



Memorandum Opinion and thus will only be reviewed here to the extent necessary to resolve the pending motion. See Worth v. Jackson, Civ. Action No. 02-1576, slip op. at 1 (D.D.C. January 5, 2005). The plaintiff, Dennis Worth, is a white male employed at the Department of Housing and Urban Development (“HUD”) in St. Louis, Missouri. Id. He brought this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (2000), and the Fifth Amendment to the United States Constitution to challenge “affirmative employment plans [“AEPs”] that discriminate on the basis of race, ethnicity, and gender . . . .” First Amended Complaint (“Compl.”) ¶ 1. In addition, the plaintiff also challenged HUD’s practice of “provid[ing] employment goals, target deadlines, managerial appraisals and incentives only for alleged ‘underrepresented’ racial minorities and women, and not for whites or males, even when whites or males are ‘underrepresented’ in a job category.” Compl. ¶ 19. The plaintiff’s challenges can be divided into two distinct categories. First, many of the allegations contained in the first amended complaint were based upon affirmative action plans that were implemented by HUD in accordance with the Equal Employment Opportunity Commission’s (“EEOC”) Management Directive 714 (“MD-714”).<sup>2</sup> See, e.g., Compl. ¶¶ 10-14. In addition, the plaintiff challenged HUD’s “general hiring and promotions practices.” Worth, slip op. at 9.

On October 1, 2003, MD-714 was superceded by the adoption of MD-715. Id. at 4.

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<sup>2</sup> MD-714

obligates all federal departments and agencies to create an “affirmative employment plan for minorities and women” which is to identify alleged instances of “manifest imbalance” and “conspicuous absence” of women and racial minorities, by gender and race, and establish “goals” and “target dates” in order to eliminate such alleged underrepresentation” at all organizational levels.

Compl. ¶ 10.

Accordingly, the defendants filed a motion to dismiss the plaintiff's first amended complaint,<sup>3</sup> arguing that the case had become moot as a result of the adoption of MD-715. Defendants' Supplemental Motion to Dismiss the First Amended Complaint. On January 5, 2004, this Court granted in part and denied in part the defendants' motion. First, the Court concluded that the plaintiff had standing to challenge the defendants' alleged discriminatory policies because the plaintiff had allegedly suffered an injury as a result of the defendants' preferential treatment of minorities. Worth, slip op. at 12. Nevertheless, the Court found that the plaintiff's claims that challenged MD-714 and HUD's AEP were indeed moot because MD-715 explicitly superceded those policies and thus those claims were dismissed. Id. However, based upon the record before it, the Court was unable to determine if the plaintiff's allegations of discrimination based on HUD's general hiring, promotion, transfer and retention policies had also been rendered moot by the adoption of MD-715. Accordingly, the Court permitted the parties to conduct limited discovery on the issue of whether the plaintiff's challenge to those other policies had also been rendered moot by the adoption of MD-715, id., even though it concluded that the challenges to those policies and practices had not been rendered moot if they had been developed and implemented by HUD independent of MD-714, or continued in effect despite the adoption of MD-715. Id. at 9.

Pursuant to this Court's Order dated March 8, 2004, and consistent with the parties' discussion with the Court during a status conference on that same date, the plaintiff filed a notice

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<sup>3</sup> On January 5, 2004, this Court granted the plaintiff's motion to file a second amended complaint. The Court concluded that because the amendment made only a minor change to ¶ 28 of the complaint, and did not alter the substance of his allegations, the defendants would not be prejudiced and thus the amendment was appropriate. Worth, slip op. at 13.

