LEXSEE 59 F.SUPP. 2D 310

THE PUERTO RICO PUBLIC HOUSING ADMINISTRATION, ET AL., Plaintiffs v. UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, ET AL., Defendants

Civ. No. 96-1304 (PG)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

59 F. Supp. 2d 310; 1999 U.S. Dist. LEXIS 10878

July 9, 1999, Decided

DISPOSITION: [**1] All of Alameda's claims DISMISSED for lack of standing. Defendants' motion for partial dismissal and limit of discovery GRANTED IN PART and DENIED IN PART.

COUNSEL: For plaintiff: James F. Hibey, Verner, Liipert, Bernhard, McPherson and Hand, Chartered, Washington, DC.

For plaintiff: William Sherman, Washington, DC.

For defendant: Fidel A. Sevillano-Del-Rio, U.S. Attorney's Office District of P.R., Civil Division, Hato Rey, PR.

JUDGES: JUAN M. PEREZ-GIMENEZ, U. S. District Judge.

OPINION BY: JUAN M. PEREZ-GIMENEZ

OPINION

[*313] **OPINION & ORDER**

In March 13, 1996, the Puerto Rico Public Housing Administration, the Puerto Rico Department of Housing, and Myriam Alameda (hereinafter referred to as "PRPHA", "PRDH" and "Alameda" respectively), commenced the instant action against defendants United States Department of Housing & Urban Development (hereinafter referred to as "HUD") and the then Secretary of HUD, Henry Cisneros (hereinafter referred to as "the Secretary") seeking declaratory and injunctive relief because defendants have allegedly discriminated against plaintiffs in the formulation, calculation, and distribution of the operating subsidies that HUD provides to the states and United [**2] States territories to provide adequate housing to low-income citizens. Pending before this Court is defendants' motion for partial dismissal and limited discovery (Dkt. # # 17 and 19) and plaintiffs' opposition to said motion. (Dkt. # # 18 and 20).

The Facts

PRPHA is a government instrumentality existing under the Laws of the Commonwealth of Puerto Rico, Act. No. 66 (August 17, 1989), *17 L.P.R.A. § 1001*, responsible for the maintenance and management of federally-funded public housing projects for the benefit of approximately 250,000 low-income residents of Puerto Rico. Pursuant to its Annual Contributions Contract (hereinafter referred to as "ACC") with HUD and the Housing and Community Development Act of 1974 (hereinafter referred to as "the Act"), *42 U.S.C. § 1437g*, PRPHA receives federal funding from HUD for the maintenance and management of these public housing projects. PRPHA currently owns and operates 332 public housing developments comprised of approximately 57,345 units. PRDH, on the other hand, is the local agency that formulates and implements housing policy in the Island; said entity was created pursuant to Act No. 97 (June 10, 1972), [**3] as amended. Alameda is a Puerto Rican resident in the Commonwealth's public housing system.

The Housing Act of 1937, 42 U.S. § 1437 *et seq.*, as amended by the Act, requires HUD to use its funding to help the "states", including Puerto Rico, *42 U.S.C. §*

(D.Mass. 1997).

> 11 Brooke Amendment to the Housing Act of 1937.

Plaintiffs

> cite *Baker v. F& F Inv. Co., 489 F.2d 829, 834 (7th Cir. 1973)* for the proposition that their claims under the civil rights statutes fall within the scope of the waiver contained in *42 U.S.C. § 1404a*. In *Baker*, the Seventh Circuit held that *5 U.S.C. § 702*, which contains [*322] a "sue and be sued" waiver provision closely analogous to *42 U.S.C. § 1404a*, extends to claims brought against the Secretary of HUD under *42 U.S.C. §§ 1981* and *1982*. This Court finds *Baker* unpersuasive. First, *Baker* was decided prior to the Supreme Court's pronouncement in [*United States v. Nordic Village, Inc., 503 U.S. 30, 33-34, 117 L. Ed. 2d 181, 112 S. Ct. 1011(1992)]*, [**32] that a waiver of sovereign immunity for monetary damages must be clear and unambiguous. Second, even before *Nordic Village*, several other courts that considered the issue held that the waiver provision contained in *42 U.S.C. § 1404a* does not extend to claims under civil rights statutes such as *42 U.S.C. §§ 1981* and *1982*. *See, e.g., Selden Apartments v. United States Dep't of Hous. & Urban Dev., 785 F.2d 152, 158 (6th Cir. 1986)*; *United States v. Yonkers Board of Educ., 594 F. Supp. 466, 473 (S.D.N.Y. 1984)*.

