

ORIGINAL

LAWYERS FOR EQUAL JUSTICE
VICTOR GEMINIANI 4354-0
P.O. Box 37952
Honolulu, Hawai`i 96837
Telephone: (808) 587-7605
Email: victor@lejehawaii.org

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UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

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SUE BEITIA, CLERK

PAUL ALSTON 1126
J. BLAINE ROGERS 8606
ZACHARY A. MCNISH 8588
1001 Bishop Street, Suite 1800
Honolulu, Hawai`i 96813
Telephone: (808) 524-1800
Facsimile: (808) 524-4591
Email: palston@ahfi.com
brogers@ahfi.com
zmcnish@ahfi.com

CV 10 00483 JMS KSC

MARGERY S. BRONSTER 4750
ROBERT M. HATCH 7724
CATHERINE L. AUBUCHON 7661
1003 Bishop Street, Suite 2300
Honolulu, Hawai`i 96813
Telephone: (808) 524-5644
Facsimile: (808) 599-1881
Email: mbronster@bhhawaii.net
rhatch@bhhawaii.net
caubuchon@bhhawaii.net

Attorneys for Plaintiffs
TONY KORAB, TOJIO CLANTON and KEBEN ENOCH

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CV 10 00483 JMS KSC

TONY KORAB, TOJIO CLANTON
and KEBEN ENOCH,
individually and on behalf of all
persons similarly situated,

Plaintiffs,

vs.

LILLIAN B. KOLLER, in her
official capacity as Director of
the State of Hawai'i,
Department of Human Services,
and KENNETH FINK, in his
official capacity as State of
Hawai'i, Department of Human
Services, Med-QUEST Division
Administrator,

Defendants.

Case No. _____

[Civil Rights Action]

[Class Action]

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF;
SUMMONS**

**COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF**

1. On July 1, 2010, the State of Hawai'i, Department of Human Services ("DHS") implemented a new medical assistance program called Basic Health Hawai'i ("BHH") for non-pregnant citizens, age nineteen or older, of countries with Compacts of Free Association ("COFA") with the United States who are lawfully

residing in Hawai`i (“COFA Residents”) and non-pregnant immigrants, age nineteen or older, who have been United States residents for less than five years (“New Residents”). Through BHH, DHS severely limits or eliminates health care benefits for COFA Residents and New Residents solely on the basis of their nationality and immigrant status.

2. This class action seeks an injunction forbidding DHS: (a) from violating the constitutional rights, as protected by Equal Protection clauses of the United States and Hawai`i Constitutions, of COFA Residents and New Residents by discriminating in the provision of health care benefits on the basis of alienage; and (b) from violating the civil rights, as protected by Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131 *et seq.* (“ADA”), of COFA Residents and New Residents with disabilities by cutting their health care and thereby by isolating them or placing them at a severe risk of isolation.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. §§ 1331, 1343, and 1367. Plaintiffs allege violations of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Article I,

Sections 2 and 5 of the Constitution of the State of Hawai'i, and the ADA, 42 U.S.C. § 12132.

4. Venue is proper in the District of Hawai'i pursuant to 28 U.S.C. § 1391(b) because the events giving rise to Plaintiffs' claims occurred in this District.

PARTIES

PLAINTIFFS

5. Plaintiff TONY KORAB ("KORAB") is a citizen of the Republic of the Marshall Islands, a country with a COFA with the United States. He is 58 years old and he has been living in Hawai'i since about 1999. KORAB needs regular dialysis treatment and had heart bypass surgery about 5 years ago. KORAB is unable to get dialysis services or the medications he needs in the Marshall Islands. In addition to his dialysis treatment, KORAB sees the doctor about 7 times per month and takes approximately 15-16 medications per month.

6. DHS had been providing medical coverage for KORAB under a program known as QUEST Expanded Access ("QExA"). QExA is a state program for the aged, blind, and disabled and is administered by DHS' Med-QUEST Division. KORAB'S benefits under QExA included dialysis treatment, transportation to

and from medical appointments, and all necessary doctors' visits and prescription drugs with no set limitation.

7. Effective July 1, 2010, DHS disenrolled KORAB from the QExA program and forced him into BHH. BHH, however, provides far fewer benefits than QExA. Under new DHS rules, KORAB is no longer eligible for QExA benefits, such as transportation to and from medical appointments and all necessary doctors' visits and prescription drugs. KORAB had also been enrolled in the State of Hawai'i Organ and Tissue Transplant ("SHOT") program because he needs a kidney transplant. Effective July 1, 2010, DHS disenrolled KORAB from this program.

