Authority had taken this interest away. As for the due process denial, the court found that, although the Housing Authority took away the Recipient's voucher pursuant to an established government procedure, the evidence that the Hearing Officer had used was deficient because it never established that the Daughter was actually in possession of cocaine. Thus, the court held the requirements for a preliminary injunction were satisfied and the Recipient's request for an injunction was granted.

EMINENT DOMAIN

City of Joliet v. Mid-City Nat. Bank of Chicago, et al., 05 C 6746, 2012 LEXIS 89940 (N.D. Ill. June 28, 2012).

DISCRIMINATION, Race, Intentional;
EMINENT DOMAIN, Blighted area,
Condemnation, Discrimination; FAIR
HOUSING, General

The City of Joliet (City) sued the United States Department of Housing and Urban Development (HUD), the tenants of the federally subsidized housing complex Evergreen Terrace (Tenants), and the Landlords of Evergreen Terrace (Landlords), seeking

to condemn the Evergreen Terrace complex. Evergreen Terrace is home to approximately 764 people, 95 percent of whom are African-American. HUD, the Tenants, and the Landlords previously filed a separate civil rights suit alleging that the City took a series of actions, concluding with the condemnation, which would leave the Tenants with nowhere to live in the City due to the lack of alternative affordable housing. HUD, the Tenants, and the Landlords alleged that the City's attempt to condemn Evergreen Terrace constituted discrimination under the Fair Housing Act (FHA) because the purpose and effect of the condemnation was to reduce the number of African-Americans living in the City and because the condemnation would have a disparate impact on African-Americans. The City contended that its purpose in condemning Evergreen Terrace was to eliminate blight, so discrimination could not have been its sole motive for the condemnation. Furthermore, the City argued that applying disparate impact to an eminent domain action would require the court to perform a detailed and burdensome review of the effects of a municipal government's redevelopment plan. The City moved for judgment on the pleadings, arguing that the FHA defenses were based on speculation about the results of the City's redevelopment plan, the City did not intend to discriminate and it had a legitimate public purpose for the condemnation, and that disparate impact defenses are not valid defenses as a matter of law in eminent domain actions. The City also moved to stay discovery on the FHA defenses, arguing that changed circumstances—namely, the City's newfound understanding of the Defendants' FHA affirmative defenses—justified a modification in the scheduling order for discovery.

The court denied the City's motions. In denying the City's motion for judgment on the pleadings, the court reasoned that an eminent domain action could indeed violate federal law if it were discriminatory in purpose. The court held that it was not necessary to prove that discrimination was the only motivation behind the condemnation, because it was unlawful for discrimination to constitute even a portion of the motivation. The court determined that the need for a detailed and searching review of the record to determine disparate impact was not a proper basis for

dismissing a legal theory, but was instead a necessary inquiry to ensure that there was no violation of the FHA. Furthermore, in making a judgment on the pleadings, the court noted it was required to construe the pleadings as true unless they were implausible. The court ruled that the pleadings here were plausible because the condemnation could indeed reduce the housing available to African-Americans in the City; thus the City's argument that the court was forced to speculate about the City's redevelopment plan was without merit. The court denied the motion to stay discovery because it determined that the City was or should have been well aware of the FHA defenses, as HUD, the Tenants, and the Landlords had maintained these defenses from the beginning of the lawsuit and the defenses mirrored the FHA claims brought in the previous civil rights suit arising from the same set of facts.

EMPLOYMENT

Brown v. Indianapolis Hous. Agency, No. 49A05-1111-CT-648, 971 N.E.2d 181, 2012 Ind. App. LEXIS 346, 2012 WL 3016240 (Ind. Ct. App. July 24, 2012).

EMPLOYMENT, Retaliation, Termination;
HOUSING AUTHORITY, Employees, Fraud,
Public purpose

Kelvin Brown (Employee) sued the Indianapolis Housing Agency (Housing Authority), his former employer, alleging the Housing Authority wrongly reported the Employee's alleged misconduct to the state prosecutor, who filed criminal charges against the Employee. The Employee was a Section 8 field housing inspector for the Housing Authority, and the Housing Authority provided the Employee with a government issued car to complete his job responsibilities. Approximately three years after the Employee began working for the Housing Authority, police officers for the Housing Authority began investigating inspectors and installed GPS devices in the government issued cars. Two years later, the Housing Authority became suspicious of the Employee's conduct and began reviewing the GPS tracking from his work car and his inspection logs. The Housing Authority found that the Employee was

conducting personal business regarding his personal rental properties while he was on duty, in violation of its policies, and suspended him for a week. After the Employee returned to work, the Housing Authority became aware that the Employee again conducted personal business regarding his personal rental properties while on duty. The Housing Authority terminated the Employee and later submitted a probable cause affidavit to the state prosecutor. The prosecutor charged the Employee with ghost employment, official misconduct, and two counts of deception, but dismissed the charges two years later due to evidentiary issues. The Employee sued the Housing Authority alleging malicious prosecution resulting from ill will that a Housing Authority attorney harbored against him and retaliation for an email that the Employee sent to the Housing Authority expressing his displeasure with its practices. The Employee's suit also included a claim for intentional infliction of emotional distress. The trial court granted the Housing Authority's motion for summary judgment on the grounds that it had a qualified privilege to make a criminal complaint against the Employee, and the Employee appealed.

The court of appeals affirmed the trial court judgment, concluding that summary judgment on the both the malicious prosecution and intentional infliction of emotional distress claims was appropriate because the claims were barred by the Housing Authority's qualified privilege. The court reasoned that the Housing Authority was entitled to a qualified privilege to report the Employee's conduct because its statements to the prosecutor helped facilitate suspected criminal activity, which in turn enhanced public safety. The court also concluded that the Employee failed to establish that the Housing Authority abused its privilege, because the Housing Authority's statements did not exceed the purpose of the privilege. The court further concluded that the Employee was unable to establish the element of malice required for a claim of malicious prosecution because the probable cause affidavit did not rely on the Employee's email complaint, information or reports made by the Housing Authority attorney, or other parties that the Employee accused of harboring ill will against him. Finally, the court found that summary judgment for the Housing Authority on the intentional infliction of emotional distress claim was appropriate because the Employee

did not establish that the Housing Authority's conduct rose to the level of being extreme and outrageous.

Greene v. Street, et al., CIV.A. 10-4529, 2012 LEXIS 124232 (E.D. Pa. Aug. 30, 2012).

DUE PROCESS, Protected interest; EMPLOYMENT, Breach of contract, Contract, Damages, Due process; EVIDENCE, Attorney-client privilege; HOUSING AUTHORITY, Employment

Carl R. Greene, former Executive Director (Former E.D.) of the Philadelphia Housing Authority (Housing Authority), sued the Housing Authority, and the individual members of the Housing Authority Board of Commissioners (Board) who voted to terminate the Former E.D., alleging deprivation of liberty interest in reputation without due process of law and for breach of his employment agreement. The Board terminated the Former E.D. after conducting an independent investigation responding to newspaper articles that reported the Former E.D. had defaulted on his mortgage, was subject to federal tax liens, and had been accused of sexual harassment by several former Housing Authority employees. The Former E.D. claimed that the Housing Authority defamed him during the course of his termination and did not give him notice and an opportunity to be heard. The Former E.D. alleged that he hired an attorney to represent him, but the Housing Authority ignored his attorney's offer to work with them and did not respond to the attorney's complaints. The Former E.D. argued that these actions deprived him of his liberty interest in reputation without due process of law. During a deposition, the Former E.D. refused to answer questions about conversations he had with an attorney about the sexual harassment complaints, claiming that these communications were protected by attorney-client privilege. The court granted the Housing Authority's motion to compel further deposition testimony because the Former E.D. admitted that the Housing Authority retained and paid the attorney, and the legal services provided were only related to Housing Authority matters. Thus, the court found that attorney-client privilege did not apply. The Housing Authority then moved for summary judgment, alleging that the Former

E.D. did not request a name-clearing hearing and the Former E.D. did not produce any evidence regarding damages with regard to the breach of contract claim. The Former E.D. responded that there was a question of fact as to whether his attorney asked for an opportunity to clear his name. The Former E.D. also responded that the employment agreement described the damages that result from a breach—specifically, that if the Housing Authority terminated him without cause, it had to pay him two years of his salary and other benefits.

The court granted the Housing Authority's motion for summary judgment on the due process claim for deprivation of liberty interest in reputation, but denied summary judgment on the breach of contract claim. First, the court looked at communications from the Former E.D.'s attorney to the Housing Authority and determined that none of the communications referenced harm to the Former E.D.'s reputation or a desire to defend the Former E.D.'s reputation against defamatory statements. Because there was no evidence that the Former E.D. had sought a name-clearing hearing, the court determined that he could not sustain his claim for deprivation of liberty interest in reputation without due process of law. Second, the court did find that the Former E.D. could sustain his claim for breach of contract because the employment agreement provided sufficient evidence of damages. According to the court, if a fact finder concluded that the Housing Authority terminated the Former E.D. without cause, the terms of the employment agreement would allow the fact finder to determine the damages.

Mengelkamp v. Lake Metro. Hous. Auth., 1:11-CV-2589, 2012 LEXIS125732 (N.D. Ohio Sept. 5, 2012).

EMPLOYMENT, Retaliation, Termination, Wrongful discharge; HOUSING AUTHORITY, Employment

Linda Mengelkamp (Employee) sued her former employer, Lake Metropolitan Housing Authority, and her former supervisor, Steven Knotts (collectively, Employer), for retaliatory discharge in violation of Title VII, violation of her First Amendment right to speak, breach of contract, and violation of the

Employee's right to due process. The Employee claimed that the Employer fired her because she investigated and supported a claim of gender discrimination against the Employer and because she objected to the Employer's interference with her investigation of a sexual harassment claim. The Employer fired the Employee six days after she concluded the sexual harassment investigation, claiming that she had been insubordinate and failed to perform her job in a satisfactory manner. The Employer responded to each claim in a motion for summary judgment. The Employee opposed the Employer's motion, but confined her response only to a defense of the retaliatory discharge claim.

The court granted the Employer's motion for summary judgment on the Employee's First Amendment, breach of contract, and violation of due process claims, and denied the Employer's motion for summary judgment on the Employee's retaliatory discharge claim. First, the court found that the Employee had abandoned all of her claims except for retaliatory discharge when she failed to respond to the Employer's motion for summary judgment with an identification of the parts of the record that showed that the Employer was not entitled to summary judgment. The court found that under the Federal Rules of Civil Procedure, the Employee was required to respond in kind to the Employer's identification of the parts of the record that supported its motion for summary judgment. As to the Employee's retaliatory discharge claim, the court found that the Employee had shown sufficient evidence to support a prima facie case of Title VII retaliation, and the Employer had not satisfied his corresponding burden to rebut. First, the court found that the Employee had shown that she had engaged in an activity protected by Title VII, because she had opposed unlawful gender discrimination and sexual harassment. The court also found that the Employee had shown that the Employer had known that the Employee had engaged in the protected activity, that the Employer had subjected the Employee to adverse employment action, and that the evidence gave rise to the inference that there was a connection between the Employee's protected activity and the adverse employment action taken against her. Finally, the court found that the Employer had not satisfied its burden of providing a legitimate, nondiscriminatory reason for

firing the Employee. The court ruled that the Employer did not make a sufficient argument that there was such a reason. The court also found that the reasons that the Employer did advance in its motion for summary judgment as the reasons it fired the Employee could have been pretextual.

EVICTION

Chamberlain Heights Redevelopment Limited Partnership v. White, CV114014859S, 2012 Conn. Super. LEXIS 1047 (Conn. Super. Ct. May 31, 2012).

DUE PROCESS, Hearing; EVICTION, Defenses, Notice, Section 8; RELOCATION, General; SECTION 8, Termination of benefits, Termination of tenancy

Chamberlain Heights Redevelopment Limited Partnership (Redeveloper) sued James White (Tenant) under a summary process action seeking eviction due to non-payment of rent. Prior to the dispute, The Meridian Housing Authority (Housing Authority) decided to rehabilitate the Chamberlain Heights public housing project (Property) where the Tenant resided, and convert it to Section 8 rental housing. Tenant was a resident commissioner on the Housing Authority board. The Housing Authority leased the property to the Redeveloper, which in turn hired Maynard Road Corporation (Landlord) to manage the property, including rent collection. The Housing Authority sent letters to the tenants informing them that their rent subsidies would be terminated and Section 8 vouchers would be issued to subsidize their new housing. In the event that an individual was not able to secure new housing, that person could remain on the Property until alternate housing was secured. The Tenant chose to remain in his apartment on the Property and paid a subsidized rate. After a year of the new arrangement, the Tenant wrote to the Housing Authority requesting an informal hearing. At the hearing, the Tenant claimed he did not want to recertify in the Section 8 program since doing so would benefit the Landlord whom he believed was not meeting the standards set by the Housing Authority. After the meeting, the Housing Authority informed the Tenant that he must either recertify and sign the Landlord's lease or relocate to

available housing at another site, or else he would lose his Section 8 voucher and be forced to pay market rate rent. The Tenant took no action, ignored multiple notices from the Housing Authority and the Landlord, refused to recertify and sign his lease, and allowed his voucher to expire. The Tenant continued to pay the voucher subsidized rate for three months, but requested a formal hearing because he was unsatisfied with the results of the informal hearing. The Housing Authority Director explained that there was no formal hearing process for Section 8 and offered to meet to discuss the Tenant's concerns; however, no meeting took place. Thereafter, the Landlord sent the Tenant a pre-termination notice giving him fifteen days to remedy the failure to pay rent and the failure to recertify. When the Tenant took no action to remedy the situation, the Landlord served the Tenant with a notice to quit the premises and then filed the eviction action in court. The Tenant filed an answer to the complaint which he then amended twice to include multiple alleged special defenses and a motion to dismiss due to inadequate notice.