Id. at n.22. [12] Similarly, the bar of sovereign immunity extends to constitutional claims. *See United States v. Timmons, 672 F.2d 1373, 1380 (11th Cir. 1982)* ("claims based directly on *Fifth Amendment* violations are likewise barred by the doctrine of sovereign immunity"); *Kelly v. United States, 512 F. Supp. 356, 362 (E.D. Pa. 1981)* ("Even where there exists a direct cause of action under the Constitution, the United States is not liable for the deprivation of constitutional rights unless it has waived immunity from suit . . . .")

> 12 *Nordic Village* was superseded by *11 U.S.C. § 106*, but said provision relates to bankruptcy proceedings and is inapplicable to the matter before this Court at the present.

[**33] The matters recently discussed, though, must be qualified by the fact that sovereign immunity prohibits an award of money damages in certain circumstances, not suits against a federal agency or officer for injunctive and specific relief. *Jaimes v. Lucas Metro Hous. Auth., 833 F.2d 1203, 1209 (6th Cir. 1987)*. Therefore, plaintiffs' request declaratory and injunctive relief is not thwarted by sovereign immunity. The question is, however, whether their prayer for $ 385,030,789 constitutes money damages, thus requiring this Court to determine whether the waiver of sovereign immunity has been clear and unequivocal, or whether it constitutes injunctive relief. Payment of money by the federal government does not necessarily entail "damages" per se. *Bowen v. Massachusetts, 487 U.S. 879, 894, 101 L. Ed. 2d 749, 108 S. Ct. 2722 (1988)* (citations omitted). "Damages are given the plaintiff to substitute for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.'" *Id. at 895* (citation omitted). Plaintiffs' request in the case at bar is not a compensation [**34] in substitution for a suffered loss, but funds to which they were allegedly entitled to from the very beginning back in 1975, date in which the alleged discrimination began. Therefore, this Court holds that plaintiffs' request for $ 385,030,789 is not barred by the doctrine of sovereign immunity.

III. Whether Plaintiffs Possess an Implied Right of Action under Title VI or Title VIII

The United States Supreme Court has generally been reluctant to recognize implied rights of action. In *J.I. Case Company v. Borak, 377 U.S. 426, 12 L. Ed. 2d 423, 84 S. Ct. 1555 (1964)*, the Court enunciated a generous view, acknowledging implied rights of action whenever doing so would aid fulfilling the purpose of the pertinent statute. Subsequently, the Court announced in *Cort v. Ash, 422 U.S. 66, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975)* a four-pronged test that provided a more focused structure in the process of determining whether an implied right of action exists. These four factors are:

> First, is the plaintiff 'one of the class for whose especial benefit the statute was

> enacted -- that is, does the statute create a federal right in favor of the plaintiff? [**35] [*323] Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (citations omitted). The *Cort* factors narrowed the potential occasions in which a right of action would be implied. Still, the Court proceeded to tighten the net even further, and in *Touche Ross & Co. v. Redington, 442 U.S. 560, 576, 61 L. Ed. 2d 82, 99 S. Ct. 2479 (1979)* it focused the inquiry primarily on "whether Congress, either expressly or by implication, intended to create a private right of action . . . ." In other words, the *Cort* factors are not to be weighed equally anymore; instead, the emphasis should be placed on the second factor. Thus, "the dispositive question remains whether Congress intended to create any such remedy." *Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 23, 62 L. Ed. 2d 146, 100 S. Ct. 242 (1979).* [**36]