8. Because of the significant cuts to his benefits, KORAB is fearful that he will be unable to pay for his needed medical care, including many of his lifesaving medications.

9. Plaintiff TOJIO CLANTON ("CLANTON") is a citizen of the Republic of the Marshall Islands, a country with a COFA with the United States. He is 66 years old and has been living in Hawai'i since 2002. In 1995, he was diagnosed with kidney problems. Later in 1997, he developed a heart condition. He could no longer work because of his health problems and retired from his government job.

10. CLANTON came to Hawai'i so he could get dialysis, which treatment is unavailable in the Marshall Islands. From 2002 to 2006, he received dialysis three times per week, which was covered by QExA. He has also had heart bypass surgery and a successful kidney transplant. On average, he had 3 doctors visits each month and took 10 prescription medications, which were covered under QExA.

11. On July 1, 2010, DHS disenrolled CLANTON from QExA and forced him into BHH. Because of BHH's prescription medication limit, he could not afford to fill many of his prescriptions including Mycophenolate, which kept his body from rejecting the kidney transplant. As a result, two weeks ago, he suffered from kidney failure and was hospitalized for 14 days. After he was discharged from the hospital, he was told that any further doctors visits would not be covered by BHH.

12. CLANTON cannot afford to pay for his doctors visits and medications without State assistance and cannot afford private health insurance. He has ceased taking some medications because of the limit imposed by BHH, and as a result, is likely to have further health complications and will likely need to be hospitalized.

13. Plaintiff KEBEN ENOCH (“ENOCH”) is a citizen of the Republic of the Marshall Islands, a country with a COFA with the United States. He has been living in the U.S. since about 1994.

14. ENOCH is diabetic, has been experiencing severe stomach pain, and is trying to get diagnostic tests to determine whether he has cancer. Before 2009, ENOCH had been receiving medical benefits through a program administered by DHS’ Med-QUEST Division. In December 2009, DHS terminated his benefits.

15. In June 2010, ENOCH and his wife applied to DHS for health care benefits. In a letter dated June 29, 2010, DHS denied their application because the residency requirement had not been met. In July 2010, a DHS employee told a family member that DHS denied ENOCH and his wife’s application because of their citizenship.

16. ENOCH no longer has coverage for the medical services he requires. Without State assistance, ENOCH cannot afford medical treatment or insurance. He is fearful that he will be unable to get the lifesaving care he needs.

DEFENDANTS

17. Defendant LILLIAN B. KOLLER, is the Director of the State of Hawai`i, Department of Human Services and is sued in her official capacity.

18. Defendant KENNETH FINK is the Administrator of the Med-QUEST Division, State of Hawai`i, Department of Human Services and is sued in his official capacity.

BACKGROUND

19. The DHS Med-QUEST Division administers the State's programs for medical assistance to eligible, low-income individuals. See <http://www.med-quest.us>. Defendants' medical and adult and community care assistance programs include QUEST, QExA, QUEST-Net, QUEST-ACE, SHOTT, Medical Assistance to Immigrant Children, Medical Assistance to Aliens and Refugees, State Medical Assistance for Pregnant Legal Immigrants Program, Nursing Home Without Walls, and fee-for-services programs. Hawai`i Administrative Rules ("HAR") §§ 17-400-17-1454 (Adult and Community Care Services); HAR § 17-1700 *et seq.* (Med-QUEST Division); HAR § 17-658 (Financial and Medical Assistance to Aged, Blind, and Disabled Individuals).

20. Prior to July 2010, COFA Residents were eligible to participate in DHS's QUEST, QExA, QUEST-Net, QUEST-ACE, fee-for service, and SHOTT programs (collectively, the "Old Programs"), under which they received the same benefits as those provided by DHS to U.S. citizens and other eligible residents in Hawai'i.

21. Since at least 1996, DHS has not provided health coverage under the Old Programs to New Residents. New Residents who have been and are ineligible to enroll in the Old Programs are being denied the same benefits as those provided by DHS to U.S. citizens and other eligible residents in Hawai'i.

22. In mid-2010, DHS stopped enrolling COFA Residents in the Old Programs. The Old Programs are still available to eligible Hawaii residents other than COFA Residents and New Residents.

23. On July 1, 2010, the DHS Med-QUEST Division implemented BHH, which was created for COFA Residents receiving State medical assistance and certain New Residents. HAR §§ 17-1722.3-1 *et seq.*

24. The COFA nations are the Republic of the Marshall Islands, Federated States of Micronesia and the Republic of Palau. Each of these nations entered into a COFA with the United States

that was approved by the U.S. Congress and ratified by the President. See 48 U.S.C. § 1901, 48 U.S.C. § 1931. Each COFA allows citizens of those nations to "enter into, lawfully engage in occupations, and establish residence as a non-immigrant in the United States and its territories and possessions" P.L. 99-239, Art. IV, § 141(a).