with the Court stating the reasons for his position that his remaining claims were not moot. Notice to the Court Regarding Mootness (“Notice”); Defs.’ Reply, Ex. A (Transcript of March 8, 2004 status conference). The purpose of this filing was to put both the Court and the defendants on notice of what the plaintiff believed were the issues remaining in the case. Defs.’ Reply, Ex A at 3. In this notice, the plaintiff cited three reasons why his remaining claims were not moot. First, the plaintiff alleges that MD-714 was not the basis for requiring numerical goals for minorities and women when such groups were deemed underrepresented, or for providing differential treatment of white males, including their exclusion from any and all underrepresentation analyses. Rather, the plaintiff suggested that these policies were based on an interpretative memorandum written in 1989 by the EEOC’s Director of Program Operations, James H. Troy (“Troy Memorandum”). Notice at 1-2. Second, the plaintiff opined that his claims are not moot because HUD’s obligation under the Federal Equal Opportunity Recruitment Program (“FEORP”), which requires agencies to keep track of the number of minorities and women in their workforce and to remedy underrepresentation, specifically excludes white males from being considered as underrepresented and has not been altered by the issuance of MD-715. Id. at 3. Finally, the plaintiff contends that because MD-715 does not explicitly prohibit any of the surviving practices alleged in the complaint (discriminatory hiring and promotion practices), his claims are not moot. Id. at 4-5.

## **II. The Parties’ Arguments**

Based upon the foregoing, the defendants have now filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and for summary judgment pursuant to Rule 56(c). The defendants raise three arguments in support their motion. First, the defendants claim that the

plaintiff lacks standing to challenge either MD-715 or the FEORP. Defs.’ Mem. at 5. Second, the defendants opine that any challenges to MD-715 are not ripe and must be dismissed. Id. at 12. Finally, the defendants argue that any challenges based upon the Troy Memorandum are moot, as the memorandum was specifically superceded by MD-715. Id. at 14.

In response, the plaintiff asserts that he is not challenging a specific document, rather, he is challenging “the discriminatory and unconstitutional policies of the Department of Housing and Urban Development (“HUD”), as aided and encouraged by the Equal Employment Opportunity Commission (“EEOC”).” Pl.’s Opp’n at 2. Accordingly, the plaintiff contends that contrary to the defendants’ assertions, their claims are not moot. Id. at 13. In fact, the plaintiff suggests that the “(1) FEORP goals still encourage (if not mandate) race-conscious goals, (2) the use (by HUD) and approval (by [the] EEOC) of race-conscious ‘goals’ was never mandated by MD-714, and (3) these goals are not prohibited by MD-715.” Id. at 24. Thus, it is clear, according to the plaintiff, that his surviving claims are not moot. In addition, the plaintiff asserts that the defendants’ “standing and ripeness arguments are irrelevant and meritless,” id. at 29, because he has not asserted any claims based on MD-715 and the FEORP program. Id. at 30. In addition, the plaintiff asserts that since MD-715 was not in effect at the time the complaint was filed, it cannot affect the plaintiff’s standing or the ripeness of his claims, since standing and ripeness must be determined as of the time when the complaint was filed. Id.

### **III. Standard of Review**

Under Federal Rule of Civil Procedure 12(b)(1), which governs motions to dismiss for lack of subject matter jurisdiction, “[t]he plaintiff bears the burden of persuasion to establish subject matter jurisdiction by a preponderance of the evidence.” Pitney Bowes, Inc. v. United

States Postal Serv., 27 F. Supp. 2d 15, 19 (D.D.C. 1998). In reviewing such a motion, this Court must accept as true all the factual allegations contained in the complaint. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164 (1993). Additionally, in deciding a Rule 12(b)(1) motion, it is well established in this Circuit that a court is not limited to the allegations in the complaint, but may also consider material outside of the pleadings in its effort to determine whether the court has jurisdiction in the case. See EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624-25 n.3 (D.C. Cir. 1997); Herbert v. Nat'l Academy of Sciences, 974 F.2d 192, 197 (D.C. Cir. 1992); Haase v. Sessions, 835 F.2d 902, 906 (D.C. Cir. 1987); Grand Lodge of Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 14 (D.D.C. 2001). A motion to dismiss on the grounds of mootness is properly brought under Rule 12(b)(1). See, e.g., Bracco Diagnostics, Inc. v. Shalala, 1997 WL 614485, at \*1 (D.D.C. 1997).

This Court will grant a motion for summary judgment under Rule 56(c) if “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). When ruling on a motion for summary judgment, this Court must view the evidence in the light most favorable to the non-moving party. Bayer v. United States Dep’t of Treasury, 956 F.2d 330, 333 (D.C. Cir. 1992). However, the non-moving party cannot rely on “mere allegations or denials . . . , but . . . must set forth specific facts showing that there [are] genuine issue[s] for trial.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (citation omitted). Under Rule 56, “if a party fails to establish the existence of an element essential to that party’s case and on which that party will bear the burden of proof at trial” summary judgment is warranted. Hazward v. Runyon, 14 F. Supp. 2d 120, 122 (D.D.C.