In 20 U.S.C. § 1617, Congress mandated that

> upon the entry of a final order by a court of the United States against . . . the United States (or any agency thereof) . . . for discrimination on the basis of race, color or national origin in violation of Title VI of the Civil Rights Act of 1964 . . . the court . . . may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Although this statute concerns discrimination with regard to education, the United States Supreme Court has recognized that the language indicates general Congressional intent regarding the right to sue under Title VI. In *Cannon v. University of Chicago, 441 U.S. 677, 699, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979)* (acknowledging of an implied right of action under Title IX) the Court addressed the issue squarely: "Congress itself understood Title VI . . . as creating a private remedy." Although neither Title VI nor Title IX expressly mention a right of action, the legislative history surrounding Title IX suggests that Congress had in mind the provision of such a remedy because the same emulated Title VI, which [**37] at the time was assumed to bestow an implied right of action. *Id. at 694-695.* Hence, defendants' argument that plaintiffs may not sue under Title VI because of an alleged lack of a right of action is without merit. [13]

> 13 Although plaintiff Alameda lacks standing to sue, such determination does not necessarily affect PRPHA's and PRDH's claims under Title VI. "Persons" that can sue pursuant to Title VI include corporations and governmental entities. *E.g., City of Chicago v. Lindley, 66 F.3d 819, 828 (7th Cir. 1995)* (holding that the city has standing to raise its Title VI claim); *but see United States v. State of Alabama, 791 F.2d 1450, 1456 (11th Cir. 1986)* (state university has no standing to sue a state board of education under Title VI), *reh'g denied 796 F.2d 1478, cert. denied 479 U.S. 1085, 94 L. Ed. 2d 144, 107 S. Ct. 1287; and Neighborhood Action Coalition v. City of Canton, Ohio, 882 F.2d 1012, 1016 (6th Cir. 1989), quoting International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock, 477 U.S. 274, 282, 91 L. Ed. 2d 228, 106 S. Ct. 2523 (1986)*("An *association* has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither claim asserted nor the relief requested requires the participation of individual members in the lawsuit.") (emphasis added).

[**38] In *Latinos Unidos de Chelsea en Accion v. Secretary of HUD, 799 F.2d 774, 792-793 (1st Cir. 1986)*, the Court of Appeals for the First Circuit dealt with the issue of whether Title VIII affords room for an implied right of action:

> First, Congress explicitly created a judicial remedy for discrimination in the sale, rental, financing or brokerage of [*324] housing as prohibited by sections 3603, 3604, 3605 and 3606 of Title VIII.

> *42 U.S.C. § 3612(a)*. Second, Title VIII provides for the filing of complaints with the Secretary, which may lead to a civil suit by the complainant against the fund recipient if voluntary compliance is not obtained within thirty days. *Id.* at §§ 3610(a)-(d). Finally, Title VIII also provides that the Attorney General may bring suit to challenge a "pattern or practice" of discrimination. *Id.* at *§ 3613*. In view of these provisions, it is unlikely that "Congress absentmindedly forgot to mention an intended private action" against HUD under *section 3608(d)*.

(Citations omitted). *See also Cousins v. Secretary of the United States Department of Transportation, 857 F.2d 37, 46 (1st Cir. 1988)* [**39] ("The plaintiff in [*N.A.A.C.P. v. Secretary of HUD, 817 F.2d 149 (1st Cir. 1987)]* also sought a private remedy under Title VIII, and in reliance upon *Latinos*, we simply rejected the claim."). [14]

> 14 Plaintiffs' surreply (Dkt. # 20) asserts that *Latinos* addresses Title VIII claims against recipient of federal funds engaged in discriminatory practices, rather than against HUD itself. It seems clear that if HUD itself is engaging in discriminatory practices, the Attorney General may bring suit under *§ 3613*.

Although plaintiffs' Title VIII claim specifically alludes to *§ 3608(e)(5)*, said section is parallel to *42 U.S.C. § 3608(d)*, which states: "All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) *in a manner affirmatively to further the purposes of this subchapter* and shall cooperate [**40] with the Secretary to further such purposes." (Emphasis added). Since the *Latinos* Court concluded that a claim under *§ 3608(d)* can only be pursued under the APA, 799 F.2d at 793, it is not unreasonable to reach a similar conclusion with regard to a claim pursuant to *§ 3608(e)(5)*. Therefore, plaintiffs' Title VIII claim shall be dismissed as any related grievance must be pursued under the APA. [15]

> 15 The Court, however, rejects the argument that public entities in general may not pursue Title VIII claims. *E.g., Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 60 L. Ed. 2d 66, 99 S. Ct. 1601 (1979)* (holding that a municipal corporation has standing under Title VIII).