25. Since approximately 1997, DHS had been providing health care coverage for financially-eligible COFA Residents.

26. Since 2003, the State of Hawai'i has received \$74,655,000 in federal funds, which are intended to assist the State cope with the expense of providing public services, including health care, to citizens of COFA nations (the "Compact Impact Funds"). The State received Compact Impact Funds totaling \$10,571,000 for FY2009-10. Starting in FY2010-11, the State will receive \$11,229,000 in Compact Impact Funds each year until the next enumeration of COFA citizens is conducted by the U.S. Department of the Interior and the U.S. Census Bureau.

27. Defendants first attempted to cut health care benefits to COFA Residents on September 1, 2009. A prior action before this Court, *Sound, et al. v. Koller, et. al*, Case No. CV09-00409 JMS-KSC ("*Sound*"), temporarily stopped the cuts and

restored the health benefits COFA Residents had previously been receiving. The *Sound* parties subsequently stipulated to extend the temporary restraining order halting the implementation of BHH pending the State's completion of the administrative rulemaking process pursuant to Chapter 91, Hawai`i Revised Statutes (“Hawai`i Administrative Procedures Act” or “HAPA”).

28. In mid-2010, the State conducted public hearings on BHH.

29. On July 1, 2010, DHS disenrolled COFA Residents who were not pregnant and who were age 19 or older from the Old Programs. See HAR § 17-1714-28(e). After they were disenrolled, eligible COFA Residents and some New Residents were deemed into BHH. HAR § 17-1722.3-33.

30. In enacting the BHH program, Defendants specifically targeted COFA Residents and New Residents because of their alienage and immigrant status.

31. Under BHH, COFA Residents and New Residents receive only limited care. They can receive, for example: “no more than ten days of medically necessary inpatient hospital care related to medical care, surgery, psychiatric care, and substance abuse treatment”; a “maximum of twelve outpatient visits including adult

health assessments, family planning services, diagnosis, treatment, consultations, to include substance abuse treatment, and second opinions”; a “maximum of six mental health visits, limited to one treatment per day”; and a “maximum of four medication prescriptions per calendar month” which “shall not exceed a one-month supply”. HAR § 17-1722.3-18.

32. BHH excludes transportation services upon which many elderly, seriously ill, and disabled residents rely to get to and from doctors’ visits. HAR § 1722.3-19.

33. Enrollment in BHH is capped at 7,000 statewide and there will not be an open application period until enrollment has dropped below 6,500. HAR § 17-1722.3-10.

34. Over 7,500 residents were deemed into BHH. Because current enrollment already exceeds the cap, the possibility of admitting new enrollees into BHH anytime in the near future is unlikely.

35. COFA Residents and New Residents, who are otherwise eligible for medical assistance through DHS’ Med-QUEST Division but for their alienage and immigrant status, but who were not deemed into BHH, cannot get State health benefits.

36. Under BHH, New Residents may become eligible to participate in the Old Programs after having lived in the U.S. for 5 years. COFA Residents can never become eligible for the Old Programs.

37. After *Sound*, DHS is now covering dialysis treatments as an emergency medical service. Dialysis patients, however, must take approximately 10-12 prescription medications per month, but prescription medications are not available as an emergency service; instead, COFA Residents and New Residents are limited to only four prescriptions per month. Providing dialysis as an emergency service, rather than under a regular health care program, also creates a high degree of uncertainty. Coverage under the emergency program requires extensive paperwork, must be renewed on a regularly basis, and is not guaranteed to continue. In contrast, patients covered by QExA are not subject to a prescription medication limit or other impediments to effective treatment.

38. BHH does not provide a comprehensive program for cancer treatments, and cancer treatments are not covered as an emergency service. Thus, a typical cancer patient will exhaust his or her allotted doctors' visits in 2-3 months.

39. QUEST and QExA, for which COFA Residents and New Residents are no longer eligible based solely on their alienage and immigrant status, provide significantly greater benefits than BHH. Both programs provide comprehensive medical and behavioral health and all necessary prescription drugs. The QExA program delivers medical and behavioral health services to certain individuals who are aged, blind, or disabled.

40. Because persons who are aged, blind, or disabled often need significantly greater medical care, COFA Residents and New Residents who would otherwise be eligible for the QExA program but for their alienage and immigrant status are severely impacted by the reduced benefits under BHH. For instance, COFA Residents who needed dialysis were able to get all necessary medications covered under QExA. Now they cannot even though DHS continues to provide such medications to persons enrolled in QExA.

41. Under BHH, COFA Residents in need of an organ transplant were removed from SHOTT. HAR § 17-1722.3-29.

42. Under BHH, COFA Residents and New Residents are prevented from enrolling in a program covering long-term care services. HAR § 17-1722.3-28(c). Long-term care services include

nursing home level of services as well as home and community based waiver services.

43. In light of their limited coverage or uninsured status, COFA Residents and New Residents do not know if, when, or from where they will be able to get preventative care, essential medical treatment, and adequate prescription drugs.

44. As a result of the cuts, COFA Residents and New Residents without an insurance plan, or COFA Residents and New Residents who have used up their allotted patient visits under BHH, are using, or will use, the State's program for Medical Assistance to Aliens and Refugees ("MAAR"). HAR § 17-1723.

45. MAAR requires patients to wait until they have developed a serious medical condition posing a serious threat to bodily health, and then seek treatment in a hospital setting. HAR § 17-1723-6.

46. Defendants are discriminating against COFA Residents and New Residents by requiring them to seek care in a hospital setting. Defendants are not administering the Med-QUEST Division programs in the most integrated setting appropriate to meet the needs of patients with disabilities.

CLASS ACTION ALLEGATIONS

47. Plaintiffs bring this action on behalf of themselves and on behalf of a class of all those similarly situated pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. The proposed class consists of:

All non-pregnant adults residing in Hawai`i under a Compact of Free Association with the U.S. or who have been legally residing in the U.S. for less than five years who are ineligible for the same health benefits as other Hawai`i residents because of their alienage or immigrant status (the "Class").

48. The proposed subclass consists of:

All non-pregnant adults residing in Hawai`i under a Compact of Free Association with the U.S. or who have been legally residing in the U.S. for less than five years, who have a disability, and who are at severe risk of isolation, or who are or will be isolated, because the State of Hawai`i is not providing them health benefits in the most integrated setting appropriate to their needs (the "Subclass").

49. Membership of the Class and Subclass is so numerous that joinder of all members is impractical. There are at least 7,500 COFA Residents and New Residents who are impacted by implementation of the BHH program. As there are no new enrollees, that number is increasing on a daily basis. Of those 7,500, upon information and belief, at least 10% percent were

enrolled in the QExA program, are disabled, or would otherwise be eligible for long-term care or home- and community-based services.

50. Common questions of law and fact exist, including whether the DHS has violated the constitutional rights of the Class and civil rights of the Subclass.

51. Plaintiffs' claims are typical of the claims of the other members of the Class, in that they have been denied equal health coverage based on their alienage or immigrant status. Plaintiff KORAB, a dialysis patient, is the class representative for the Subclass because he is also disabled.

52. Plaintiffs KORAB, CLANTON and ENOCH will fairly and adequately represent and protect the interests of the Class. Plaintiff KORAB will fairly and adequately represent the interests of the Subclass. Plaintiffs intend to prosecute this action vigorously in order to secure remedies for the entire Class and Subclass. Counsel of record for Plaintiffs are experienced in federal civil rights litigation and class actions, including systemic litigation against state defendants for constitutional violations and disability discrimination.

53. A class action is the only realistic method available for the fair and efficient adjudication of this controversy. The

expense and burden of individual litigation makes it impracticable for members of the class to seek redress individually for the wrongful conduct herein alleged. Were each individual member required to bring a separate lawsuit, the resulting multiplicity of proceedings would cause undue hardship and expense for the litigants and the Court and create the risk of inconsistent rulings which would be contrary to the interest of justice and equity.

54. Defendants have acted, refused to act, and/or failed to act in a manner that violates the constitutional and civil rights of the Class and Subclass members entitling the Class and Subclass to declaratory and injunctive relief as well as attorneys' fees and costs.

CAUSES OF ACTION

Cause of Action I

Violation of Equal Protection Clause of Fourteenth Amendment of the U.S. Constitution **(Pursuant to 42 U.S.C. § 1983)**

55. Plaintiffs re-allege and incorporate by reference the allegations contained in paragraphs 1-54 above as if fully set forth.

56. The Defendants are providing inferior health care benefits to the Class solely on the basis of alienage, immigrant status, and the duration of their presence in the United States. The

Class is being discriminated against on the basis of alienage, immigrant status, and the duration of their presence in the United States, in violation of the Equal Protection clause of the U.S. Constitution.