The court denied the Tenant's motion to dismiss and granted possession to the Landlord. The court determined that each of the Tenant's special defenses was without merit because there was no credible evidence that the Landlord sought to retaliate against the Tenant, and the Tenant was fully aware of the rehabilitation project due to his position as a resident commissioner on the Housing Authority board. Additionally, the court found that the Tenant was not entitled to a formal hearing, that the Tenant failed to prove he had reached an oral lease agreement with the Landlord, that the Tenant's defense that he was a "tenant at sufferance" was without merit, and that the Tenant offered no proof that the apartment was unsuitable under Section 8 standards or that equity required a judgment in his favor. The court found that the non-payment of rent and the failure to recertify and sign the new lease were valid reasons to evict the Tenant, and thus the Landlord could move for immediate repossession.

Indigo Real Estate Servs., Inc. v. Wadsworth, 169 Wn. App. 412, 280 P.3d 506, 2012 Wash. App. LEXIS 1586 (Wash. Ct. App. July 9, 2012).

EVICTION, Good cause, Lease violations, Section 8, Unlawful detainer

Indigo Real Estate Services, Inc. (Landlord) brought an unlawful detainer action against Tina L. Wadsworth (Participant), who leased a Section 8 apartment from the Landlord, alleging that the Participant failed to comply with a community rule. The Participant, signed a lease which included a community rule that required all tenants to keep their balconies clean and neat. The Landlord also agreed to an addendum to the Participant's lease, which was required by HUD for Section 8 recipients. The Landlord alleged that the Participant violated the community rule and served the Participant with a ten-day notice to comply with the rule by cleaning the balcony, taking action to prevent materials from falling through the deck, and removing a plywood panel that the Participant had placed along the inside of the balcony, or vacate the apartment. The notice also advised the Participant that she had ten days to challenge the matter in a court proceeding or discuss the matter with the Landlord. Within ten days, the Participant cleaned the balcony and placed a tarp on the balcony to prevent material from falling through the deck. The Participant also asked the Landlord to allow an exemption for the plywood panel, but the Landlord denied her request. The Participant removed the panel fourteen days after the Landlord served her with the notice. The following week, the Landlord initiated an unlawful detainer action and a writ of restitution against the Participant based on the Participant's alleged failure to comply with the ten-day notice. A few days later, the Participant participated in a show cause hearing, where she contended that federal laws governing Section 8 leases precluded the Landlord from attempting to terminate her lease without establishing that the alleged violation of the ten-day notice constituted good cause. The trial court ruled in favor of the Landlord, finding there were no genuine issues of material fact to warrant a trial because the Participant admitted that she did not remove the plywood panel within ten days of the Landlord's notice. The Participant learned that the Landlord did not attach the HUD lease addendum, which required

material noncompliance with the lease for a Landlord to terminate a Section 8 tenant's lease, to the initial complaint. The Participant moved for reconsideration. The court concluded that the state's eviction law, and not the provisions of the lease addendum, governed the matter and denied the Participant's motion. The Participant was evicted and filed an appeal.

The appellate court reversed and remanded the matter to the lower court on the grounds that the lower court erred when it granted summary judgment without first determining if the Participant's conduct constituted material noncompliance with the lease. In addition, the court concluded that the federal law requiring a showing of good cause, and the provisions within the lease addendum, limited the state's unlawful detainer statute because they provided greater protection than the state statute. The court held that where a landlord has accepted the substantial financial benefits of the federal Section 8 program, the landlord must abide by the rules of that program in any unlawful detainer action. The court also determined that the state law required a showing that the Participant wrongfully occupied the property, and the Landlord did not establish this requirement because it did not prove material noncompliance of the lease as required by the lease addendum. The court further concluded that summary judgment was inappropriate because there was a material issue of fact as to whether the Tenant's conduct constituted material noncompliance with the lease.

Lewis v. Jaeger, et al., 818 N.W.2d 165 (Iowa 2012).

CIVIL PROCEDURE, Appellate review, Mootness; DUE PROCESS, General, Notice, Privacy rights; EVICTION, Defenses, Due process, Lease violations, Notice, Section 8, Termination of tenancy; LEASES, Termination

Umeka Lewis (Tenant) sued landlord John Jaeger (Landlord), the City of Dubuque (City) and the city housing inspector Robert Boge (Inspector), for unlawful eviction and to regain the Tenant's security deposit. In November 2008, the Tenant signed a lease, partially funded with Section 8 housing vouchers. After moving in, the Tenant though she heard bats in the wall

and complained her apartment was too cold. To combat these problems, the Tenant began leaving her water running to scare the bats and her gas oven on with the door open. The Landlord entered the Tenant's apartment several times without the Tenant's permission, to turn off the gas and water. Eventually, the Landlord contacted the Inspector about the situation. In October 2009, the Inspector issued an order to the Landlord to change the locks on the door pursuant to a city emergency action ordinance. The Landlord changed the locks and removed all of the Tenant's belongings. Several days later the Inspector wrote a notice for the lock change order; however, neither the Inspector nor the Landlord gave this notice to the Tenant. The Tenant then filed suit in the district court with seven causes of action. First, the Tenant claimed preemption of the city emergency lockout. The Tenant alleged that the city ordinance, which allowed the emergency lockout, was preempted by the state eviction law and was thus invalid. Second, the Tenant claimed deprivation of constitutional due process when the Landlord changed the locks on the door. Third, the Tenant and argued the city ordinance was void for vagueness. Fifth, the tenant claimed the Landlord's entry into her apartment was unlawful. Finally, the Tenant claimed bad faith retention of the security deposit and conversion. The district court found that the Tenant had a valid claim for the security deposit but denied all other relief. The Tenant appealed adding a claim that some of the Landlord's pleadings amounted to a confessed judgment.

The appellate court affirmed in part and reversed in part, finding that the Tenant had a valid claim for unlawful entry and for unlawful retention of the security deposit, and dismissed all other claims. The court addressed each of the Tenant's eight claims in turn. The court first addressed the Tenant's preemption claim by looking to the purposes of the two laws. Because the city ordinance addressed public health and safety, not eviction proceedings, the court found there was no preemption. Second, the court established that the City's failure to give the Tenant notice of the lockout was a violation of due process; however, because the Tenant terminated her lease during the lockout, the due process claim was moot. Next, the court rejected the Tenant's claim that the city's emergency ordinance was void for vagueness. The

court rejected the Tenant's arguments that the ordinance was not specific enough in its definition of emergency and in the remedies that it prescribed for emergency situations, concluding that a reasonable person would understand the meaning of the word "emergency" and that, in an ordinary circumstance, due process principles would prevent abuse. Next, the court considered the Tenant's unlawful entry claim and affirmed the lower court's finding that the Landlord had entered illegally. The court found that the city ordinance excused the last entry, however, all other entries were without the Tenant's permission and thus illegal. Due to this violation, the court found the Tenant could recover attorney's fees. Additionally, the court upheld the lower court decision that the Landlord illegally withheld the security deposit, ordered repayment of the deposit, and awarded \$200 in damages for failure to pay when originally demanded. The court dismissed the last two claims for conversion and confessed judgment and remanded the case for a determination on the lawyer's fees.

FAIR HOUSING

Becker v. Orchard Hills Apts., et al., CV-11-5108-RMP, 2012 U.S. Dist. LEXIS 123187 (E.D. Wash. Aug. 29, 2012).

CIVIL PROCEDURE, Summary judgment;
FAIR HOUSING, Disability discrimination;
HOUSING AUTHORITY, Section 8

Section 8 participant Sherry Becker (Participant) *pro se* sued the Orchard Hills Apartments, Riverstone Residential Group, et al. (collectively Landlords) for allegedly violating the Fair Housing Act ("FHA") by failing to provide reasonable accommodations for her disabilities. The Participant paid to have a covered parking space near her apartment as an accommodation for her disabilities. Towards the end of her tenancy, the Participant's share of rent was increased by the Landlords due to a market increase, and then increased again during recertification which revealed an increase in the Participant's income. The Participant alleged that the Landlords denied her a reasonable accommodation under the FHA by failing to grant her a free parking spot and by increasing her rent. The

Participant moved to submit attachments to the original complaint and moved for a preliminary injunction to prevent a termination of tenancy. The Landlords moved to strike attachments to the complaint and to dismiss the case for failure to state a claim.

The court granted the Participant's motion to resubmit attachments to the original complaint, citing the Participant's *pro se* status, and denied the injunction as moot because the Participant voluntarily moved out of her apartment before the hearing. The court denied the Landlords' motion to dismiss with regard to the Participant's FHA reasonable accommodation claim, but granted the motion to dismiss with regard to the discrimination claims. Regarding the reasonable accommodation claim, first the court found that the Participant submitted enough evidence of injury for there to be a valid question of fact as to whether the Participant was a qualified disabled person under the FHA. Second, the court found that there was reasonable evidence that the Landlords knew of the disability, and the Landlords did not dispute their knowledge. The court focused on the third and fourth elements of a *prima facie* reasonable accommodation claim as the primary reason to deny the motion for summary judgment. The court found that a free parking space for a mobility-impaired resident can be a reasonable and necessary accommodation to afford the Participant an equal opportunity to use and enjoy her dwelling. Finally, the court determined that the Landlords' cost to waive the parking fee did not automatically render the accommodation unreasonable, so the court could not determine as a matter of law that the Landlords did not refuse to provide a reasonable accommodation. Regarding the claim of discriminatory rent increase, the court found that the Participant failed to allege any facts to support a nexus between her disability and the Landlords' decision to increase her rent, and the question of her subsidy amount did not implicate the Landlords. Thus, the court granted summary judgment to the Landlords on that claim.

Pondexter v. Allegheny County Hous. Auth., CIV.A. 11-857, 2012 U.S. Dist. LEXIS 117992 (W.D. Pa. Aug. 21, 2012).

CIVIL PROCEDURE, Summary judgment;

The Authority

DEFAMATION, General; DUE PROCESS, General; FAIR HOUSING, Disability, Discrimination; SECTION 8, Discrimination; U.S. HOUSING ACT, General

Earl Pondexter (Applicant) brought this suit *pro se* against the Allegheny County Housing Authority (Housing Authority) alleging a discriminatory denial of his housing application based upon his race and mental disability, and defamation, after a prior suit and an action before the Pennsylvania Human Relations Commission. The Applicant, who was totally disabled and suffered from several different mental disabilities, claimed that he downloaded an application for low-income housing and that he applied for housing by mailing in the application to the Housing Authority. The Housing Authority claimed to have no record of the Applicant or his application, and that as a result, it had not considered the Applicant for low-income housing. The Applicant filed a complaint against the Housing Authority with HUD Fair Housing and Equal Opportunity, but these claims were immediately dismissed. The Applicant then brought an action with the Pennsylvania Human Relations Commission (Commission) against the Housing Authority. During his process, the Applicant alleged that the Housing Authority sent a letter to the Commission stating that the Applicant had been arrested in 2005 for making threats to a federal judge. The Commission concluded that the Applicant had never filed an application and dismissed the Applicant's complaint. The Applicant brought this lawsuit in district court in which the Applicant alleged that the Housing Authority had denied his application because of the Applicant's race and disability in violation of the Applicant's civil rights. Both the Applicant and Housing Authority moved for summary judgment.

The district court granted summary judgment for the Housing Authority, finding that the Applicant had failed to plead any facts in support of his claims. Liberally construing the Applicant's *pro se* complaint, the court teased out five different causes of action against the Housing Authority. First, the court construed the Applicant's allegations of race and disability discrimination as causes of action under Title VI, the FHA, the Rehabilitation Act, and the ADA. The court found that in order to survive the motion for

summary judgment, the Applicant needed to establish a *prima facie* case of discrimination, including a show that he had actually applied for the housing assistance. To meet this burden, the Applicant relied on the Mailbox Rule that a properly addressed letter that is placed in a mailbox is assumed to reach its destination. While the court noted that evidence of actual mailing is not required, the court found that the Applicant in no way attempted to rebut the Housing Authority's evidence that the Housing Authority had in fact not received an application and that it had no record of the Applicant's letter. Therefore, the court ruled that the Applicant had not submitted a valid application and thus the Applicant's discrimination claims were invalid. Next, the court dismissed the Applicant's § 1986 claim stating that he presented no facts in support of his claim. Finally, the court construed the Applicant's allegation that the Housing Authority had improperly sent a letter to the Commission as a defamation claim against the Housing Authority. The court analyzed the letter and found that there was no accusation raised or an arrest mentioned. Accordingly, the court dismissed the Applicant's claims.

Sycamore Ridge Apts. v. L.M.G., DOCKET NO. A-5552-10T4, 2012 N.J. Super. Unpub. LEXIS 1333 (App. Div. June 14, 2012).

