

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 12-2096, 12-2239

MICHAEL COREY,

Petitioner-Cross-Respondent

v.

UNITED STATES DEPARTMENT OF HOUSING & URBAN
DEVELOPMENT, OFFICE OF THE SECRETARY, ON BEHALF OF:
DELORES WALKER, GREGORY WALKER, BY AND THROUGH
DELORES WALKER, HIS LEGAL GUARDIAN,

Respondent-Cross-Petitioner

ON PETITION FOR REVIEW OF THE FINAL AGENCY ORDER OF
THE UNITED STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT

THE SECRETARY'S RESPONSE TO PETITIONER'S MOTION FOR STAY

Petitioner-Cross-Respondent Michael Corey has moved this Court for a stay of the Final Agency Order of the Secretary of the United States Department of Housing and Urban Development (HUD or the Secretary) dated August 15, 2012. Pursuant to this Court's notice of October 9, 2012, requesting a response, Respondent-Cross-Petitioner, the Secretary, responds to Corey's Motion for Stay as follows:

1. On September 29, 2010, HUD brought a Charge of Discrimination on behalf of Delores Walker and Gregory Walker, by and through Delores Walker, his legal guardian, against Michael Corey, alleging that Corey had unlawfully engaged in discrimination on the basis of disability in violation of the Fair Housing Act (FHA), 42 U.S.C. 3604(c), (f)(1) & (f)(2). The administrative law judge (ALJ) issued Initial Decisions and Orders on liability and damages that were set aside on Secretarial review, culminating in a Final Agency Order dated August 15, 2012. That order awarded Delores Walker \$18,000 in emotional distress damages, imposed upon Corey the maximum \$16,000 civil penalty for a first-time violation, and entered injunctive relief. On September 7, 2012, Corey filed a Petition for Review of the Final Agency Order in this Court, which docketed the Petition as No. 12-2096. On October 4, 2012, the Secretary filed a Cross-Application for Enforcement of the Final Agency Order, which is docketed as No. 12-2239. By Order dated October 5, 2012, this Court consolidated the two actions as cross-appeals.

2. On September 7, 2012, Corey filed a Motion for Stay in this Court (Judicial Motion for Stay) requesting a stay of the Final Agency Order. On September 10, 2012, this Court issued a Notice to Corey directing him to supplement his Judicial Motion for Stay with the information required by Federal

Rule of Appellate Procedure 18(a)(2)(A).¹ On September 17, 2012, Corey refiled his Motion for Stay with the Secretary (Agency Motion for Stay), who denied the motion on October 4, 2012, for “fail[ure] to provide reasons and facts necessary to support a sufficient motion for stay and fail[ure] to address the factors necessary for granting a stay.” Agency Order, 10/4/12, Att. A, at 3. Upon receipt of the Secretary’s denial of Corey’s Agency Motion for Stay, this Court directed the Secretary to respond to Corey’s Judicial Motion for Stay.

3. In deciding whether to grant a petitioner’s motion for stay of the execution of an agency’s order pending review, this Court applies the following factors, which it adopted from *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958) (per curiam):

- (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal?
- (2) Has the petitioner shown that without such relief it will be irreparably injured?
- (3) Would the issuance of a stay substantially harm other parties interested in the proceeding?
- (4) Where lies the public interest?

¹ Rule 18(a)(2)(A) requires a motion for stay filed in the court of appeals to (1) “show that moving [for a stay] first before the agency would be impracticable,” or (2) “state that, a motion [for stay] having been made, the agency denied the motion or failed to afford the relief requested.”