1998) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). The party moving for summary judgment bears the burden of establishing the absence of evidence that supports the non-moving party's case. Id. In considering a motion for summary judgment, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000).<sup>4</sup>

#### IV. Legal Analysis

The Court begins its analysis with a discussion concerning whether the plaintiff's remaining claims are moot.

The mootness doctrine limits federal courts to deciding "actual, ongoing controversies." "Even where the litigation poses a live controversy when filed, the doctrine requires a federal court to refrain from deciding it if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'"

Lepelletier v. FDIC, 2001 WL 1491398, at \*2 (D.C. Cir. 2001) (internal citations omitted) (quoting Honig v. Doe, 484 U.S. 305, 317 (1988); Clarke v. United States, 915 F.2d 699, 701 (D.C. Cir. 1990)). However, a court will not apply the mootness doctrine and dismiss a case if the challenged action is capable of repetition but is evading judicial review. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs, 528 U.S. 167, 191 (2000). This disqualifier from the application of the mootness doctrine is "limited to the situation where two elements [are] combined: (1) the

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<sup>4</sup> Although the parties in this case have not been permitted to engage in full discovery, the Court has permitted them to conduct limited discovery pertaining to the question of whether all of the plaintiff's claims are moot. March 8, 2004 Order. Accordingly, the standard of review applicable to summary judgment motions is the proper standard under which the defendants' motion should be reviewed. See, e.g., White's Landing Fisheries, Inc. v. Buchholzer, 29 F.3d 229, 231 (6th Cir. 1994) (illustrating that "some discovery must be afforded the non-movant before summary judgment is granted is supported by the Supreme Court's holdings in both Anderson [v. Liberty Lobby], 477 U.S. 242 (1986) and Celotex Corp. v. Catrett, 477 U.S. 317 (1986).") (emphasis added).

challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again.” Weinstein v. Bradford, 423 U.S. 147, 149 (1975).

Furthermore, “[i]t is well settled that ‘a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.’” Friends of the Earth, 528 U.S. at 189 (citing City of Mesquite v. Aladdin’s Castle, Inc., 455 U.S. 283, 289 (1982)). However,

“[a] case might become moot if [a defendant’s] subsequent [voluntary] events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” The “heavy burden of persua[ding]” the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.

Id. at 189 (internal citation omitted). Courts have frequently declared cases moot if the rule or regulation upon which the plaintiff’s discrimination claims are premised is later changed to eliminate the allegedly unlawful conduct. See, e.g., Am. Bankers Ass’n v. Nat’l Credit Union Admin., 271 F.3d 262 (D.C. Cir. 2001); Nat’l Mining Ass’n v. Dep’t of the Interior, 251 F.3d 1007, 1011-12 (D.C. Cir. 2001); Clarke v. United States, 915 F.2d 699, 703 (D.C. Cir. 1990).

This Court has already dismissed the plaintiff’s claims that challenge MD-714 and HUD’s AEP as moot due to the adoption of MD-715. Worth, slip op. at 12. Thus, the question before this Court is whether the plaintiff’s allegations that HUD’s general hiring and promotion practices are discriminatory are also moot in light of MD-715. As noted above, the plaintiff bears a heavy burden to establish that these claims are moot. And the plaintiff has set forth three reasons why his claims that HUD’s general hiring and promotion policies are not moot since they remain in force. The Court will address each claim in turn.