57. Defendants' discriminatory actions entitle the Class to injunctive and declaratory relief, and attorneys' fees and costs.

Cause of Action II
Violation of the Americans with Disabilities Act
(42 U.S.C. § 12132)

58. Plaintiffs re-allege and incorporate by reference the allegations contained in paragraphs 1-57 above as if fully set forth.

59. The ADA, 42 U.S.C. § 12132, prohibits discrimination based on disability. Unnecessary isolation of the disabled is discrimination. The ADA's "integration mandate" serves as one of the principle purposes of the ADA – to end the isolation of segregation of disabled persons.

60. ADA regulations provide: "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified persons with disabilities." 28 C.F.R. § 35.130(d). The "most integrated setting" means "a setting that enables individuals with disabilities to

interact with non-disabled persons to the fullest extent possible.”

28 C.F.R. pt. 35 app A.

61. Members of the Subclass are COFA Residents and New Residents with disabilities.

62. Defendants are discriminating against members of the Subclass by putting them at severe risk of isolation, institutionalization, and/or hospitalization.

63. In particular, Defendants are administering their Med-QUEST programs, including the Old Programs, BHH, and MAAR, in a manner that discriminates against members of the Subclass by cutting services under BHH and/or MAAR.

64. Care under MAAR is only available in a hospital setting. This is not the most integrated setting appropriate to meet members of the Subclass’s needs.

65. Defendants’ discriminatory actions entitle the Subclass to injunctive and declaratory relief, and attorneys’ fees and costs.

Cause of Action III
Violation of Article I, Sections 2 and 5 of the Constitution
of the State of Hawai’i

66. Plaintiffs re-allege and incorporate by reference the allegations contained in paragraphs 1-65 above as if fully set forth.

67. Defendants are providing inferior health care benefits to the Class solely on the basis of alienage, immigrant status, and the duration of their presence in the United States. The Class is being discriminated against on the basis of alienage, immigrant status, and the duration of their presence in the United States, in violation of the equal protection clause of the U.S. Constitution.

68. Defendants' actions violate Article I, Section 5 of the Hawai'i Constitution by treating Plaintiffs differently than other similarly-situated residents on the basis of their status as aliens.

69. Defendants' actions violate Article I, Section 2 of the Hawai'i Constitution by depriving critically ill Plaintiffs of their right to life.

70. Defendants' discriminatory actions entitle the Class to injunctive and declaratory relief, and attorneys' fees and costs.

**DECLARATORY AND INJUNCTIVE
RELIEF ALLEGATIONS**

71. Plaintiffs re-allege and incorporate by reference the allegations contained in paragraphs 1-70 above as if fully set forth.

72. An actual and immediate controversy has arisen and now exists between Plaintiffs and Defendants, which parties

have genuine and opposing interests and which interests are direct and substantial. Defendants have violated, and continue to violate, Plaintiffs' constitutional rights to equal protection and civil rights to be free from disability discrimination. Plaintiffs are entitled to declaratory and injunctive relief.

73. Plaintiffs have no adequate remedy at law. Unless enjoined by the Court, Defendants will continue to infringe Plaintiffs' constitutionally- and statutorily- protected rights and will continue to inflict irreparable injury. This threat of injury to Plaintiffs from continuing violations requires temporary, preliminary, and permanent injunctive relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and behalf of all persons similarly situated, respectfully request that this Court:

1. Assume jurisdiction over this action;
2. Issue a declaratory judgment stating that

Defendants have violated the equal protection clause of the United States Constitution, Article I, Sections 2 and 5 of the Constitution of the State of Hawai'i, and the ADA, 42 U.S.C. § 12132;


3. Grant all injunctive relief necessary to cease Defendants' violations of Plaintiffs' constitutional and civil rights;

4. Grant such other declaratory and injunctive relief as may be appropriate;

5. Award Plaintiffs reasonable attorneys' fees, reasonable expert witness fees, and other costs of the action pursuant to 42 U.S.C. § 1988, 42 U.S.C. § 12205, and other applicable laws; and

6. Order such other relief as this Court deems just and proper.

DATED: Honolulu, Hawai'i, August 23, 2010.


MARGERY S. BRONSTER
ROBERT H. HATCH
CATHERINE L. AUBUCHON

PAUL ALSTON
J. BLAINE ROGERS
ZACHARY A. MCNISH

VICTOR GEMINIANI

Attorneys for Plaintiffs
TONY KORAB, TOJIO CLANTON
and KEBEN ENOCH