IV. Whether PRPHA and PRDH are "Persons" within the Meaning of the Equal Protection and Due Process Clauses [16]

> 16 Even though Puerto Rico is not a state, as a United States territory it is bound by the *Fourteenth Amendment. E.g., Rivas Tenorio v. Liga Atletica Interuniversitaria, 554 F.2d 492 (1977)*.

[**41]

The *Fourteenth Amendment to the United States Constitution* states, *inter alia*, that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." [17] Who or what was meant to be included into the term "person", though, is not as obvious as it may appear to be. In addition to natural individuals who are citizens of the United States, "person" encompasses: corporations, *Metropolitan Life Ins. Co. v. W.G. Ward, 470 U.S. 869, 881 n.9, 84 L. Ed. 2d 751, 105 S. Ct. 1676 (1985), reh'g denied 471 U.S. 1120, 86 L. Ed. 2d 269, 105 S. Ct. 2370 (1985)*; *Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77, , 82 L. Ed. 673, 58 S. Ct. 436 (1938)*; *Louis K. Liggett Co. v. Lee, 288 U.S. 517, 536, 77 L. Ed. 929, 53 S. Ct. 481 (1933)* [18]; illegitimate children, [*325] *Levy v. Louisiana, 391 U.S. 68, 70, 20 L. Ed. 2d 436, 88 S. Ct. 1509 (1968)*(as to the *Equal Protection Clause*), *reh'g denied 393 U.S. 898, 21 L. Ed. 2d 185, 89 S. Ct. 65 (1968)*; juveniles, *Gault, 387 U.S. 1, 12, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967)*; [**42] aliens who are inhabitants and residents of the United States, *Terrace v. Thompson, 263 U.S. 197, 68 L. Ed. 255, 44 S. Ct. 15 (1923)*; and inmates, *Laaman v. Hancock, 351 F. Supp. 1265 (D.N.H. 1972)*. However, said term does not include: states, *Pennsylvania v. New Jersey, 426 U.S. 660, 665, 49 L. Ed. 2d 124, 96 S. Ct. 2333 (1976)* (as to the *Equal Protection Clause*); *State of Alabama v. United States Equal Protection Agency, 871 F.2d 1548, 1554* (11th Cir.), *cert. denied, 493 U.S. 991 (1989)* (no protections afforded to the state under the *Fifth Amendment*); municipalities, *East St. Louis v. Circuit*

Court for Twentieth Judicial Circuit, 986 F.2d 1142, 1144 (7th Cir. 1993) (both, as to the *Fifth* and *Fourteenth Amendments*); *see also Lewis v. Richardson, 428 F. Supp. 1164, 1167 n.3 (D.Mass. 1977), but see Aguayo v. Richardson, 473 F.2d 1090, 1100-01 (2nd Cir. 1973)*(dicta); foreign corporations, *Fire Ass'n of Philadelphia v. People of the State of New York, 119 U.S. 110, 30 L. Ed. 342, 7 S. Ct. 108 (1886)*; and sadly and unfortunately, the human [**43] fetus. *Roe v. Wade, 410 U.S. 113, 158, 35 L. Ed. 2d 147, 93 S. Ct. 705(1973), reh'g denied 410 U.S. 959, 35 L. Ed. 2d 694, 93 S. Ct. 1409 (1973).* [19]

17 The wording of the *Fifth Amendment* contains a similar Due Process Clause, but is silent as to "equal protection." Nevertheless, all the *Fourteenth Amendment* protections have been extended to the *Fifth Amendment. E.g., Rostker v. Goldberg, 453 U.S. 57, 62 n.3, 69 L. Ed. 2d 478, 101 S. Ct. 2646 (1981).*

18 But note that corporations are not citizens within the meaning of the Privileges and Immunities Clause. *Grosjean v. American Press Co., 297 U.S. 233, 244, 80 L. Ed. 660, 56 S. Ct. 444 (1936)* (citation omitted).