**(A) The Troy Memorandum**

In his notice to the Court regarding the mootness issue, the plaintiff asserts that the Troy Memorandum, not MD-714, was the basis for the alleged acts of discrimination referenced in his complaint. Notice at 2. The defendants assert that any claim based upon this memorandum is moot because the memorandum simply interpreted MD-714, which has now been superceded by MD-715. Defs.' Mem. at 15. And thus the defendants posit that just as this Court found the plaintiff's claims based upon MD-714 moot because it was superceded by MD-715, so too are claims based upon memoranda that merely interpreted MD-714. *Id.* In response, the plaintiff concedes that the Troy Memorandum's "instructions for compliance with MD-714 are no longer in effect," but nonetheless argues that the memorandum also interprets Title VII and Executive Order 11,478<sup>5</sup> to exclude white males from any underrepresentation analysis and those interpretations have not changed despite the adoption of MD-715. Pl.'s Opp'n at 10. Thus, the plaintiff asserts that the agency has not altered its policies of not including white males in underrepresentation analyses.

After a careful review of the Troy Memorandum, it is clear that the plaintiff's position is without merit. Contrary to the plaintiff's assertion, the Troy Memorandum does not interpret Title VII or Executive Order 11,478, rather, the memorandum merely provides an interpretation of MD-714. Specifically, the memorandum begins by explaining that the EEOC's review "of the multi-year affirmative employment plans submitted in accordance with EEOC [MD-714] revealed that some clarification of the directive's language and intent [was] necessary." Pl.'s Mem., Gallegos

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<sup>5</sup> Executive Order 11,478 "prohibit[s] discrimination in employment because of race, color, religion, sex, or national origin . . ."

Decl., Ex. 3 (“Troy Memorandum”) at 1 (emphasis added). And it concludes by indicating that “[a]ny confusion regarding the intent of [MD-714] should be clarified by this memorandum.” Id. at 2 (emphasis added). The memorandum also urges directors of Equal Employment Offices to strictly adhere to the directive. Id. at 1. It is clear that the Troy Memorandum was merely interpreting MD-714. Although the memorandum does reference Title VII and Executive Order 11,478, this fleeting reference does not amount to an agency interpretation of those provisions, but rather merely postulates that the interpretation of MD-714 appears to be consistent with those provisions. Id.

This Court has already concluded in its prior opinion that MD-714 is specifically and unequivocally superceded by MD-715. Worth, slip op. at 11-12. Moreover, MD-715 clearly states that it supercedes not only MD-714, but also any related interpretative memorandum. Def.’s Mem., Gallegos Decl., Ex. 1 at 1 (MD-715) (stating that MD-715 superceded MD-714 and any related interpretative memoranda). The Troy Memorandum is clearly the type of interpretative memoranda that MD-715 supercedes. See Def.’s Mem., Gallegos Decl. ¶ 5 (stating that the Troy Memorandum was superceded by MD-715 and thus has no force or effect). Accordingly, for the reasons articulated in this Court’s prior Memorandum Opinion, any claims based upon the Troy Memorandum, just as any claims based on MD-714, are moot and therefore must be dismissed. See Worth, slip op. at 11-12.

**(B) MD-715**

The plaintiff suggests that MD-715 does not explicitly prohibit the discriminatory hiring and promotion practices identified in his complaint, and represents that several agencies continue to submit affirmative employment programs not unlike the ones challenged in this case. Notice at

4-5. Thus, the plaintiff opines that his claims that survived the defendants' initial dismissal motion are not moot. Notice at 4-5.<sup>6</sup> However, contrary to the plaintiff's assertions, based upon the record evidence presented to the Court, it is clear that many of HUD's hiring and promotions policies, particularly those relating to underrepresentation analyses, were in fact based upon MD-714 and therefore claims based on some of those prior policies are clearly moot since MD-714 has been superceded by MD-715. The defendants have satisfied their burden of establishing that the plaintiff's claims that were made in this respect are moot.

Under MD-714, HUD was required to issue both multi-year plans which set goals for minorities and women (but not white males) and accomplishment reports setting forth the progress made towards reaching those goals. Worth, slip op. at 4-5. The record is replete with evidence which indicates that such plans and reports are no longer required under MD-715. For example, Thelma Cockrell testified at a deposition on behalf of HUD and stated that HUD would not be conducting a 2004 accomplishment report or AEP plan update as a direct result of the implementation of MD-715. Defs.' Reply, Attachment C (Cockrell Deposition) at 21. In addition, a memorandum from Marcella Brown, Acting Director of HUD's Office of