Airport Comm'n of Forsyth Cnty., N.C. v. Civil Aeronautics Bd., 296 F.2d 95, 96 (4th Cir. 1961) (per curiam) (quoting *Virginia Petroleum*, 259 F.2d at 925). As with the Agency Motion for Stay, Corey's Judicial Motion for Stay does not mention these four factors, much less attempt to show that they weigh in favor of a stay of the Final Agency Order pending review. In fact, Corey offers no basis for the "extraordinary relief requested," *Virginia Petroleum*, 259 F.2d at 925, other than a reference to the information contained in his Petition for Review, which in turn cites as its basis the Secretary's overturning of the first ALJ Initial Decision that found no FHA violation. As the Secretary correctly held in denying the Agency Motion for Stay, this dearth of facts and analysis precludes a grant of a stay of the Final Agency Order pending review. See Fed. R. App. P. 18(a)(2)(B)(i) (requiring a motion for stay filed in court of appeals to include "the reasons for granting the relief requested and the facts relied on"); *Koutcher v. Gonzales*, 494 F.3d 1133, 1134-1135 (7th Cir. 2007) (denying bare-bones motion for stay of removal pending judicial review that did "nothing more than make a general request for a stay" and "fail[ed] to set forth any information in support of the criteria" for a stay); cf. *Family Found., Inc. v. Brown*, 9 F.3d 1075, 1076 (4th Cir. 1993) (denying stay of judgment pending appeal where applicants had not made the "requisite" strong showing of likelihood of success on the merits).

WHEREFORE, Michael Corey's Motion for Stay should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2012, I electronically filed the foregoing
THE SECRETARY'S RESPONSE TO PETITIONER'S MOTION FOR STAY
with the United States Court of Appeals for the Fourth Circuit by using the
CM/ECF system. All participants in this case are registered CM/ECF users, and
service will be accomplished by the appellate CM/ECF system.

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney

Attachment A

**UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF THE SECRETARY**

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)
The Secretary, United States Department of)
Housing and Urban Development,)
Charging Party, on behalf of:)
)
Delores Walker, Gregory Walker,)
by and through Delores Walker, his)
legal guardian,)
)
Complainants,) HUDALJ 10-M-207-FH-27
)
)
v.) October 4, 2012
)
)
Michael Corey)
)
Respondent.)
)
)

For the Complainant: Jeanine Worden, Associate General Counsel for Fair Housing,
 Kathleen Pennington, Assistant General Counsel for Fair Housing
 Enforcement, Sheryl L. Johnson, Regional Counsel, Region III,
 Richard A. Marchese, Associate Regional Counsel, Region III,
 Melissa Stegman and Michelle Caramenico, Trial Attorneys, U.S.
 Department of Housing and Urban Development

For the Respondents: Fred F. Holroyd, Attorney, Holroyd & Yost, Charleston, WV

ORDER ON MOTION TO STAY

On September 7, 2012, Respondent filed a Petition for Review with the United States Court of Appeals for the Fourth Circuit (“Fourth Circuit”) seeking review and reversal of the Secretary’s Order issued August 15, 2012 (“August 15th Order”). Respondent also filed a Motion for Stay on September 7, 2012 with the Fourth Circuit, and an amended Motion for Stay on September 17, 2012 with the Secretary and the Fourth Circuit, requesting that the Secretary stay the August 15th Order pending his appeal to the Fourth Circuit. The Fourth Circuit issued an Order (“Court Order”) on September 17, 2012 which “defers consideration of the motion for stay filed in this court pending receipt of a ruling by the Department of Housing and Urban Development of the motion for stay filed with that agency on September 17, 2012.” See Court

Order. On September 24, 2012, the Charging Party filed an Opposition to Respondent's Motion for Stay, arguing that the Secretary lacks jurisdiction to stay enforcement of HUD's final decision. After review, I DENY the Respondent's Motion for Stay.

BACKGROUND

On September 29, 2010, the Charging Party filed a Charge of Discrimination on behalf of Delores Walker and Gregory Walker, by and through Delores Walker, his legal guardian ("Complainants"), alleging that Michael Corey ("Respondent") discriminated against the Complainants based on disability in violation of the Fair Housing Act, as amended, 42 U.S.C. §§ 3601 *et seq.*, by making facially discriminatory statements in violation of 42 U.S.C. § 3604(c); making housing unavailable because of disability in violation of 42 U.S.C. § 3604(f)(1); and imposing discriminatory terms and conditions because of disability in violation of 42 U.S.C. § 3604(f)(2).

On May 16, 2012, the Administrative Law Judge ("ALJ") issued an Initial Decision finding Respondent had not violated the Fair Housing Act. Subsequently, the Charging Party submitted a Petition for Review ("Initial Petition") to the Secretary requesting that the Secretary vacate the Initial Decision and remand the case to the ALJ. On June 15, 2012, the Secretary issued an Order granting the Initial Petition. See Order at 8. The Secretary found that the Charging Party offered evidence sufficient to prove Respondent violated 42 U.S.C. §§ 3604(f)(1)-(2) and (c) of the Fair Housing Act. Id. at 3-4. The Secretary then remanded the proceeding to the ALJ to rule on the issue of damages and civil penalty. See id. at 8.

On July 16, 2012, the ALJ issued an Initial Decision and Order Upon Remand, ordering Respondent to pay \$5,000 in damages to Complainants and assessing a \$4,000 civil penalty. The Charging Party again sought Secretarial Review on July 30, 2012. On August 15, 2012, the Secretary issued a final decision granting the Charging Party's petition for review and ordered Respondent to pay \$18,000 in damages to the Complainants and assessed a \$16,000 civil penalty. See id.

DISCUSSION

The Fair Housing Act provides that the Secretary may review any finding of fact, conclusion of law, or order contained in an ALJ's initial decision, and issue his own final decision in the case as a whole or on any matters therein within 30 days of the ALJ's initial order. See 42 U.S.C. § 3612(h); 24 C.F.R. § 180.680(b)(1). Similarly, HUD's regulations permit parties to petition for Secretarial review following an ALJ's decision. See 24 C.F.R. § 180.675. If, however, a party is adversely affected by a final agency decision¹, that party may obtain review in the judicial circuit in which the discriminatory housing practice is alleged to have occurred. 42 U.S.C. § 3612(i).

A party adversely affected by an administrative decision must ordinarily move first before the agency for a stay pending review of its decision or order. Fed. R. App. P. 18(a)(1).

¹ An agency decision becomes final if issued by the Secretary on review or if 30 days lapses after a an ALJ decision without any further action on the part of the Secretary. See 42 U.S.C. § 3612(h); 24 C.F.R. § 180.680(b)(1).

The motion must include (1) the reasons for granting the relief requested and the facts relied on; (2) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; (3) and relevant parts of the record. Fed. R. App. P. 18(a)(B).² Furthermore, general authority is given to both the agency and the reviewing court to stay agency action pending review. 5 U.S.C. § 705. While the Charging Party argues that the Secretary lacks jurisdiction to stay enforcement of a final agency decision, the Secretary finds, based on the above authority, that he does in fact have authority to rule on Respondent's motion to stay.

In reviewing whether to grant a motion for stay, an agency or court must consider four factors: (1) whether the movant will likely prevail on the merits of the appeal; (2) whether the movant will suffer irreparable injury if the stay is not granted; (3) whether the nonmoving party will be substantially harmed by the stay; and (4) whether the public interest will be served by granting the stay. See Mowbray v. Kozowski, 725 F. Supp. 888, 889 (W.D.Va 1989); see also Long v. Robinson, 432 F.2d 977, 979 (4th Cir. 1970).

In support of his motion, Respondent argues that "the decision of the agency (Housing and Urban Development) has improperly interpreted the faits [sic] and law of the case before it, as evidenced in the attached Decision of its Chief Administrative Law Judge and the rejection thereof by said agency ..." However, Respondent's argument falls short of the specificity needed for a sufficient request for stay. Instead of providing reasons and facts that support his request for stay, Respondent attached the ALJ's July 16, 2012 decision, a decision that was overruled by the Secretary in the August 15th Order. Furthermore, not only did Respondent fail to offer evidence that he would suffer irreparable injury, he failed to address the other three factors necessary for granting a stay. Therefore, the Secretary denies Respondent's request to stay enforcement of the August 15th Order.

CONCLUSION

Upon review, I DENY Respondent's Motion for Stay because Respondent failed to provide reasons and facts necessary to support a sufficient motion for stay and failed to address the factors necessary for granting a stay.

IT IS SO ORDERED.

Dated this 4th day of October, 2012



Laurel Blatchford
Secretarial Designee

² While this rule has no counterpart in present rules regulating review of agency proceedings, it merely assimilates the procedure for obtaining stays in agency proceedings with that for obtaining stays in appeals from the district courts. The same considerations which justify the requirement of an initial application to the district court for a stay pending appeal support the requirement of an initial application to the agency pending review. See Note accompanying Rule 18.