19 Thus, this Court finds the United States Court of Appeals for the Eighth Circuit's approach to the issue in *Reeder v. Kansas City Board Police Commissioners, 796 F.2d 1050, 1053* (8th Cir.), *cert. denied, 479 U.S. 1065, 93 L. Ed. 2d 1000, 107 S. Ct. 951 (1986)*(*Equal Protection Clause* "protects people") as perhaps adequate for rule-of-thumb purposes, but not as an accurate portrayal of all the juridical developments that have affected its interpretation.

[**44] For our purposes, we must determine whether PRPHA and PRDH, as instrumentalities of the Commonwealth of Puerto Rico, should be treated as a state or a municipality -- thereby losing all their constitutional claims -- or as a non-foreign corporation, in which case plaintiffs' constitutional claims could be pursued. Neither PRPHA nor PRDH have been authorized to "sue and be sued", a standard clause in independent public corporations. There is also no indication that PRPHA and PRDH have an independent source for their funds, with the exception of a public housing improvement fund created in the Department of Treasury composed of donations, appropriations from the Legislature, income generated from the rent of public housing, and funds from federal agencies. *17 L.P.R.A. § 1011.* Yet, even this statutory provision fails to convincingly persuade that either entity is self-sufficient or capable of producing its own funds to operate properly. Therefore, the Court holds that PRPHA and PRDH ought to be treated as intrinsically part of the Commonwealth of Puerto Rico. Having reached said conclusion, it seems inevitable to regard PRPHA and PRDH as "non-persons" for purposes of their constitutional [**45] claims. *See Delta Special School District No. 5 v. State Bd. of Educ., 745 F.2d 532 (1984)* (a political subdivision of a state is not protected by the *Fourteenth Amendment*). Nevertheless, the analysis detailed above is flawed by failing to acknowledge the well-established parens-patriae doctrine.

"The [United States Supreme] Court has recognized the legitimacy of Parens patriae suits. It has, however, become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania v. New Jersey, 426 U.S. 660, 665, 49 L. Ed. 2d 124, 96 S. Ct. 2333 (1976)* (citations omitted). There are two possible ways in which a State can claim a quasi-sovereign interest: "First, a State has a quasi-sovereign interest in the health and well-being -- both physical and economic of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily [*326] denied its rightful status within the federal system." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607, 73 L. Ed. 2d 995, 102 S. Ct. 3260 (1982).* [**46] Both of these requirements are met by PRPHA and PRDH as instrumentalities of the Commonwealth of Puerto Rico since their action concerns the physical and economic well-being of low-income residents as well as the necessary funds to provide adequate public housing, allegedly denied due to HUD's discrimination on the basis of race or national origin. In dictum, however, the *Snapp* Court asserted that "[a] State does not have standing as parens patriae to bring an action against the Federal Government." *Id. at 610 n.16* (citations omitted). [20] Yet, we must be careful "not go so far as to say that a state may never intervene by suit to protect its citizens against any form of unconstitutional acts of Congress...," *Massachusetts v. Mellon, 262 U.S. 447, 485, 67 L. Ed. 1078, 43 S. Ct. 597 (1923)*, or of any federal agency.

20 A city, as opposed to a state, usually lacks parens patriae standing. *See In re Multidistrict*

Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 131 (9th Cir. 1973), cert. denied, 414 U.S. 1045 (1973).

[**47]