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<sup>6</sup> Although the plaintiff asserts that the challenged policies that remain alive are not moot, he concedes that "he has not asserted any claims based on MD-715 and the FEORP program." Pl.'s Opp'n at 30. Based, in part, upon this representation, the defendants assert that the plaintiff lacks standing to make claims under either MD-715 or the FEORP. Defs.' Mem. at 5-10. While the defendants are correct, their arguments as to standing concerning the claims that remain alive simply miss the point. This Court has already concluded that the plaintiff has standing to challenge the prior alleged acts of discrimination relating to HUD's general hiring and promotion practices that were independent of MD-714. Worth, slip op. at 12. The plaintiff was not being ordered to set-forth new claims or allegations of discrimination or discriminatory practices (if that had been the case, the Court would have ordered the plaintiff to file an amended complaint, which is not the case), rather, the plaintiff was required to demonstrate that his claims based on HUD's general hiring and promotions practices are not moot in light of the adoption of MD-715. Moreover, it is clear that the plaintiff is not making any claims of discrimination based on MD-715 or the FEORP. Pl.'s Opp'n at 30. Rather, he is attempting to use those policies to demonstrate to the Court that HUD continues to utilize the underrepresentation analysis, which excludes white males even after MD-715 was implemented. Id. Accordingly, because those policies purportedly remain in effect, the plaintiff asserts that the policies he is challenging are independent of MD-714 and MD-715 and thus his claims are not moot. Id. at 28-29.

Departmental Equal Employment Opportunity, stated that “HUD’s most recent [AEP] that . . . contained goals and targets to remedy underrepresentation of women and minorities, which had been adopted pursuant to MD-714, expired . . . and was not, as a direct result of MD-715, renewed and reissued.” Defs.’ Reply, Attachment B, Ex. 2 at 1; see also Defs.’ Reply, Attachment B, Ex. 3 (email from Thelma Cockrell to AEP managers informing them that there would be “[n]o more special attention to the workforce representation of minorities and women”); Defs.’ Reply, Attachment B, Ex. 5 (email from Thelma Cockrell stating that “HUD (all federal agencies) can no longer establish AEP numerical goal[s], except for persons with targeted disabilities . . . . MD-715 also eliminated all reference to under-representation and to minorities and women as targeted groups.”).<sup>7</sup> Thus, based on the evidence in the record, it is clear that MD-715 has been construed to end HUD’s use of multi-year plans, AEP’s, and goals and targets to remedy underrepresentation of minorities and women.<sup>8</sup> Thus, as to these policies, it is clear that the defendants have satisfied their burden of demonstrating that the plaintiff’s challenges to them are now moot.

The plaintiff also claims that MD-714 and MD-715 are so similar that numerical goals are

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<sup>7</sup> There is some evidence in the record that the EEOC had not yet issued guidance concerning MD-715, and thus the interpretation of it is still in doubt. Pl.’s Opp’n, Ex. 5 (Cockrell Deposition) at 110-11. However, this evidence does not refute the evidence in the record which clearly indicates that MD-715 has been interpreted to prohibit the creation of multi-year plans and AEP’s as had been required by MD-714.

<sup>8</sup> The plaintiff also claims that HUD regulation 24 C.F.R. § 7.4 explicitly permits promulgation of AEP’s that identify underrepresentation of minorities and women. Pl.’s Opp’n at 12. However, this regulation has now been revised to explicitly state that the Secretary “shall establish, maintain, and carry out a plan of equal employment opportunity to promote equal opportunity in every aspect of employment policy and practice. Each plan must be consistent with 29 C.F.R. part 1614 and EEOC Management Directive 715.” 24 C.F.R. § 7.4; see also 69 Fed. Reg. 62,172 (Oct. 22, 2004) (publishing final rule). Accordingly, any claims based upon 24 C.F.R. § 7.4 are also now moot since the regulation has been amended to conform with MD-715. See, e.g., Am. Bankers Ass’n, 271 F.3d at 274 (holding that a claim based upon a rule was moot because the agency had “eliminated the allegedly unlawful provision and ‘there is no indication [the agency would] revert to its past [policy].’”).