DISCRIMINATION, Disability, Section 8; EVICTION, Discrimination, Good cause, Lease violation; FAIR HOUSING, Section 8; SECTION 8, Discrimination, Termination of lease

Sycamore Ridge Apartments (Landlord) obtained an eviction order against Section 8 tenants L.M.G. (Tenant), and J.F. (Daughter) (collectively, Tenants) for violating the terms of their lease and sought possession of the unit in state court. The Landlord claimed that the Tenants had breached their lease by creating a persistent noxious urine odor in their apartment, which affected the livability of other units in the Landlord's housing development. The Tenants sought rescission of the eviction order, arguing that the Landlord failed to provide an accommodation, as required under the Fair Housing Act Amendments and state laws, to the Daughter, whose disabilities included

mental disability, chronic diabetes, related limited mobility, and chronic urinary incontinence, which caused the smell. The Landlord countered that he tried to accommodate the Tenants by involving the Tenants' family, repainting rooms in the unit, and calling in social service workers. The Landlord also alleged that over the course of two years, the Tenants failed to satisfy a cease and desist order, and the Tenants' efforts to purge the smell from the apartment fell short of health and safety standards. During the hearing, the court considered the Landlord's evidence, including testimony that other residents had complained for at least ten years, the odor had not been remedied, and the costs to clean the apartment would be significant. The court also considered evidence from the Tenants, including testimony from the Daughter's doctor who said it would be better if the Daughter lived in an assisted living facility. After considering this evidence, the trial court granted the Landlord judgment for possession, but also granted the Tenants' request for a stay pending appeal. The Tenants then appealed the court's decision on five separate grounds. The Tenants argued that the court improperly based its judgment on the Daughter's best interests, the judgment was improper because the odor was no longer present, the Landlord failed to provide a reasonable accommodation as required by the Fair Housing Act and comparable state law, the Landlord failed to engage in a required interactive process under that law, and the eviction was not supported by the "direct threat" exception of the Fair Housing Amendments Act of 1988 (FHAA).

On appeal, the court affirmed the lower court's judgment. First, the court rejected the Tenant's argument that the lower court improperly based its judgment on the Daughter's best interest, which was a not ground for eviction under the state law. The court concluded that the lower court properly based its judgment on its findings that the persistent odor impacted the Tenants' duty to keep the apartment clean, and interfered with the livability of the apartment complex, both of which constituted a material breach of the Tenants' lease. The court also rejected the Tenants' assertion that judgment of possession was not justified because given the evidence below the lease violation had not been cured by the time judgment was entered. With respect to the FHAA claims, the appellate court affirmed that the Landlord had no duty to engage in an

interactive process because the Tenants' request for an accommodation was clear. Although a Landlord is required to make a reasonable accommodation to a tenant with a disability, the Act allows a landlord to consider the cost of the accommodation and the degree to which it aids the Tenant to cope with her disability. Here, the Tenants' requested accommodation was rescission of the eviction order, but this was not reasonable because continued occupancy of the unit fell within the direct threat exception of the FHAA, and would impose significant cost to the Landlord. After affirming the lower court's ruling, the appellate court stayed its mandate for thirty days so the Tenants could find alternative housing.

FEDERAL COURTS

Price v. Hous. Auth. of New Orleans, CIV.A. 12-992, 2012 U.S. Dist. LEXIS 89709 (E.D. La. June 27, 2012);
Price v. Hous. Auth. of New Orleans, CIV.A. 12-992, 2012 U.S. Dist. LEXIS 81042 (E.D. La. June 12, 2012).

CIVIL PROCEDURE, Appellate review, Dismissal; FEDERAL COURTS, Jurisdiction; SECTION 8, Termination of benefits, Lease termination

Ora Price (Tenant) and her grandsons Leonard and Darryl Price (Grandsons) (collectively, Family), *pro se* sued the Housing Authority of New Orleans (Housing Authority), Interstate Realty Management Company and other companies (collectively, Owner), and other parties, alleging wrongful eviction and improper termination of the Tenant's Section 8 voucher. In December 2010, one of the Grandsons was involved in a shooting on the premises of the Tenant's apartment complex. The Housing Authority determined that the Tenant had violated her lease agreement and began termination proceedings against the Tenant, ultimately terminating the Tenant's Section 8 voucher. The Housing Authority's decision was based primarily on the fact that neither of the Grandsons were listed as legal residents on the lease and thus, their residency violated the Tenant's housing agreement. The Owner sought and received an eviction order against the Family in state court, which was affirmed in the intermediate state court on appeal. The Family

requested *certiorari* from the Louisiana Supreme Court, which the court denied. While awaiting the Louisiana Supreme Court's decision, the Family filed a complaint in federal court alleging violations of their rights pursuant to the 14th amendment, the US Housing Act, and their civil rights pursuant to §1983 and §1985. The Housing Authority moved to dismiss the claims for lack of federal subject matter jurisdiction.

The court liberally construed the Family's pro se complaint but dismissed the Family's claims due to lack of federal subject matter jurisdiction. In its June 12, 2012 opinion, the court found that there was no question of diversity jurisdiction since all parties were Louisiana residents, and concluded that none of the Family's allegations, including conspiracy, slander, and fabrication of evidence, arose from federal law. Even though the Family cited federal statutes in its cause of action, the court found that all of the underlying facts related directly to the state eviction claim to which the Owner, not the Housing Authority, was a party. In its June 27, 2012 opinion, the court dismissed the Family's claim that the Housing Authority had a duty to monitor and investigate the actions of the Owner, again on grounds of lack of jurisdiction. The court found that the Family had not cited any authority, state or federal, as the basis for this duty, and concluded that the Family was requesting an impermissible collateral attack on the state law judgments. The court noted that federal case law forbade a federal-to-state collateral attack, and thus the Family had stated no valid issues of federal law. Accordingly, the court granted the Housing Authority's motion to dismiss for lack of subject matter jurisdiction.

FREEDOM OF SPEECH

Morris v. Philadelphia Hous. Auth., 11-3334, 2012 LEXIS13774 (3d Cir. July 6, 2012).

EMPLOYMENT, Retaliation, Termination, Wrongful discharge; FREEDOM OF SPEECH, Employment; HOUSING AUTHORITY, Employment, Immunity

Vincent Morris (Employee) sued the Philadelphia Housing Authority (Housing Authority) and Tenant

Social Services, Inc.'s (TSSI) under 42 U.S.C. § 1983, alleging that the Housing Authority and TSSI wrongfully discharged him for speech that was protected by the First Amendment. For eleven years, the Employee had worked as the Executive Assistant to the Housing Authority's Executive Director. In this position, the Employee supervised various troubled departments at the Housing Authority, including TSSI. The Employee alleged that the Executive Director had ordered him to participate in lobbying activities on behalf of the Housing Authority and to perform work for a political action committee. The Employee further alleged that he had resisted doing so because the Housing Authority received funds from the United States Department of Housing and Urban Development (HUD), which precluded the Housing Authority from engaging in those types of political activities. The Employee had also objected to a lawsuit that the Housing Authority had brought against HUD and voiced concerns about TSSI's management. Eventually, the Executive Director demoted the Employee and cut his pay by over \$30,000. The Employee then resigned and sued the Housing Authority, alleging that the Housing Authority constructively discharged him as retaliation for his exercise of his right to free speech under the First Amendment. The district court granted the Housing Authority's motions to dismiss, finding that the First Amendment did not protect the speech made by the Employee because he had made that speech as part of his official duties. The district court also found that the Housing Authority and TSSI were entitled to qualified immunity. The Employee appealed the district court's grant of the Housing Authority's and TSSI's motions to dismiss.

The appellate court affirmed the district court's ruling, agreeing that the Employee's speech was made as part of his official duties and therefore was not constitutionally protected. The court first determined that in order for the Employee to prevail on a First Amendment retaliation claim, he had to demonstrate that he engaged in an activity that the First Amendment protects and that the Housing Authority used the protected activity as a substantial factor in its decision to take retaliatory action against the Employee. To determine whether the First Amendment protected the Employee's speech, the court looked at whether the

Employee had made his speech as part of his official duties as a public employee or as an average citizen. Applying the relevant case law, the court concluded that the First Amendment did not protect the Employee's speech because it was made within his official duties. The court found that an employee's complaints about issues related to an employee's workplace duties are part of an employee's official duties. In this case, the court found that the Employee's complaints about potential misconduct by Housing Authority and TSSI employees were directly related to his duty to supervise troubled departments at the Housing Authority, including TSSI. According to the court, reporting misconduct was a logical part of the Employee's job duties as Executive Assistant to the Housing Authority's Executive Director. The court did not reach the issue of qualified immunity because it did not have to in order to resolve the present case.

HOUSING AUTHORITY

Freeman v. Philadelphia Hous. Auth. et al., CIV.A. 12-1422, 2012 LEXIS 112031 (E.D. Pa. Aug. 8, 2012).

DISCRIMINATION, Disability;
EMPLOYMENT, Wrongful discharge;
HOUSING AUTHORITY, Employment

Thomas Freeman (Employee) sued his former employer, the Philadelphia Housing Authority (Housing Authority); Fred Pasour, the Housing Authority's Acting General Counsel (General Counsel); and Stacey Thomas, the Housing Authority's Labor Relations Coordinator (Coordinator) for disability discrimination after the Housing Authority terminated his employment. The Employee worked for the Housing Authority as an Asset Manager for over fourteen years when he began experiencing problems with his foot because of his diabetes. Three years after he made known his original diagnosis to the Housing Authority, the Employee took a leave of absence from work to undergo foot surgery in which all of the toes on his left foot were amputated. The Coordinator sent the Employee a letter acknowledging his request for a leave of absence and informing him of his rights under the Family and Medical Leave Act (FMLA). The Employee informed the Coordinator of his desire to

return to work at the Housing Authority, and she advised him that his job would be available to him for up to one year. Approximately six months later, the Employee attempted to return to the Housing Authority but the General Counsel told him that he would have to schedule an appointment with the Coordinator to be cleared by the Housing Authority's physician before he could return. After attempting to reach, without success, either the Coordinator or the General Counsel for over a month, the Employee received a letter from the General Counsel, informing him that his FMLA leave had expired and that his employment was terminated. The Employee alleged that this was the first time the Housing Authority had informed him that he was on FMLA leave. Over one year later, the Employee filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC) and the Pennsylvania Human Relations Commission (PHRC), which issued him a Right to Sue Letter. The Employee sued the Housing Authority for violating the Americans with Disabilities Act (ADA), retaliation under the ADA, failure to accommodate under the ADA, violation of the FMLA, and violation of the Pennsylvania Human Relations Act (PHRA). He sued the Coordinator and the General Counsel for interference under the FMLA and aiding and abetting discrimination and retaliation under the PHRA. The Employee sought compensatory and punitive damages. The Housing Authority, the General Counsel, and the Coordinator moved to dismiss the complaints against them due to the Employee's alleged failure to comply with the applicable statutes of limitations and failure to plead an adequate claim for violation of the FMLA.

The court granted the motions in part and denied the motions in part. The court dismissed the ADA claims against the Housing Authority because the Employee did not file his complaint to the EEOC within the applicable statute of limitations. Even though the ADA adopts the 180-day statute of limitations used by Title VII of the Civil Rights Act, because the Employee filed his complaint with the PHRC, a parallel state agency, he had 300 days to file his complaint. Nevertheless, the court found that the Employee missed the extended deadline because the alleged unlawful employment practice could only be considered the termination effective on February 19, 2010, and the Employee did not file his Charge of Discrimination with the EEOC

until May 3, 2011. The court denied the Housing Authority's motion to dismiss the FMLA claim. The court found that although the statute of limitations under the FMLA claim is two years, in cases of willful violation, the statute of limitations is three years. The court found that the Employee had pled facts in his complaint that constituted a willful violation of the FMLA. The court also found that the Employee had properly pled an interference claim under the FMLA as to the Housing Authority, but not to the General Counsel. For the Housing Authority, the Employee pled facts showing that he was an eligible employee under the FMLA, that he was entitled to FMLA leave and was working for an employer who was subject to the FMLA, and that he gave notice of his intention to take FMLA leave but was then denied the FMLA benefits to which he was entitled. However, the court found that the Employee did not plead sufficient facts to allege that the General Counsel constituted an "employer" for purposes of the FMLA because he did not plead that the General Counsel had supervisory control over the Employee. The court permitted the Employee the opportunity to cure the deficiencies in his FMLA interference complaint against the General Counsel. The court granted the Housing Authority's motion to dismiss the Employee's claim for punitive damages, finding that the FMLA did not expressly provide for punitive damages nor did case law support such an interpretation of the FMLA. Finally, the court found that the Employee's PHRA claim was barred by the statute of limitations because he had not filed his complaint within the 180 days that the PHRA allocated to complainants.

Smith v. Philadelphia Hous. Auth., CIV.A. 12-329, 2012 LEXIS 112641 (E.D. Pa. Aug. 10, 2012).

EMPLOYMENT, Collective bargaining, Fair representation; FREEDOM OF SPEECH, Employment; HOUSING AUTHORITY, Collective bargaining, Employment

Robert Smith (Employee) sued the Philadelphia Housing Authority (Employer), its executive director (Director), the United Brotherhood of Carpenters and Joiners of America Local 8 (Union), and the Union's executive secretary (Secretary), for injuries the

Employee allegedly suffered on the job and for violations of the Employee's constitutional rights. The Employee, a member of the Union and an employee of the Employer, worked at a construction site in Philadelphia where he allegedly encountered asbestos and other dangerous substances in 2009 and 2010. The Employee claimed that he raised concerns about these materials to the Union and to the Employer, but they ignored the Employee's concerns. The Employee alleged that he subsequently began to suffer severe respiratory problems, which caused him to have to stop working. The Employee also claimed that the Union and the Employer had underpaid the Employee for his work, paying him \$24.50 per hour instead of \$37.40 per hour, the contractual rate of pay for a union carpenter in Philadelphia. At a workers' compensation hearing, a judge found that the Employee had not met his burden of showing that he suffered from asbestos-related disease and that the Employee's respiratory problems were unrelated to asbestos exposure. The judge did find that the Employee had experienced job-related asthma because of exposure to airborne dust, and that the Employee was entitled to disability benefits as a result. In the present lawsuit, the Employee claimed that the Union breached its duty of fair representation to the Employee; that the Union and its Secretary violated the Labor-Management Reporting and Disclosure Act by ignoring the Employee's concerns about the asbestos exposure; and that the Employer, Union, and Director violated the Employee's rights under the First, Fifth, and Fourteenth Amendments. The Employer, the Director, the Union, and the Secretary moved to dismiss all claims.

The court granted the defendants' motions and dismissed all claims with prejudice except for the Employee's breach of duty of fair representation claim against the Union, which the court dismissed without prejudice. As to this claim, the court found that the Employee had not met his burden of showing, first, precisely which portion of the collective-bargaining agreement the Employer had breached or second, that the Union had breached its duty of fair representation it owed to the Employee. The court dismissed this claim without prejudice to allow the Employee to file an amended pleading. Next, the court dismissed the Employee's claim against the Union and the Secretary that the Employee's first amendment free speech rights

were violated when the Union and the Secretary ignored the Employee's complaints about the dangerous work conditions. The court found that the Labor-Management Reporting and Disclosure Act protected union workers' right to free speech to the extent of ensuring that unions are democratically governed. The court concluded that the Employee had not alleged that the Union had restricted his right to free speech in a manner having a direct impact on the union's democratic governance, and therefore the Employee's claim was without merit. Finally, turning to the Employee's allegations against the Employer, the Director, and the Union that the Employee's constitutional rights were violated, the court looked at case law from the Supreme Court to find that there was no constitutional right to a workplace free of unreasonable risk of harm. The Employee, therefore, had failed to allege a cognizable constitutional claim and the court dismissed these claims.

Tagliaferri v. Winter Park Hous. Auth., et al., 12-10109, 2012 LEXIS 16673 (11th Cir. Aug. 10, 2012).

APPOINTMENT OF COUNSEL, General;
DISCRIMINATION, Handicap; HOUSING
AUTHORITY, General

Angela Tagliaferri and Betsy Stephens (Tenants) sued Winter Park Housing Authority, Cambridge Management Services, Inc., and two Cambridge employees (collectively, Housing Authority) *pro se* for not renewing the Tenants' lease on account of the sexual relationship they had with a maintenance man. The Tenants alleged that the Housing Authority violated the Fair Housing Act (FHA) by sexually harassing the Tenants and discriminating against one of them based on her handicaps by failing to provide a bike rack that would keep other tenants from leaving bicycles on the staircase in front of her apartment. The Tenants also argued that the Housing Authority violated Florida law by breach of contract, retaliation by landlord, and defamation. The Tenants moved the court to appoint them counsel. The Housing Authority moved to dismiss for failure to state a claim. The district court denied the motion for appointment of counsel, dismissed the federal law claims, and declined to exercise supplemental jurisdiction over the state law

claims. The Tenants appealed the district court rulings and argued that the district court erred by failing to stay its ruling on the motion to dismiss until the Florida Commission on Human Relations (Commission) finished an investigation of their claims.

The appellate court, in a per curiam decision, affirmed the district court's dismissal of the Tenants' complaint. First, the court determined that the district court had not abused its discretion by denying the Tenants' motions for appointment of counsel because plaintiffs in civil cases have no constitutional right to be represented by an attorney. The court reasoned that the appointment of counsel in civil cases is a privilege that only arises in exceptional circumstances such as the presence of novel or complex facts or legal issues, which did not exist in the Tenants' case. Next, the court refused to consider the Tenants' argument that the district court erred by dismissing the Tenants' complaint before the Commission completed its investigation. The court found that that the Tenants were raising the issue for the first time in their appeal, and therefore the issue was not properly before the court to consider. Next, the court concluded that the district court's dismissal of the Tenants' claims under the Fair Housing Act was correct because the allegations of sexual harassment in the Tenants' complaint were incomplete and did not meet the standard of being sufficiently severe and pervasive to be actionable under the FHA. The court noted that the Tenants had not claimed that their lease would have been renewed if they had consented to unwelcome sexual advances. The court also ruled that the district court was correct to dismiss the Tenant's claim of discrimination based on her handicaps because the installation of a bike rack would not have addressed the Tenant's disabilities. Furthermore, the court said, the Housing Authority did not deny the Tenant an equal opportunity to access her apartment because all of the apartment's residents were required to move around the bicycles. Finally, the court concluded that the district court did not abuse its discretion by declining to exercise supplemental jurisdiction over the Tenants' state law claims because it had already dismissed all of the Tenants' federal law claims.

United States v. Pitt, 09-4724, 2012 LEXIS 11169 (4th Cir. June 1, 2012).

CONFLICT OF INTEREST, General;
CRIMINAL ACTIVITY, General; HOUSING
AUTHORITY, Fraud

Ernest Harold Pitt (Chairman), the chairman of the board of the Housing Authority of Winston-Salem (Housing Authority), was indicted and tried for mail fraud. North Carolina law prohibits housing authority commissioners from acquiring an interest in a current or potential housing project and requires them to disclose any conflict of interest. The Chairman and a business partner purchased a subdivision known as Lansing Ridge, which they sold to Forsyth Economic Venture, a non-profit organization owned and controlled by the Housing Authority. The Housing Authority's board was not aware of the purchase of Lansing Ridge and it did not seek approval from the United States Department of Housing and Urban Development (HUD) before the purchase, as it usually did. The Housing Authority eventually submitted an acquisition package to HUD, but HUD denied it after discovering the Chairman's conflict of interest. This denial meant that the Housing Authority could not use federal funds to develop the property. The Chairman resigned and was subsequently indicted, tried, and convicted on two counts of mail fraud. The Chairman appealed on the grounds that the district court had improperly denied his motion for judgment of acquittal and that the jury instructions had been improper.

The appellate court vacated the Chairman's conviction on the grounds that that the trial court's jury instructions were plainly erroneous. First, however, the court rejected the Chairman's contention that there had been insufficient evidence for the jury to convict him of mail fraud. The court found that the evidence had indeed been sufficient for a reasonable jury to find beyond a reasonable doubt that the Chairman had concealed his conflict of interest from the Housing Authority and that the Chairman had had the intent to defraud the Housing Authority of the money it used to purchase Lansing Ridge. The court, however, accepted the Chairman's argument that the instructions the district court gave to the jury were erroneous. The appeals court found that the district court had

appropriately instructed the jury that it could convict on either a deprivation-of-property or a deprivation of honest-services theory of fraud, but that it had failed to instruct the jury that an honest-services theory of fraud is limited to bribery or kickback schemes, as a recent Supreme Court decision required. However, since the Supreme Court had not yet issued its ruling by the time the Chairman's trial ended, the Chairman had not made an issue of the erroneous jury instructions at trial. The court therefore proceeded under a plain error review and found that to demonstrate plain error, the Chairman had to show that plain error had affected his substantial rights as well as the fairness, integrity, or public reputation of the court proceedings. The court found that the erroneous jury instructions did constitute plain error that substantially affected the Chairman's rights, since but for the erroneous instructions, the jury would likely have found the Chairman to be innocent of mail fraud. The case against the Chairman had been based on the theory that he had committed honest-services fraud by depriving the public of his honest services as chairman of the board for the Housing Authority by failing to disclose his conflict of interest, although there was no evidence of bribery or kickback. Finally, the court noted that the erroneous jury instructions had affected the fairness, integrity, or public reputation of the court proceedings and therefore the court vacated both of the Chairman's convictions and remanded to the district court for further proceedings.

Williams v. New York City Hous. Auth., 10-CV-1070, 2012 LEXIS 104385 (E.D.N.Y. July 26, 2012).

DISCRIMINATION, Race, Disability;
HOUSING AUTHORITY, Discrimination

Alvin Williams (Tenant) sued the New York City Housing Authority (Housing Authority), alleging that it violated his rights under federal, state, and city law, by failing to lease him the apartment his mother lived in before she died. After his mother's death, the Tenant claimed that he had lived in the apartment with her for the past ten years and requested that the apartment complex's managing office allow him to remain in the apartment. The managing office declined to honor the Tenant's request because his mother had not obtained permission for him to live with her and he

could not therefore satisfy the Housing Authority's requirements for succeeding his mother as the apartment's tenant of record. After the Housing Authority denied his request, the Tenant attended a grievance meeting with the apartment manager, who refused to allow him to stay in the apartment because he had not been lawfully living there. The Housing Authority affirmed this decision and commenced eviction proceedings against the Tenant. The Tenant sued the Housing Authority, alleging that the Housing Authority's refusal to allow him to live in his mother's former apartment constituted discrimination against him on the basis of race and disability, in violation of the federal Fair Housing Act, the New York State Human Rights Law, and the New York City Administrative Code. To support his contention that the Housing Authority discriminated against him on the basis of his race, the Tenant submitted a chart showing that out of twenty-eight holdover proceedings commenced by the Housing Authority against occupants of the Tenant's apartment complex from 2008 to 2010, nineteen were initiated against African-Americans while only one was initiated against a non-Hispanic white. In support of his contention that the Housing Authority discriminated against him on the basis of his disability, the Tenant provided evidence that he suffered from heart disease and depression. The Housing Authority moved for summary judgment dismissing the complaint.

The court granted the Housing Authority's motion for summary judgment. First, the court noted a plaintiff could use three legal theories under the Fair Housing Act and its state and city analogs: intentional discrimination, disparate impact, or failure to make a reasonable accommodation. The court categorized the Tenant's arguments as claims of intentional discrimination based on disability and race; discrimination in the form of disparate impact against African-Americans from the Housing Authority's rent-succession policies; and failure to provide a reasonable accommodation for his disability in the form of allowing him to succeed to his mother's lease. For the intentional discrimination based on race and disability claims, the court granted summary judgment to the Housing Authority because the Tenant had not attempted to rebut the Housing Authority's legitimate, nondiscriminatory reason for refusing to allow the

Tenant to succeed to his mother's lease. As to the disparate impact claim, the court granted summary judgment to the Housing Authority because the chart that the Tenant offered as evidence did not demonstrate a disparate impact on African-American residents. In order for the chart to show disparate impact, the Tenant would also have had to provide evidence showing the demographics of the entire apartment complex as a comparison of the impact on residents of other races. Finally, the court granted summary judgment to the Housing Authority on the reasonable accommodation claim, explaining that it would have been "patently unreasonable" to require the Housing Authority to violate its tenant selection policy, adopted pursuant to federal regulations and a federal consent decree, by forcing it to allow the Tenant to succeed to his mother's lease.

INDIAN HOUSING

Lummi Tribe of Lummi Reservation, et al. v. United States, 08-848C, 2012 LEXIS 1005 (Fed. Cl. Aug. 21, 2012).

INDIAN HOUSING, Indian housing authority;
U.S. DEP'T OF HUD, General

The Lummi Tribe of the Lummi Reservation, the Lummi Nation Housing Authority, the Fort Peck Housing Authority, the Fort Berthold Housing Authority, and the Hopi Tribal Housing Authority (Tribe) sued the United States to recover grant funds that the Department of Housing and Urban Development (HUD) recaptured from them. HUD had provided the grant funds to the Tribe pursuant to the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), which provides that the Secretary of HUD will give annual grants to Indian tribes or tribal housing authorities. The amount of funds given is determined in part by the inventory of rental units and lease-to-own units owned by the recipient. In 2001, HUD's Office of Inspector General concluded that HUD had improperly failed to exclude from the grant calculation units that no longer qualified to be part of the determination, and recommended that HUD recoup the overpayments for the ineligible units. HUD then notified the Tribe that

it intended to recover funds from them by reducing the grant funds they would subsequently receive. HUD did not conduct formal hearings. In Count II of their complaint, the Tribe alleged that HUD committed an illegal exaction because it did not have the legal authority to recapture the funds. The Tribe alleged that HUD violated NAHASDA's terms and that the remedy for this failure was a return of the funds unlawfully exacted. The United States moved to dismiss this count, contending that HUD had acted properly in recapturing the funds because it was permitted to recover grant funds without following NAHASDA's procedures. The Tribe argued that Congress had expressed its intention to exclude all other procedures by setting forth procedures in Sections 401 and 405 of NAHASDA, which required HUD to provide hearings and disallowed the recovery of funds if those funds had been spent on affordable housing, so long as HUD did not find that the recipient failed to comply substantially with NAHASDA. None of these conditions was allegedly satisfied in HUD's recapture of the Tribe's funds. The United States responded that Section 401 only applied to cases where a grant recipient has substantially failed to comply with NAHASDA and Section 405 only applied to audits and reviews by HUD for specific purposes that did not apply in the instant case. The United States also argued that the Tribe was incorrect in asserting that Section 405 contained the same requirements as Section 401. According to the United States, in cases where HUD misallocated funds, it was authorized to use its inherent authority, a common law right independent of NAHASDA, to recover these funds. The United States moved to dismiss the count of the Tribe's complaint.

The court denied the United States' motion to dismiss. The court determined that Section 405 did apply to HUD's recovery of misallocated funds. The court reasoned that when HUD acted pursuant to the audit that showed that ineligible housing had been included in the grant-funding formula, it was acting within Section 405's mandate to ensure that the grant program complied with NAHASDA. The court determined the United States read Section 405 too narrowly when it argued that the audits governed by Section 405 did not include reviews of the formula that determines the amounts of grants. The court then concluded that HUD could not use a common law approach when Section

405 applied, because common law remedies are only appropriate when a statute has not superseded them. The court nonetheless rejected the Tribe's argument that Section 405 incorporated the noncompliance provisions of Section 401 into actions taken under Section 405. However, the court determined that Section 405 contained its own hearing requirement, and because HUD failed to provide the Tribe with a hearing, the court denied the United States' motion to dismiss the claim.

Nambe Pueblo Hous. Entity v. United States HUD, Civil Action No. 11-CV-01516-RPM, 2012 U.S. Dist. LEXIS 125025 (D. Colo. Sept. 4, 2012).

HOUSING AUTHORITY, Funds; INDIAN HOUSING, Indian housing authority; U.S. DEPT OF HUD, Due process, Enforcement of regulations

The Nambe Pueblo Housing Entity (Nambe Pueblo), a tribally designated housing entity, sued the United States Department of Housing and Urban Development (HUD) after HUD determined that twenty-three home Landlordship units were ineligible for block grant funding and sought recoupment of asserted overpayments. In 1998, Nambe Pueblo assumed responsibility for the management of 47 lease-to-own units owned by the Northern Pueblos Housing Authority. Five years later, Nambe Pueblo began the process of preparing the quitclaim deeds necessary for the transfer of legal Landlordship of the units. In October of 2006, the Division of Land Titles and Records (Records Office) recorded the deeds. Nambe Pueblo was unable to convey the 47 units to the homebuyers before the expiration of the 25-year lease-purchase agreements; however, Nambe Pueblo continued to operate and maintain the units and reported them as units eligible for HUD funding for the next two years. In 2008, HUD notified Nambe Pueblo that the units had become ineligible for grant funds because of the Nambe Pueblo's failure to timely convey the units to the homebuyers. Consequently, HUD informed the Nambe Pueblo that it had to repay over two hundred thousand dollars in grant funds it received for these units during the years the units were ineligible. In 2009, Nambe Pueblo appealed HUD's

determination and requested that HUD reconsider the eligibility of the units. HUD accepted Nambe Pueblo's explanation that 24 of the units were eligible because conveyance to the homebuyers was impracticable, but it denied the claim that the remaining 23 units were eligible. In 2010, HUD notified Nambe Pueblo that it would recover the overpayment for the 23 units of \$166,177.00 by reducing the Nambe Pueblo's annual grant funds over the subsequent four years, until the overpayments were paid off. Nambe Pueblo then filed a lawsuit against HUD challenging HUD's determinations on the grounds that HUD's recoupment of the asserted overpayments on the 23 units violated the NAHASDA regulatory scheme, were barred by a three year statute of limitations, and, furthermore, were arbitrary and capricious because the same master lease problems resulted in delays in conveying all 47 of the units, and HUD allowed 24 units to remain eligible, but claimed that 23 units, in the exact same situation, were ineligible.

The court granted Nambe Pueblo's claims and ordered the question of HUD's recapture authority for determination in subsequent litigation. The court found that HUD was not entitled to recover the alleged 2006 fiscal year overpayments because HUD did not take action to notify the Housing Agency that it was removing the units from Nambe Pueblo's inventory as ineligible until 2009; therefore, its actions were barred by the three-year statute of limitations. First, the court noted that the relevant HUD regulation established a statute of limitations of three years from the date that HUD took action. Second, the court found that the statute of limitations expired on August 1, 2008 because HUD took action when it sent the Formula Response Form to Nambe Pueblo for the 2006 fiscal year on August 1, 2005. Furthermore, the court rejected HUD's claim that it did not take action until its 2008 letter to Nambe Pueblo requesting information about the disputed fiscal years, reasoning that "take action" does not include HUD's mere request for information. The court also concluded that HUD's determination was arbitrary and capricious because Nambe Pueblo's failure to prepare and submit quitclaim deeds for the 23 units to the Records Office for approval was irrelevant since the problems with the master lease would have prevented the timely conveyances to the homebuyers and were beyond Nambe Pueblo's control. Next, the

court found that HUD's determinations were not entitled to deference, because HUD's contention that the untimely conveyances were attributable to Nambe Pueblo, rather than the Records Office, was faulty. Finally, the court made note of Nambe Pueblo's argument that HUD had violated the Housing Act because it lacked the authority to recapture alleged overpayments that were already spent on affordable housing activities, but delayed a decision on that issue until the next phase of litigation.

JURISDICTION

U.S. ex rel. Newell v. City of Saint Paul, Minn., CIV. 09-1177 DWF/TNL, 2012 LEXIS 100799 (D. Minn. July 20, 2012).

JURISDICTION, Subject matter; U.S. DEP'T OF HUD, Regulations

Frederick Newell (Whistleblower) initiated a qui tam action against the City of St. Paul (City), alleging that the City had submitted fraudulent certifications of Section 3 compliance to the U.S. Department of Housing and Urban Development (HUD) so that it could receive Community Development Block Grants and other federal funds. The City's compliance with section 3 had been called into question on numerous occasions since 1982, when a contractor filed a complaint with HUD, causing HUD to enter into a voluntary compliance agreement with the City. The City had also been sued three times between 1983 and 1994 for failing to comply with Section 3. In 2005, when the Whistleblower inquired about the City's Section 3 compliance, a former City employee gave him a copy of an internal memorandum documenting the City's noncompliance with Section 3 requirements; the City had made this memorandum public in 2003 through a Minnesota Data Practices Act request. In 2006, the Whistleblower sued the City for alleged violations of Section 3; the district court dismissed for lack of standing. In 2007, the City disclosed to the public a report stating that it was unclear that the City was following HUD guidelines regarding Section 3. In 2008, the Whistleblower filed a complaint with HUD about the City's failure to comply with Section 3 requirements. HUD and the City again entered into a

Voluntary Compliance Agreement, which specifically stated that it did not release the City from any claims arising under the False Claims Act (FCA). The Whistleblower then sued the City for violations of the FCA. The City moved to dismiss the Whistleblower's complaint, arguing that the district court did not have jurisdiction over the Whistleblower's claim because it was based on publicly disclosed information of which the Whistleblower was not an original source. The City asserted that the Whistleblower's FCA claim was thus barred by federal law governing civil actions for false claims. The City also alternatively argued that the Whistleblower failed to plead fraud with particularity and failed to state a claim upon which relief could be granted.

The court granted the City's motion to dismiss the Whistleblower's FCA claims. The FCA provides that no court has jurisdiction when a party sues under the FCA based upon publicly disclosed sources of information for which that party is not an original source. The court agreed with the City that the Whistleblower's allegations were based upon disclosures that had been publicly available before the Whistleblower filed suit against the City, including the original 1983 complaint to HUD, the ensuing Voluntary Compliance Agreement between HUD and the City, the three lawsuits subsequently filed against the City between 1983 and 1994 for alleged failure to comply with Section 3 requirements, and the Whistleblower's own previous lawsuit against the City on similar grounds. The publicly available disclosures also included an internal memorandum documenting the City's Section 3 noncompliance that the Whistleblower received from the former City employee, as well as reports (and the absence of certain reports) that the Whistleblower received from HUD as a FOIA request. Having found that the Whistleblower's allegations had been publicly disclosed before the Whistleblower brought his FCA claim, the court next found that the Whistleblower's *qui tam* suit was actually based on the public disclosures that had been previously made. The court concluded that, since the Whistleblower was not an original source of the information on which he had based his allegations, the FCA barred jurisdiction of the court to hear the Whistleblower's claim.

LEAD PAINT

Bowman, et al. v. Ottawa Enterprises, et al., NNHCV075013005S, 2012 Conn. Super. LEXIS 1368 (Conn. Super. Ct. May 24, 2012).

ATTORNEY'S FEES, Amount of award; CIVIL PROCEDURE, Failure to appear; LEAD PAINT, General; NEGLIGENCE, Damages, Duty to make premises safe, Liability; SECTION 8, Condition of housing

Doretta Bowman (Participant), on behalf of herself and her minor daughter Amarea Moore (Daughter) sued Ottawa Enterprises and Anthony Perrotti (Owners), the owners of the Participant's apartment building, for monetary damages resulting from lead paint exposure. The Participant took up residence in the apartment in February 2005, when her Daughter was one year old. During her annual pediatric exam in March 2005, the Daughter was tested for traces of lead in her blood. The results showed normal lead levels. During a pediatric well-child visit in September 2006, the doctor observed that the Daughter had speech difficulties, and a blood test confirmed that the Daughter had an elevated blood lead level, confirmed by a follow-up test two weeks later. Shortly thereafter, at the request of the doctor and the Participant, the state Department of Health performed an inspection and found lead paint in several locations in the interior and exterior of the Participant's apartment. With this news, the Participant terminated her lease in November of 2006. Subsequent tests showed that the Daughter's lead levels decreased to normal over the next four years after leaving the apartment. In 2011, a neuropsychologist performed a battery of tests on the Daughter and determined that she suffered from expressive language delays and would have educational difficulty in comparison to her peers. The neuropsychologist concluded that, while she could not rule out genetic factors, there was a strong likelihood that the damage caused by elevated levels of lead resulted in the Daughter's cognitive problems. The Participant alleged the Owners were guilty of negligence *per se* for violating state lead paint statutes. The Owners failed to appear, and the court entered default judgment in the Participant's favor. The Participant requested compensatory damages as well as

the return of all money paid in rent.

The court ruled that the Daughter was entitled to \$200,000 in compensatory damages and the Participant was entitled to \$15,810 in attorney's fees and costs. The court determined that responsibility fell to the Owners to make repairs and undertake all necessary abatement, and the Owners knew or should have known that there was lead paint in the apartment when the Participant rented it. For this reason, the court found the Owners were liable for damages to the Participant and her Daughter. The Court found that state statute provided that a landlord may not collect rent when out of compliance with the lead paint statute; however, the court ruled that this remedy allowed a Participant to stop paying rent but did not allow for the recoupment of rent paid. Furthermore, the court further held that, since the Participant had the entirety of her rent paid by Section 8 vouchers, reimbursement to the Participant would result in unjust enrichment. For this reason, the court denied the Participant's request for reimbursement of past rent.

LOW INCOME HOUSING

City of Richmond v. Jackson Ward Partners, No. 110820, 284 Va. 8, 726 S.E.2d 279, 2012 Va. LEXIS 127, 2012 WL 2036938 (June 7, 2012).

HOUSING AUTHORITY, Scattered site; LOW INCOME HOUSING, Funding, Taxation; U.S. DEPT OF HUD, Regulations

Jackson Ward Partners, L.P. (Property Owner), the property owner and operator of an affordable rental housing development, sued the City of Richmond (City) alleging erroneous property tax assessments by the City. The Property Owner purchased eight non-contiguous tax parcels and financed the renovations necessary to operate an affordable, scattered-site housing development with loans from the Virginia Housing and Development Authority (Housing Authority) and HUD. The Housing Authority required the Property Owner to operate the property as an eighteen-unit, affordable, multi-family rental housing development for a fixed number of years, and it treated the parcels as an eighteen-unit apartment complex. The

property included eleven buildings, located on three different streets. The Property Owner filed suit against the City alleging that the City's tax assessment of the property as eighteen separate units, as opposed to a single apartment complex, was erroneous and in violation of the state's constitution because it exceeded market value and lacked uniformity among similarly situated properties. The Property Owner also requested a correction of the assessments. During the trial, the Property Owner's expert witness contended that the City's assessment of the property did not represent the highest and best use of the property as an affordable housing development. The Property Owner further contended that the City should have appraised the fair market value of the properties as a single apartment complex and allocated the value on a per unit basis. The City's expert witness contended that the mathematical calculation offered by the Property Owner would result in a valuation at less than fee simple interest, and that the City's assessment was not restricted by the regulatory agreement between the Housing Authority and the Property Owner. The City further contended that it correctly used a sales comparison approach, which assessed the value of the eight parcels based on each parcel's individual characteristics and comparable units. The court ruled in favor of the Property Owner and ordered the City to refund the Property Owner for the overpaid taxes plus interest. The City filed a motion to reconsider, which the court denied, and the City appealed.

The appellate court reversed the lower court's decision and remanded the matter to the lower court to enter an order reinstating the City's tax assessments on the eight units for the applicable tax years. The court concluded that the City's assessment was presumed to be correct and the Property Owner had the burden to prove that the fair market value assessed by the City was incorrect. The court found that the Property Owner did not meet this burden because it challenged the City's assessment method but failed to establish the property's fair market value based on an acceptable, non-arithmetic formula. Additionally, the court reasoned that the mathematical assessment method suggested by the Property Owner did not properly consider the variations among the units such as size, number of bedrooms, and location of each unit. The court further concluded that the City's assessment of the property as

eight separate, non-contiguous parcels was required pursuant to statute. The dissenting judges concluded that the City should not have prevailed because the assessment method relied on by the Property Owner was not improper as a matter of law. The dissent also noted that the restrictions imposed by the Housing Authority affected the highest and best use, and reliance on a mathematical income approach was persuasive because there was evidence presented that the Housing Authority supported the use of the property as a single, multifamily development.

Jones, et al. v. Mayor & Council of Hurlock, Md., CIV. JFM-11-00123, 2012 LEXIS 110115 (D. Md. Aug. 7, 2012).

DISCRIMINATION, Race; EQUAL PROTECTION, General; FAIR HOUSING, Damages, Site selection; LOW INCOME HOUSING, Approval by locality, Discrimination

Amos and Ronald Jones and Jones Brothers General Contractors (Contractors) sued the Mayor and Council of Hurlock, Maryland alleging that the Mayor and Council discriminated against them and their plans to provide affordable housing due to their race and in violation of the FHA and the Equal Protection Clause of the Fourteenth Amendment. At a meeting of the Mayor and Council, the Contractors proposed to demolish the apartments on a property downtown and build townhome units for low-income families. The next day, the Contractors entered into a contract to purchase the property. A month later, the Contractors attended another Mayor and Council meeting to submit a site plan drawing. The Contractors alleged that this was the first time the City's zoning administrator informed them that they would need a special exception and a variance for the project. The Contractors made the necessary requests, but the City's Board of Appeals granted the requests on the condition that they applied only to the Contractors and were not transferrable. The Contractors alleged that this prevented them from partnering with investors. The Contractors were unable to secure financing before the settlement deadline, and their contract to purchase the property became void. Someone bought part of the property, which nullified

the approval of the Contractors' special exception and variance. The Contractors again entered into a contract to purchase the remainder of the property and re-sought zoning approval. The Board of Appeals granted them a special exception and two variances on the condition that they settle the purchase contract within ninety days. The Contractors again failed to obtain financing before the settlement deadline. The previous buyer bought the remainder of the property. The Contractors accused the Council of attempting to influence the Board of Appeals to deny their zoning applications. The Contractors also claimed that the Council urged the purchaser of the property to buy it in order to block the Contractors' project and prevent African-Americans from moving downtown. The Contractors continued to express their desire to bring affordable housing to the City and continued to voice their concerns about disparate treatment at meetings months later before the newly elected Council and Mayor, but allegedly the Council prohibited them from discussing their plans because they were African-American. The Contractors alleged the new Council acted in retaliation and filed suit. The Mayor and Council moved for summary judgment, arguing that the Contractors lacked standing because there was no evidence that the Contractors suffered any injury because of the Mayor and Council's actions.

The court granted the Mayor and Council's motion for summary judgment. The court determined that the Contractors had standing to sue because they alleged that the Mayor and Council caused them to face economic losses and stigma. The court then analyzed the Fair Housing Act claim under the different standards advanced by the two parties and determined that the Contractors' claim failed under both approaches. The Contractors advocated that the court should determine discriminatory zoning claims against municipal governments through a test that used four factors: disparate impact, discriminatory intent, the defendant's interests in performing the challenged action, and the relief sought by the plaintiff. The court found that these factors weighed against the Contractors' claims because there was no evidence of disparate impact, little evidence of discriminatory intent, and legitimate reasons for the Mayor and Council's actions, which outweighed the fact that the Contractors merely sought to prevent them from

interfering with their ability to develop affordable housing. The Mayor and Council advocated that the court evaluate the discriminatory intent claim through the McDonnell Douglas burden-shifting approach. Using this approach, the court found that the Contractors did not have sufficient direct or circumstantial evidence of discrimination to defeat a motion for summary judgment. The court dismissed the Contractors' claim under the Equal Protection Clause of the Fourteenth Amendment, using its prior reasoning that the Contractors had failed to show that the Mayor and Council's actions were motivated by racial discrimination.

Maciel v. Thomas J. Hastings Properties, Inc., et al., CIV.A. 10-12167-JCB, 2012 LEXIS 115534 (D. Mass. Aug. 16, 2012).

CONTRACT, Dispute; DISCRIMINATION, Race; FAIR HOUSING, Standard of proof; LOW INCOME HOUSING, Discrimination

Donna Maciel (Buyer) sued Thomas J. Hastings Properties, Inc., Mr. Hastings, Hastings Companies LLC, and Back River Park LLC (collectively, Company) alleging discrimination based on race under federal and state laws. The Buyer had attempted to purchase an affordable housing condominium at the Back River Townhomes development (Development), which included five affordable housing units in the luxury condominium development. The Buyer, an individual of South Asian/Indian descent, visited the Development with her two daughters to view a unit. The Buyer asserted that the real estate sales associate questioned whether she would feel comfortable living in the predominantly white neighborhood, although the Company denied that this occurred. The Buyer also contended that another employee of the Company was friendly to her over the phone and told her to be ready to sign a Purchase and Sale Agreement (P&S), but when she met him in person, he was shocked by her appearance and told her that an affordable unit might not be available for ten years. The Buyer alleged that she signed a P&S with another company because of what the employee told her; however, she remained at the top of a unit selection list with the Company and was invited to sign a P&S for a unit at the

Development. The Buyer alleged that the Company insisted she obtain a written release from the other company with which she had signed a P&S before allowing her to sign a P&S with them, despite her provision of documentation showing that the other company had agreed to release her from the P&S. After the Buyer signed a P&S with the Company, the Buyer and the Company entered into a dispute over the closing date, which resulted in the Company holding the Buyer in default under her P&S for failure to close at the appointed time. The Buyer alleged that the Company allowed a white purchaser the opportunity to purchase a more desirable unit for which the Buyer was actually next in line and treated this purchaser more favorably in regards to her closing date. The Buyer alleged that the Company violated the Fair Housing Act, the Massachusetts Fair Housing Law, the Massachusetts Equal Rights Act, and the Massachusetts Consumer Protection Act by discriminating against her based on her race. She also brought claims for breach of the covenant of good faith and fair dealing and breach of contract, as well as intentional infliction of emotional distress. The Buyer moved for summary judgment with respect to her contract claims and the Company moved for summary judgment on all claims.

The court denied both motions for summary judgment. The court found that there were genuine issues of material fact regarding whether the Company breached the covenant of good faith and fair dealing. The court analyzed the housing discrimination claims under federal law because the federal and state statutes at issue were substantially similar. The court found that the Buyer had provided evidence that gave rise to a prima facie inference of unlawful discrimination. The burden then shifted to the Company to provide a nondiscriminatory reason for its conduct. The court found that the Company had provided a legitimate reason for its actions, so the burden shifted back to the Buyer to show that this reason was pretextual by showing that the Company treated her differently than a similarly situated individual at a similar time. The court found that there was a genuine issue of material fact as to whether the Company discriminated against the Buyer and whether its stated reasons were pretextual. Finally, the court did not grant the Company summary judgment on the Buyer's claims for intentional infliction of emotional distress because the

Company had not specifically addressed these claims in its arguments.

PLAN OF DEVELOPMENT

Stefanoni v. Dep't of Econ.& Cmty. Dev., HHBCV115015396, 2012 Conn. Super. LEXIS 1537 (Conn. Super. Ct. June 19, 2012).

CIVIL PROCEDURE, Dismissal, Standing; LAND USE, Authorization of specific use, Low-income housing; PLAN OF DEVELOPMENT, Approval of permit, Implementation; ZONING, Government exception, Low-income housing, Restrictive covenants, Standing, Standing to challenge, Statewide planning goals

Affordable Housing developers Christopher and Margaret Stefanoni (Developers) *pro se* sued the Connecticut Department of Economic and Community Development (Department), and the Town of Darien (Town) seeking a declaratory judgment that the Department had improperly granted the Town a four-year moratorium on affordable housing development. The Developers claimed the Department gave the Town too much credit for the housing that the Town had made available to low income residents. The 2010 moratorium prevented the Developers from applying to develop affordable housing projects in the Town. The Developers filed their lawsuit seeking to overturn the moratorium in June of 2011. Two months later they filed a petition with the Town to create a floating affordable housing zone, which would have zoned the entire Town for affordable housing. At a hearing on this proposal, the Developers also proposed to build affordable housing units on the property where the Developers' private residence stood. The Town denied the Developers' petition on the grounds that no floating affordable housing zones existed anywhere in the state, and that a restrictive covenant limited the Developer's private parcel to one single family home. The Developers appealed, and the Department and the Town moved for dismissal due to lack of standing.

The court granted the motion to dismiss. Liberally construing the Developers' *pro se* claims, the court nonetheless concluded that the Developers did not meet

state standing requirements because the Developers were neither classically aggrieved nor had statutory authorization to bring suit. To qualify as a classically aggrieved party, the Developers needed to show, first, a personal and legal interest in the action, and second, that the Developers had been specifically injured by the challenged action. The court found that the Developers could not show a personal and legal interest in the contested action because the Town had never rejected the Developers' affordable housing application due to the moratorium. The court rejected the Developers' argument that their application to the Town for a floating zone and the Developers' proposal to build affordable housing on their home property amounted to an effective affordable housing application. The Developers, the court concluded, could not provide meaningful assurance that they would build affordable housing in the Town, and thus they could not show a specific connection to the action or any sort of actual injury. The court also held that the Developers lacked statutory standing to bring their lawsuit because the Developers were no differently situated than any other member of the public, who also possessed the same right. The court refused to read the aggrievement statute so broadly as to grant automatic standing to any person claiming a legal right or privilege, and instead followed the relevant case law to apply a more narrow interpretation that limited the statute's applicability to individuals who had shown a specific personal legal interest in the challenged decision. The court concluded that the Developers' lack of a valid affordable housing claim meant that they lacked a specific, personal legal interest and that they were therefore from asserting statutory standing. Having failed to meet the classical or statutory aggrievement standards for standing, the court determined the Developers did not have standing and dismissed their case.

SECTION 8

Hous. Auth. of the City of Pittsburgh v. McBride, 46 A.3d 833 (Pa. Commw. Ct. 2012).

ADMINISTRATIVE ACTION, Adequacy of procedures, Failure to follow regulations, Fair hearing; CIVIL PROCEDURE, Appellate review; FAIR HOUSING, Section 8; SECTION

8, Eligibility

The Housing Authority of the City of Pittsburgh (Housing Authority) appealed the decision of the trial court granting Evelyn McBride (Applicant) a new hearing evaluating her eligibility for the Section 8 program. The Applicant's application to the Section 8 voucher program was denied due to a criminal record as well as an outstanding debt to another housing authority. The Applicant requested an informal hearing from the Housing Authority, noting that a third party was willing to pay her debt to the Allegheny Housing Authority. After reviewing all the evidence, the hearing officer upheld the Housing Authority's decision to deny the Applicant admission to the program. The hearing officer noted that the HUD regulations permit the Housing Authority to deny Section 8 vouchers due to criminal activity that may be a threat to the other residents or their property and due to outstanding balances owed to prior landlords. Shortly after the hearing, the third party paid off the Applicant's debt to the Allegheny Authority. The Applicant then appealed the hearing officer's decision to the trial court and requesting a new hearing. Finding for the Applicant, the trial court ruled that the hearing officer relied on the wrong section of the HUD regulations and failed to take into account the Applicant's rehabilitation and relevant social circumstances. The Housing Authority appealed the decision to the intermediate appellate court on the ground that the trial court erred when it did not address the issue of the money owed to the Allegheny Authority.

The appellate court held that the Housing Authority complied with the requirements of the HUD statute while making its determination and overruled the trial court. The appellate court first addressed the Housing Authority's argument that the HUD statutes required them to deny the Applicant's application. To back this claim, the Pittsburgh Authority cited the fact that the statute uses the phrase "will deny admission" with reference to outstanding debts. The court addressed the fact that the debt was paid off shortly after the determination by the hearing officer, but held that the subsequent payment was irrelevant since the debt had not been paid at the time of the initial hearing. The court interpreted the language of the statute to mean

that the Housing Authority was required to consider all specific factors, like an applicant's outstanding debts, in its decision, as opposed to requiring automatic denial of all indebted applicants. The court noted five factors that must be used in a housing authority's decision: the seriousness of the case, the effect a denial will have on other family members, the extent of culpability of the individual in the behavior that caused the denial, the length of time since the last violation, and whether the applicant completed drug or alcohol treatment if applicable. After reviewing the hearing officer's notes, the court determined that all the relevant factors were considered during the hearing with regard to the outstanding debt and reversed the decision of the trial court.

Matter of Spann v. Rhea, 112004/11, 2012 NY Slip Op 31707U, 2012 N.Y. Misc. LEXIS 3104 (N.Y. Sup. Ct. June 27, 2012).

HOUSING AUTHORITY, Notice to tenants, Termination of lease; SECTION 8, Termination of benefits

Mervin Spann (Recipient), a Section 8 voucher recipient, sued the New York City Housing Authority (Housing Authority), its chairman, and Highbridge House Ogden, Inc., challenging the Housing Authority's termination of the Recipient's housing benefits in the year 2000. The Housing Authority maintained that it had lawfully terminated the Recipient's Section 8 subsidy because of the Recipient's alleged failure to report his annual financial information. Further, the Housing Authority maintained that it had notified the Recipient of the decision to terminate the housing subsidy during an earlier, unrelated court hearing for alleged nonpayment of rent; therefore, the Recipient had been on actual or constructive notice of the Housing Authority's decision as of the date of the decision of that case. The Housing Authority claimed that the four-month statute of limitations began tolling on the Recipient when the nonpayment of rent decision was rendered in early 2008, and that the statute of limitations had expired, at the latest, in May 2008. The Recipient alleged that the Housing Authority's determination was arbitrary and capricious, an abuse of discretion, an error of law, and

The Authority

a violation of the Housing Authority's procedures, as well as federal constitutional law. The Recipient requested an order to restore his benefits, retroactive to the date of termination, or, alternatively, an informal hearing to challenge the termination of the Recipient's benefits. The Housing Authority cross-moved to dismiss on the grounds that the Recipient's action was time-barred by the statute of limitations, or, alternatively, that the court grant the Housing Authority permission to answer the Recipient's petition.

The court denied the Housing Authority's motion to dismiss, rejecting the Housing Authority's statute of limitations argument. The court found that the Recipient was entitled to receive written notice of the Housing Authority's final determination, pursuant to the federal law and the Housing Authority's own procedures, which required three separate written notices before termination of a Section 8 subsidy. First, the Housing Authority was required to send the Recipient a warning letter with the basis for the termination and, if applicable, a request for the Recipient's compliance. Next, the Housing Authority was required to send notice of termination through certified and regular mail, providing specific grounds for the termination and information on the Recipient's right to challenge the termination. Finally, if the Recipient failed to respond, the Housing Authority was required to mail a third notice advising the Recipient that his rent subsidy would be terminated, the basis for the termination, and explaining the Recipient's opportunity to request a hearing. In this case, the Housing Authority failed to present evidence that it mailed any of the aforementioned notices. The court then determined that the statute of limitations would run from the time the Recipient received the written notice. Having denied the Housing Authority's cross motion to dismiss, the court ordered both parties to submit briefs on the issue of whether the Housing Authority should be permitted to submit an answer to the Recipient's petition, and ordered the parties to schedule a settlement conference.

Romagna v. Hous. Auth. of Indiana County, 1648 C.D. 2011, 2012 WL 3026386 (Pa. Commw. Ct. July 13, 2012).

ADMINISTRATIVE ACTION, General; CIVIL PROCEDURE, Appellate review; DUE PROCESS, General; EQUAL PROTECTION, Eligibility for benefits; HOUSING AUTHORITY, Drug activity; SECTION 8, Eligibility

Brenda Romagna (Applicant) appealed the administrative officer's decision to uphold the Housing Authority of Indiana County's (Housing Authority) denial of Section 8 housing to the Applicant for a single drug paraphernalia conviction. The Housing Authority maintained a policy of automatically denying applicants who had a record of convictions. During the trial, the Housing Authority testified that its policy of denying all applicants for drug-related offences is consistent with federal law, which vests the ability to make regulations to the local housing authorities. The Applicant testified to her drug treatment and recovery status. The court found this to be irrelevant as the Housing Authority's regulation does not make provisions for treatment and recovery. Moreover, the court noted that the Housing Authority's regulation was limited to drug-related criminal activity and that possession of drug-paraphernalia was not the type of drug-related criminal activity addressed by this regulation. The court overturned the Housing Authority's decision and ordered the Housing Authority to process the Applicant's housing application. The Housing Authority appealed the trial court's decision on the grounds that the court had erred in its conclusions.

The appellate court affirmed the trial court's conclusion that a conviction for possession of drug paraphernalia did not constitute drug-related criminal activity for the purpose of denying the Applicant housing. Looking to the relevant statutory definitions, the court noted that federal law defines drug-related crime as "the illegal manufacture, sale, distribution or possession of a drug or possession with the intent to manufacture, sell, distribute or use the drug." This language, the court noted, is copied word for word in the Housing Authority's statute. Thus, the court held that the definition does not include drug paraphernalia. Furthermore, the court found that the Housing Authority had not supported its claim that drug paraphernalia was included in the definition of drug-

related crime. Looking to the relevant case law, the court held that the Housing Authority's definition of drug-related activity required actual possession of drugs, and that a charge for the possession of drug paraphernalia was not sufficient to deny the Applicant housing. Furthermore, the court found that the language of the Housing Authority's regulation statute was not broad enough to include paraphernalia under any context. For this reason, the court found that the paraphernalia charge was not relevant to the Applicants housing application.

Barfield v. Plano Hous. Auth., et al., 4-11-CV-00206, 2012 U.S. Dist. LEXIS 93531, 93528, 107205 (E.D. Tex. July 6, 2012).

CIVIL PROCEDURE, Counterclaim, Dismissal, Summary judgment; DUE PROCESS, Hearing; FAIR HOUSING, Disability discrimination; PRELIMINARY INJUNCTION, Irreparable harm, Likelihood of success; SECTION 8, Eligibility, Termination of benefits

Section 8 Participant Joseph Barfield (Participant) brought suit against the Plano Housing Authority (Housing Authority) and several members of its administrative staff (Staff) seeking to reverse the termination of his Section 8 housing benefits. This decision is based on the consolidation of three separate motions decided on the same day and arising out of the same set of facts. All three members of the household received disability payments from the Social Security Administration. The Participant allegedly failed to report a change in household income resulting from his decreased Social Security benefits and his daughters' increased SSI benefits. After the Housing Authority terminated the family's Section 8 benefits without a hearing, the Participant appealed the decision to the trial court. The Housing Authority counter-claimed, alleging that the Participant committed fraud when he failed to report past criminal activity related to domestic violence and failed to disclose a temporary change of residence, and that the Participant breached the Family Obligations by failing to report a change in income. The Housing Authority moved for summary judgment, and the Participant moved for a preliminary injunction to prevent the Housing Authority from

terminating his Section 8 voucher or collecting money owed from overpayment, as well as for dismissal of the cross claim, and summary judgment. The first case addressed the Participant's request for a preliminary injunction, the second case addressed the Participant's motion to dismiss the counterclaim, and the third case addressed both parties' motions for summary judgment.

The court denied the preliminary injunction on the basis that the Participant was still living in the home and, thus, could not demonstrate irreparable harm. It also denied the Participant's motion for summary judgment. However, the court granted in part and denied in part the Participant's motion to dismiss the counter-claim, finding that the Housing Authority pled enough facts to support the fraud and breach of contract claims for the Participant's failures to report; while also finding that the Housing Authority failed to allege that the Participant made false statements regarding his residency or that the Participant was required to report a temporary change of address. In granting the Housing Authority's motion for summary judgment, the court ruled that the Participant's claim alleging a violation of the Violence against Women Act could not stand because the Participant was not a victim of domestic violence. The court also granted summary judgment of the Participant's ADA and FHA claims, finding that the Participant had failed to request an accommodation. However, the court granted the Participant summary judgment, in part, on his claims arising from the failure of the Housing Authority to allow the Participant to challenge his criminal record.

Eslin v. Hous. Auth. of the Town of Mansfield, 3:11-CV-134 JCH, 2012 U.S. Dist. LEXIS 106064 (D. Conn. July 13, 2012).

CIVIL PROCEDURE, Dismissal, Failure to state a claim; LEASES, Refusal to renew, Termination; SECTION 8, Termination of benefits, Termination of tenancy; SECTION 1983, Official immunity, Private right of action

Section 8 participant Karen Eslin (Participant) sued the Housing Authority of the Town of Mansfield (Housing Authority) seeking money damages under U.S.C. § 1983 for violations of her rights. Beginning in 2010 the

The Authority

Participant complained to her Landlords about numerous problems with that apartment which affected her health and safety. In February 2010, the Housing Authority approved an increase the Participant's rent, to which the Participant objected. At the same time, the Housing Authority determined that the Participant should occupy a smaller unit and offered her one. After the Participant turned down the new apartment due to its condition, the Housing Authority notified her that her failure to find a new apartment would result in the termination of her Section 8 voucher. However, when the Participant attempted to rent the smaller apartment the Landlord refused her request. Subsequently, the Housing Authority terminated the Participant's Section 8 benefits for failure to locate a new apartment. The Participant requested and was granted an informal hearing, where the Executive Director served as hearing officer and upheld the decision. The Participant appealed the case to the trial court and argued that, by terminating her Section 8 voucher, the Housing Authority violated her civil rights pursuant to §1983. The Housing Authority moved to dismiss the case for failure to state a claim and to preclude the testimony of an expert witness.

The trial court denied both the Housing Authority's motion to dismiss and their motion to preclude an expert witness. The court began its discussion by noting that an individual may not bring a civil rights suit against a municipal entity or official, unless it can be shown that the challenged action taken was the official policy of the Authority. One method of establishing whether an agency decision is an official policy of the agency is to determine if the official making the decision has final decision-making authority. The Participant argued that the Director exercised final policymaking authority since her decision on the termination ended the Participant's administrative remedies. The Participant went on to argue that the Housing Authority's governing body implicitly delegated its authority to the Director by completely removing itself from the Section 8 termination process. As proof of this delegation the Participant cited the fact that the Director is able to determine which violations are severe enough to terminate Section 8 vouchers. Looking to these claims, the court determined that the Participant presented enough facts to survive a motion to dismiss, and thus

denied the Housing Authority's motion. The court next looked as the Housing Authority's motion to preclude an expert witness that was disclosed late. The court found that since the witness in question was a doctor referenced frequently in the discovery documents, the Housing Authority was not prejudiced by the inclusion of the expert and denied the motion.

SOVEREIGN IMMUNITY

Blanchard v. Newton, CIV.A. 11-723-FJP, 2012 LEXIS 79281 (M.D. La. June 7, 2012).

COMMUNITY DEVELOPMENT BLOCK GRANT, General; DUE PROCESS, General; EQUAL PROTECTION, General; SOVEREIGN IMMUNITY, General

Wayne Blanchard (Applicant) sued Carol Newton, in her official capacity as the Executive Director of the Office of Community Development, and Patrick Forbes, in his official capacity as Executive Director of the Disaster Recovery Unit of the Office of Community Development (collectively, the Directors). The Applicant sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983, alleging denial of property without due process and denial of equal protection under the Fourteenth Amendment. The Office of Community Development administered "The Road Home Program," which disbursed federal Community Development Block Grant funds to compensate property owners in Louisiana whose homes had been damaged by hurricanes Katrina and Rita. The Applicant submitted a Road Home application seeking compensation for his damaged home in New Orleans. The Office of Community Development rejected the application after discovering that the Applicant had resided at another location at the time of Hurricane Katrina and thus failed to meet the program's occupancy requirements. The Applicant attempted to appeal the decision, arguing that he had not resided at the second property but had merely used its address for mail delivery because of problems with mail delivery to his actual residence. The Directors advised the Applicant that the Road Home policies were not subject to appeal, and that the Applicant failed to supply the Office of Community Development with documents

that established his occupancy under Road Home policies. The Applicant sued in federal court, and the Directors filed a motion to dismiss based on sovereign immunity grounds, discretionary immunity under Louisiana law, and in the alternative, failure to state a claim upon which relief may be granted. The Applicant opposed the motion, contending that he sued individual officers of the state as opposed to the State of Louisiana or a state agency and that he sought injunctive or declaratory relief as opposed to recovery from state funds.

The court granted the Directors' motion to dismiss. The court found support in case law for its ruling that a suit against the Directors in their official capacity constituted a suit against the State of Louisiana because the Directors are representatives of the State. The court concluded that, despite the Applicant's attempt to characterize the relief he sought as equitable, he actually sought funds from the Road Home program, which would constitute retroactive monetary relief that the Eleventh Amendment prohibits in suits against states. According to the court, there was no way for the Applicant to circumvent Louisiana's sovereign immunity from suits for damages. The court found that Louisiana had not waived its Eleventh Amendment immunity, and that a waiver of immunity could not result from the mere fact that Louisiana accepted federal funds to run the Road Home Program. The court also found that the Directors were entitled to discretionary immunity under Louisiana law because of a Louisiana statute that shielded public entities and their officers from lawsuits based on their performance, or lack thereof, of discretionary acts derived from their lawful powers and duties. Furthermore, the court found that the Applicant failed to state a due process claim because he did not have an individual, vested property interest in the Road Home Program grant, and therefore the Directors could not have denied him due process of law or equal protection.

SUBPOENAS

Greene v. Philadelphia Hous. Auth. et al, 11-2745, 2012 LEXIS 11502(3d Cir. June 7, 2012).

ATTORNEY'S FEES, General; EMPLOY-

MENT, General; EVIDENCE, Attorney-client privilege; HOUSING AUTHORITY, Attorneys, Employment; SUBPOENAS, Enforcement

Carl R. Greene, former Executive Director (Former E.D.) of the Philadelphia Housing Authority (Housing Authority), sued the Housing Authority and requested a temporary restraining order and preliminary injunction to prevent the Housing Authority from releasing invoices for legal services to the United States Department of Housing and Urban Development (HUD). Two years prior, the Housing Authority had fired the Former E.D. for purported misconduct. The invoices concerned matters in which the Former E.D. was sued in his individual capacity for conduct related to his position as executive director, and the Housing Authority paid for his legal representation. HUD's Office of the Inspector General learned of the excessive amounts the Housing Authority was spending on legal services and investigated the Housing Authority. HUD issued a subpoena to the Housing Authority requesting that it provide invoices for legal services. The Housing Authority's Board of Commissioners ordered the Housing Authority to provide unredacted legal invoices in response to the subpoena. The Former E.D. sued to prevent the Housing Authority from releasing the invoices, arguing that releasing unredacted invoices could force him to waive his attorney-client privilege in those matters. The Housing Authority's counsel filed an affidavit stating that the invoices did not concern matters in which the Former E.D. retained attorney-client privilege because none of the invoices concerned notes or legal analysis related to the Former E.D., individually. The trial court denied the Former E.D.'s motions to prevent the release of the invoices. The Former E.D. appealed, arguing that the trial court abused its discretion by not performing an *in camera* review of the invoices and by not giving him an opportunity to verify the statements in the affidavit.

The appellate court affirmed the lower court's denial of the Former E.D.'s motions and the authorization of the release of the invoices. Reviewing the lower court's conclusions *de novo*, the court held that the lower court properly exercised its discretion in relying on the Housing Authority counsel's affidavit. The court reasoned that trial courts have broad discretion in creating a process for fairly adjudicating challenges to

subpoenas. The court determined that a trial court only abuses its discretion in this process if it deprives a party of the opportunity to obtain important evidence. The court held that the lower court never prevented the Former E.D. from gathering evidence to support his claims of attorney-client privilege. Although the Former E.D. could have requested copies of the invoices for his review, he did not make those requests, and instead based his assertions of attorney-client privilege on speculation. The court also held that the lower court did not have a duty to review the thousands of invoices *in camera*, because *in camera* review is merely one of several methods district courts can use in deciding whether to enforce a subpoena.

U.S. CONSTITUTION

Doe v. Wilmington Hous. Auth., CA 10-473-LPS, 2012 LEXIS 104976 (D. Del. Jul. 27, 2012).

CIVIL PROCEDURE, Standing; HOUSING AUTHORITY, Weapons; U.S. CONSTITUTION, Second Amendment

Jane Doe and Charles Boone (Tenants) sued the Wilmington Housing Authority (Housing Authority) seeking to invalidate the Housing Authority's firearm possession policies for alleged violations of the United States and Delaware Constitutions. The Tenants, residents of separate housing facilities managed by the Housing Authority, filed a motion to expedite a preliminary injunction preventing enforcement of the original Housing Authority policies that prohibited tenants from possessing firearms under threat of eviction. While the litigation was pending, the United States Supreme Court held that the Second Amendment was incorporated against the states through the Due Process Clause of the Fourteenth Amendment. In light of the Supreme Court decision, the Housing Authority changed its firearms policy to allow residents to own firearms, but prohibited residents from displaying or carrying a firearm in any common areas. The revised policy also obligated residents to provide any legally required documentation regarding possession of the firearm when reasonable cause existed to believe that the resident violated the Housing Authority's policy. The Tenants amended their complaint to also address

the changes in the Housing Authority's policy, adding challenges to the common area provision and the reasonable cause provision in the revised policy. The Tenants alleged that the original and the revised policies violated their Second and Fourteenth Amendment rights to bear arms as well as their right to bear arms under the Delaware Constitution. They sought a ruling that Delaware law preempted the Housing Authority's firearm policies and a declaratory judgment that the policies are unlawful. They also alleged that the Housing Authority's enactment of the policies exceeded the scope of its authority. The Tenants and the Housing Authority moved for summary judgment. The Housing Authority alleged that the Tenants lacked standing to bring their suit because neither of them owned firearms or disagreed with most or all of the policies.

The court denied the Tenants' motion for summary judgment and granted the Housing Authority's motion for summary judgment. The court first determined that the Tenants did not have to own firearms in order to have standing, because they suffered the threat of being evicted if they exercised rights they considered themselves entitled to by the Second Amendment and because they did not agree with certain parts of the Housing Authority's firearms policies. The court then dismissed the Tenants' challenges to the original policies as moot, because it was clear that the Housing Authority was not planning to reinstate those policies. The court applied case law to the Tenants' Second Amendment claims against the new policy and assumed without deciding that the first challenged provision, regarding the common areas, regulated conduct within the scope of the Second Amendment. The court used intermediate scrutiny because the new policy merely regulated a constitutional right as opposed to severely limiting it. The court determined that both the common area provision and the reasonable cause provision withstood intermediate constitutional scrutiny because there was a reasonable fit between the provisions and the Housing Authority's interest in protecting the safety of its residents and their guests. The court granted summary judgment to the Housing Authority on the Tenants' claim under the Delaware Constitution for the same reasons. The court also granted summary judgment to the Housing Authority on the Tenants' claims that Delaware law preempted the Housing

Authority's firearms policy and that the Housing Authority exceeded the scope of its statutory authority because Delaware law only prohibits municipalities and counties from regulating firearms, while the Housing Authority is a state agency. The court denied the Tenants' request for a declaratory judgment.

U.S. DEPARTMENT OF HUD

United States ex rel. Wade v. DBS Invs., LLC, Case No. 11-cv-20155-COOKE/TURNOFF, 2012 U.S. Dist. LEXIS 122734 (S.D. Fla. Aug. 29, 2012).

CONTRACT, Unjust enrichment; SECTION 8, Housing assistance plan, Modification of lease, Rents; U.S. DEPT OF HUD, Housing assistance payments

Taronda Wade (Tenant), a Section 8 participant, brought an action as a Relator on behalf of the United States (Government), against DBS Investments and John P. Joseph (collectively, Landlord) alleging the Landlord violated the False Claims Act (Act), and requesting damages for mistake and unjust enrichment. In 2007, the Tenant signed a Section 8 lease to rent a subsidized unit from the Landlord which provided that the Landlord would not charge the Tenant more than the HAP allowed or increase the Tenant's rent during the initial term; however, the Landlord charged the Tenant over three hundred dollars per month more than the HAP and the Section 8 contract allowed. The Landlord also required the Tenant to sign a separate lease for the higher rent amount. In 2009, the Tenant's Section 8 Program rent decreased by three hundred dollars, and the Tenant's required share decreased by approximately fifty dollars. Nonetheless, the Landlord overcharged the Tenant by more than \$200 per month for rent. During this time, the Landlord also continued to receive and accept federally subsidized HAP checks. The Tenant sued the Landlord in 2011 as a relator under the Act and the Government intervened. The Government's first amended complaint alleged that the Landlord made twenty-three material false statements or omissions by failing to give the alternate lease to the housing program, failing to obtain approval to modify the Tenant's rent to exceed the housing program contribution amount, making misrepresentations in the

HAP contract, and endorsing the HAP checks. The Government moved for summary judgment after the Landlord failed to timely reply.

The court granted summary judgment on the Government's False Claims Act and unjust enrichment claims. The court found that the Government met the four-part test for showing that the Landlord's conduct amounted to a violation of the Act. First, the court found that the Landlord's conduct was fraudulent because the Landlord knowingly charged and collected an excessive monthly rent. Second, the Landlord's alternate lease evidenced the Landlord's knowledge of its falsity and fraudulent conduct with the Tenant, which it failed to submit to the housing program. Third, the Landlord's false statements were material inducements to the Housing Program to enter a HAP contract with the Landlord. Fourth, the Government paid the Landlord money, in the form of rental subsidies, because of the Landlord's false statements. Next, the court considered the Government's state-law mistaken payment and unjust enrichment claims, and ruled that the Government had established the three elements for these claims as well. The court found that the Government had conferred a benefit upon the Landlord by allowing the Landlord to participate in the housing program and paying the Landlord in accordance with the program's terms, the Landlord knowingly accepted and maintained the illegal subsidy payments, and it would be inequitable for the Landlord to keep the money. The court awarded False Claims Act damages in the amount of the overpayment, plus treble damages as an element of the statutory civil penalty, or \$13,194 to the Government. Applying the civil penalty provided by the Act of between \$5,500 up to \$11,000 for each false statement, the court declined to impose the maximum penalty of \$253,000.00 because of the amount of damages at issue. Instead, the court imposed the minimum of \$5,500.00 for each of the Tenant's four main claims: failing to give the alternate lease to the housing program, failing to obtain approval to modify the Tenant's total rent, failing to obtain approval to overcharge the Tenant for rent, and making misrepresentations in the HAP contract; which totaled \$22,000.00. In addition, the court awarded the Tenant the \$4,398.00 that the Landlord overcharged her in rent and ordered the Tenant and the Government to file their motions for attorney's fees and costs.

Weeks v. Hous. Auth. of Opp, Ala., Case No. 2:11-cv-1011-MEF, 2012 U.S. Dist. LEXIS 11991 (M.D. Ala. Aug. 24, 2012).

EMPLOYMENT, Contract, Termination; HOUSING AUTHORITY, Breach of contract, Employment; SOVEREIGN IMMUNITY, Federal; U.S. DEPT OF HUD, Contract claim, Jurisdiction

Janie Weeks (Employee), formerly the executive director of the Housing Authority of The City of Opp (Housing Authority), sued the Housing Authority after HUD withdrew its promise to give the Housing Authority money to pay the Employee a severance. In 2011, the Housing Authority, HUD, and the Employee entered into a severance agreement (Agreement) after Housing Authority employees and tenants accused the Employee of racial discrimination. Under the Agreement, the Employee agreed to resign her position and return all Housing Authority property, the Housing Authority agreed to pay \$125,000 in severance pay and to provide the Employee with six months of health insurance, and HUD agreed to provide the Housing Authority with money to pay the Employee's severance. The Employee fulfilled her obligations under the Agreement; however, after HUD met with the tenants and employees who had complained about the Employee, HUD decided to withdraw its severance offer and its promise to give the Housing Authority money. HUD also refused to grant the Housing Authority permission to use other funds to pay the Employee. As a result, the Housing Authority placed the Employee on paid administrative leave and did not provide her the severance package. The Employee then sued the Housing Authority to enforce the Agreement. The Housing Authority moved to dismiss the complaint on several grounds, including the Employee's failure to join HUD as a necessary party. The Employee did not respond to the Housing Authority's motion and instead filed a second amended complaint, naming HUD and its Secretary, Shaun Donovan, as defendants. HUD moved to dismiss on the grounds that the Employee did not plead a waiver of sovereign immunity and therefore the court lacked jurisdiction. HUD also filed a motion for an extension of time to file an answer. The Employee did not timely respond and instead moved

for leave to amend to include a claim under the Administrative Procedures Act (Act) and additional claims against other HUD employees.

The district court granted HUD's motion to dismiss without prejudice, and denied the Employee's motion to amend. First, the court accepted HUD's sovereign immunity argument, and ruled that without an explicit statutory waiver, Employee had failed to establish federal jurisdiction. The court further found that the Employee's pleadings described an alleged contractual obligation and not a statutory obligation and therefore fell solely within the scope of the Tucker Act, which provided exclusive jurisdiction to the court of federal claims and not to the sitting court. Additionally, the court rejected the Employee's attempt to circumvent the waiver of sovereign immunity requirement by framing her argument as an action for specific performance of the Agreement. The court reasoned that even if it accepted the Employee's complaint as a claim for equitable relief, the court would not have jurisdiction because the claim amounted to a request for money damages based on an alleged breach of contract, which was outside of the court's jurisdiction under the Tucker Act. Second, the court denied the Employee's motion for leave to file a third amended complaint as futile. The court concluded that the Employee's proposed amendment for an equitable relief claim, in the form of a declaratory injunction against additional HUD employees, would still amount to a claim for money damages for breach of contract. As a result, the court would still lack jurisdiction over the Employee's amended claim, even if the Employee added the HUD employees. Finally, the court denied the Employee's request to amend her complaint to add a claim under the Act, finding that the Act could not provide the court with jurisdiction to hear the claim because the claim was for monetary relief and the Tucker Act provided an adequate remedy in the court of federal claims.

Wells Fargo Bank v. Southeastern N.M. Affordable Hous. Corp., No. CIV 11-0182 JB/CG, 2012 U.S. Dist. LEXIS 91621 (D.N.M. June 27, 2012).

CIVIL PROCEDURE, Joinder of parties; U.S. DEPT OF HUD, Immunity; SOVEREIGN

IMMUNITY, Federal

Wells Fargo Bank (Bank) filed an action against the Southeastern New Mexico Affordable Housing Corporation (AHC) and the United States Department of Housing and Urban Development (HUD) seeking foreclosure and damages. In 1994, HUD sold a multi-family housing development to the AHC under a special warranty deed that allowed HUD to maintain equity in the property and limited governing authority. Then, in 1997 HUD agreed to let the AHC refinance the development through the Bank, and the AHC accomplished the refinance in part by issuing almost two million dollars worth of bonds. When the AHC defaulted on its debt in 2010, the Bank filed a foreclosure action in state court naming the AHC and HUD as defendants and seeking foreclosure on the property as well as damages. The AHC and HUD removed the case to federal court, where HUD filed a motion to dismiss, or, alternatively, for summary judgment, on the ground that Bank had not established a waiver of sovereign immunity. After a hearing, the Bank amended its complaint to assert four federal statutes entitling Bank to foreclose and terminate HUD's financial and governing interest unless the Bank received payment in full. In response, HUD withdrew its motion to dismiss, and in a second hearing HUD clarified that its primary opposition to the action was the Bank's request for declaratory relief that HUD failed to comply with its governing obligations of the property. The Bank contended that since HUD maintained a financial interest in the property, it would remain a party in the case, even if the court dismissed the Bank's action against it.

The court granted HUD's motion to dismiss all of the Bank's claims. The court determined that the Bank could not establish jurisdiction for the declaratory relief that it sought against HUD because the statute governing actions to quiet title to a government interest in real property, upon which the Bank relied, did not provide a waiver of sovereign immunity. Although the statute allowed waivers in claims for equitable relief, it did not allow waivers for claims involving injunctive or declaratory relief. In addition, the court determined that, although the terms of the special warranty deed established HUD's contractual consent to joinder in a foreclosure action, it did not provide a waiver.

Furthermore, the court found that the quiet title statute did not provide a waiver because the twelve-year statute of limitations had already run. Finally, the court concluded that the Bank could not establish jurisdiction based on the Declaratory Judgment Act because the act did not provide a waiver or an independent basis for federal subject-matter jurisdiction. Although the court dismissed the Bank's actions against HUD, it ordered that HUD remain a party in the action.

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