The pivotal inquiry relates to the state's (and its agencies') goal in the instant action: If the state wants to "protect its citizens from the operation of a [federal] statute," it has no standing as parens patriae. *Holden v. Heckler, 584 F. Supp. 463, 485 (N.D. Ohio 1984).* Hence, a state can not attempt to exempt its citizens from the applicability of federal law. On the other hand, if by means of its suit the state seeks to enforce, rather than overturn or avoid, a federal statute, the parens patriae doctrine is triggered to drive the action forward. *Id.* Although defendants correctly distinguish *Washington Utilities & Transportation Commission v. F.C.C., 513 F.2d 1142, 1153 (9th Cir. 1975)* (*Mellon, supra*, is inapplicable when a state wants "to vindicate the congressional will by preventing what it asserts to be a violation of a statute by the administrative agency charged with its enforcement"), *cert. denied 423 U.S. 836 (1975)*, since it "discusses state standing where a state commission and a federal authority have overlapping authority over inter- and intra-state telecommunications rate making and each are separately [**48] charged with exercising that authority for the benefit of the citizenry" (Reply at 26), there is persuasive precedent suggesting that the instant action ought not to be dismissed. *E.g., Carey v. Klutznick, 637 F.2d 834, 838 (2nd Cir. 1980)*(New York State has standing to sue Census Bureau both on parens patriae grounds and of injury to its own interests), *rev'd on other grounds, 653 F.2d 732 (2nd Cir. 1981), cert. denied 455 U.S. 999 (1982); but see Graham v. Schweiker, 545 F. Supp. 625, 627 (S.D.Fla. 1982)*(suit concerning regulations for refugee funding may not proceed against the federal government); *Pennsylvania v. Kleppe, 174 U.S. App. D.C. 441, 533 F.2d 668, 676-77 (D.C. Cir. 1976), cert. denied, 429 U.S. 977 (1976)*(principles of federalism prevented suit of Pennsylvania versus the Small Business Administration).

The harm alleged by plaintiffs, is first suffered by PRPHA and PRDH themselves, but it is also suffered -- if true -- by all the public housing residents. Public housing residents, however, have slim chances surviving summary judgment in class action suit since it is difficult [**49] to find standing for them for the same reasons that this Court has determined that Alameda lacks standing. Due to the impossibility for private citizens to bring suit themselves against HUD within the present circumstances, PRPHA and PRDH, as instrumentalities of the Commonwealth of Puerto Rico, do have a quasi-sovereign interest, channeled through their parens patriae role, to protect public housing residents from invidious discrimination in the enforcement of federal statutes. Therefore, [*327] it would be improper to dismiss PRPHA's and PRDH's constitutional claims.

V. Whether the Statute of Limitations Limits the APA Claims to Final Agency Decisions Taken Up to Six Years before the Filing of this Action in March 14, 1996

The federal statute of limitations states as follows: "Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." *28 U.S.C. § 2401(a).* Said provision "applies to all civil actions whether legal, equitable or mixed," *Nesovic v. United States, 71 F.3d 776, 778 (9th Cir. 1995)* [**50] (quoting *Spannaus v. Department of Justice, 262 U.S. App. D.C. 325, 824 F.2d 52, 55 (D.C. Cir. 1987)*, including APA claims. *E.g., James Madison Ltd. v. Ludwig, 317 U.S. App. D.C. 281, 82 F.3d 1085, 1094 (D.C. Cir. 1996), cert. denied 519 U.S. 1077, 136 L. Ed. 2d 676, 117 S. Ct. 737; Village of Elk Grove Village v. Evans, 997 F.2d 328, 331 (7th Cir. 1993); Wind River Mining Corp. v. United States, 946 F.2d 710, 712-13 (9th Cir. 1991).*

"The failure to sue the United States within the period of limitations is not simply a waivable defense; it deprives the district court of jurisdiction to entertain the action." *Nesovic, 71 F.3d at 777-78* (citation omitted). *See also Walters v. Secretary of Defense, 233 U.S. App. D.C. 148, 725 F.2d 107, 112 n.12 (D.C. Cir. 1983), reh'g denied 237 U.S. App. D.C. 333, 737 F.2d 1038 (1984)*; 14 Wright, Miller & Cooper, Federal Practice and Procedure § 3654 (1985). Since the statute of limitations is jurisdictional, it must be strictly construed. *E.g., Lehman v. Nakshian, 453 U.S. 156, 160-161, 69 L. Ed. 2d 548, 101 S. Ct. 2698 (1981)* [**51] (no exceptions shall be implied) (*superseded on other grounds as stated in Elbaz v. Congregation Beth Judea, 812 F. Supp. 802 (N.D.Ill. 1992)).* Thus, the statute of limitations begins to run when "facts which would support a cause of action are apparent or should be apparent to a person with reasonable prudent regard for his rights." *Rozar v. Mullis, 85 F.3d 556, 561-62 (11th Cir. 1996).*