still a permissible response to statistical underrepresentations. Pl.'s Opp'n at 11. Even assuming arguendo that this is an accurate assessment of the two management directives, there is one clear difference—MD-715 does not mandate different treatment of minorities and women as compared to the treatment of white males. This distinction is critical because the plaintiff claims that HUD's policies discriminate against white males. Accordingly, even if MD-715 still permits the use of statistical underrepresentation analyses, any such analyses under MD-715 cannot exclude white males because MD-715 explicitly treats all employees equally. And, as noted above, it is clear that as MD-715 has been implemented, no underrepresentation analysis has been conducted. This evidence satisfies the defendants' burden of demonstrating that any claims based upon the underrepresentation analyses required by MD-714 and allegedly still permitted by MD-715 are moot.

**(C) The FEORP**

The plaintiff also suggests that HUD's obligations under the FEORP have not changed despite the implementation of MD-715, Notice at 3, and under the FEORP, white males are precluded from being considered as underrepresented. Thus, according to the plaintiff, it is clear that the policies and practices of discrimination challenged in his complaint continue. Id. Specifically, the plaintiff opines that the FEORP still incorporates the type of discriminatory conduct about which he initially complained of, i.e., setting numerical limits. Pl.'s Opp'n at 3. For example, according to the plaintiff, under the FEORP, HUD must submit FEORP plans to the Office of Personnel Management, which attempt to eliminate any "underrepresentations" of minority groups or women, but not white males. Pl.'s Opp'n at 3 (citing 5 U.S.C. § 7201(a), (c); 5 C.F.R. § 720.202(c)). According to the plaintiff, such plans must "include annual specific

determinations of underrepresentation for each group” and must include “quantifiable indices by which progress toward eliminating underrepresentation can be measured.” Id. (citing 5 C.F.R. § 720.205(b)). Thus, according to the plaintiff, because the FEORP still provides for such underrepresentation calculations for all employees except white males, it is clear that the underlying HUD policies that have been challenged by the plaintiff are not based on MD-714, but rather are based on other independent grounds. Id. at 3-4.

The plaintiff places great weight on the deposition testimony of Thelma Cockrell. Id. at 4. In her deposition, Ms. Cockrell was questioned about the FEORP and asked why white male underrepresentation assessments were not conducted. Pl.’s Opp’n, Ex. 5 (Cockrell deposition) at 84-85. Ms. Cockrell stated that “using my understanding of the term under-representation, a situation for minorities and women, it is impossible for white males to be shown as under-represented.” Id. When questioned further about the basis for this understanding, she stated, “it’s my understanding that the definition in 5 C.F.R. about the FEORP that says a situation, minorities and women, and again as we spoke earlier about the guidance against from EEOC as it related to white males. So using both of those two.” Id. Ms. Cockrell appears to state that the reason the FEORP still conducts underrepresentation analyses that exclude white males is based upon her interpretation of the earlier guidance (MD-714) and definitions in the Code of Federal Regulations. Thus, based upon this testimony, it appears that any underrepresentation analysis that excluded white males under the FEORP was based, at least in part, on MD-714. However, it appears that the underrepresentation analysis is also based on other HUD policies, i.e., definitions contained in the Code of Federal Regulations. Therefore, the evidence indicates that HUD’s underrepresentation analyses policy is not completely dependent on MD-714. Moreover, the

plaintiff also cites to Ms. Cockrell's testimony that the FEORP plan is unaffected by MD-715. Id. at 125-26.<sup>9</sup> Such evidence tends to indicate that the policies under the FEORP are independent of both MD-714 and MD-715, and thus properly leads to the conclusion that since the FEORP still provides for underrepresentation analysis, such policies are independent of MD-715. Accordingly, there may be some basis for the plaintiff's surviving claims not being moot. Although the plaintiff makes no claims under the FEORP, if this program permits underrepresentation analysis that excludes white males, it would tend to show that the defendants continues to engage in such activity despite the adoption of MD-715 and that at least some of those policies are independent of MD-714. Accordingly, the defendants have failed to satisfy their burden of establishing that all of the plaintiff's claims based upon underrepresentation determinations are moot.

**(C) Other Policies and Practices**

In his opposition to the defendants' motion to dismiss and for summary judgment, the plaintiff references other evidence of policies and practices that support his argument that his surviving claims are not moot. While the defendants have succeeded in demonstrating that many

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<sup>9</sup> The plaintiff also notes that HUD's Upward Mobility Program, a job development program for employees at lower grade levels, remains in effect and takes into account, as to certain qualifying employees, underrepresentation analyses in determining who is entitled to participate in the program. Pl.'s Opp'n at 4-5. Although the plaintiff does not identify any examples of discrimination resulting from application of the Upward Mobility Program, he rather cites to excerpts from HUD Handbook 951.1 (the Upward Mobility Program) at 3-11, Pl.'s Opp'n, Ex. 9 at 3-11, as support for his position that the FEORP still advances the discriminatory policies he is challenging. While focusing on only one section of this Handbook may at first glance suggest that this program sanctions discrimination that has a "direct relationship" to the FEORP, when the Handbook is reviewed in its entirety, it is clear that such a conclusion is unwarranted. To be eligible for inclusion in the Upward Mobility program, a person is considered, in part, to also fall under HUD's Merit Staffing Policy, which explicitly provides that "[a]ll actions to fill positions will be taken without any regard to political, religious, union affiliation or non-affiliation, marital status, race, color, national origin, sex, age or non-disqualifying handicap." Defs.' Reply, Attach. B (Reizes Declaration) Ex. 6 at § 1-2. Thus, it is clear that selection to this program is not based on discriminatory factors and since the plaintiff does not put forth any evidence that this program is being implemented in a discriminatory manner, his claim that the FEORP still promotes the policies he is challenging as a result of the Upward Mobility Program's continued existence is without merit.

of the plaintiff's claims have become moot in light of the adoption of MD-715, they have failed to do so as to some of those claims. In addition to those practices discussed above, the plaintiff also appears to allege that training and other opportunities available to HUD employees are discriminatory. Pl.'s Opp'n at 5. Specifically, the plaintiff alleges that HUD does not immediately post job openings, but rather places a desired minority or women candidate in the position on a temporary basis, which then gives that candidate a "significant" advantage when the job opening is finally posted. Id. In addition, the plaintiff alleges that he was discriminated against when he was denied entry into HUD's emerging leaders program. Id. The defendants do not represent that the policies that led to these allegedly discriminatory actions are moot, rather they argue that because the plaintiff's arguments are based solely on his unsubstantiated affidavit, he has not defeated their motion for summary judgment. Defs.' Reply at 23 (citing Guardian Life Ins. of Am. v. Madole, 48 F. Supp. 2d 26, 29 (D.D.C. 1999) ("[T]he non-moving party's opposition must consist of more than unsupported allegations. Rather, the opposition, must be supported by affidavits or other competent evidence setting forth specific facts showing there is a genuine issue for trial.")). While the defendants accurately identify the standard, this standard does not alleviate the defendants' burden of demonstrating that the challenged policies and practices are moot. See, e.g., Friends of the Earth, 528 U.S. at 189 ("The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness."). Here, the defendants have failed to make this showing. In fact, they do not even allege that certain policies complained about are indeed moot. Accordingly, these challenges survive the defendants' motion.

## V. Conclusion

Many of the claims raised by the plaintiff are indeed moot because the policies on which those claims are premised are based upon MD-714, which has been superceded by MD-715. Moreover, these claims do not fall under any exception to the mootness doctrine. Worth, slip op. at 12. However, there is evidence in the record that some of HUD's hiring and promotion policies were not implemented pursuant to MD-714 and may in fact be predicated on independent grounds. For the reasons discussed above, those claims, on the record currently before the Court, survive the defendants' dismissal and summary judgment motion.<sup>10</sup>

**SO ORDERED** this day of 23rd day of February, 2005.<sup>11</sup>

REGGIE B. WALTON  
United States District Judge

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<sup>10</sup> The Court acknowledges that there is evidence in the record that MD-715, as a new directive, is still in the process of being interpreted and applied. Accordingly, should evidence later come to light that the surviving claims are indeed moot, a renewed motion addressing those claims would be appropriate.

<sup>11</sup> An Order consistent with the Court's ruling accompanies this Memorandum Opinion.