This Court need not imply an exception to the federal statute of limitations that the Supreme Court of the United States has announced explicitly, namely the continuing violation theory. *Havens Realty Corp. v. Coleman, 455 U.S. 363, 380-81, 71 L. Ed. 2d 214, 102 S. Ct. 1114 (1982)* (where challenge is not to just one incident but to an unlawful practice that continues into the limitation period, the complaint is timely); *see also Sabree v. United Brotherhood of Carpenters & Joiners Local No. 33, 921 F.2d 396, 399 (1st Cir. 1990)* (distinguishing between serial and systemic violations). Since plaintiffs have alleged that HUD has discriminated continually against PRPHA and PRDH since 1975, defendants' statute of limitations objection [**52] does not hold water.

VI. Whether Discovery Outside of the Administrative Records Concerning HUD's Funding Decisions Is Inappropriate

If there is an existing administrative record and if this Court were to find that the sole justiciable question in this action is whether under the APA, HUD's weighting of two factors in its analysis of PRPHA's FEL in the course of the 1992 appeals process was arbitrary or capricious, then it is black letter law that "the factfinding capacity of the district court is . . . typically unnecessary to judicial review of agency decisionmaking." *Florida Power & Light v. Lorion, 470 U.S. 729, 744, 84 L. Ed. 2d 643, 105 S. Ct. 1598 (1985)*. "In applying that standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts, 411 U.S. 138, 142, 36 L. Ed. 2d 106, 93 S. Ct. 1241 (1973)*. Even when constitutional claims have been made, wide-ranging discovery is not blindly authorized at a stage in which an administrative record is being reviewed. [*328] *E.g. Rydeen v. Quigg, 748 F. Supp. 900, 906 (D.C.C. 1990)* [**53] (allowing plaintiffs to submit two affidavits), *aff'd, 937 F.2d 623 (D.C. Cir. 1991), cert. denied 502 U.S. 1075, 117 L. Ed. 2d 138, 112 S. Ct. 974 (1992)*.

The case at bar, however, has no administrative record with regard to the Title VI and the constitutional claims, but only as to the 1992 appeal process to determine if Puerto Rico's FEL was, to put it succinctly, too low. Obviously, then, boilerplate principles of review serve poorly to address the matter pending before this Court. The United States Supreme Court has held that a plaintiff who is entitled to judicial review of its constitutional claims under the APA is entitled to discovery in connection with those claims. *See Webster v. Doe, 486 U.S. 592, 604, 100 L. Ed. 2d 632, 108 S. Ct. 2047 (1988)*(noting that discovery was available against the Central Intelligence Agency in Title VII cases and that the district court could adequately protect these concerns under the APA). Furthermore, this Court is not dismissing all of plaintiffs' claims except those under the APA. To the contrary, the Court is allowing PRPHA and PRDH to pursue their constitutional claims, as well as their [**54] Title VI claim. Only the Title VIII claim has been limited to abide by the guidelines established in the APA. Therefore, discovery shall not be limited to the APA claims only.

Conclusion

In sum, all of Alameda's claims are hereby **DISMISSED** for lack of standing. PRPHA's and PRDH's Equal Protection, Due Process, and Title VI claims shall remain alive in this forum and shall be subsequently addressed by another order detailing discovery matters. PRPHA's and PRDH's Title VIII claim shall be limited to whatever procedures are allowable under the APA and its appeal process and is also **DISMISSED** in order to be entertained by an administrative law judge or by the pertinent administrative agency. Defendants' motion for partial dismissal and limit of discovery, thus, is hereby **GRANTED IN PART**, and **DENIED IN PART.**

IT IS SO ORDERED.

San Juan, Puerto Rico, July 9, 1999.

JUAN M. PEREZ-GIMENEZ

U. S. District Judge

Appendix

A comparison of Puerto Rico's AEL for Fiscal Year 1993 with other relevant PHAs reveals that a substantial disparity between them: