
In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 08-3140

SHAUN DONOVAN, Secretary of the United States
Department of Housing and Urban Development,
on behalf of ROZIEL REYES,

Petitioner,

v.

MICHAEL BASSALI,

Respondent.

On Application for Enforcement
of an Administrative Consent Order.
No. HUDALJ07-044 — Constance T. O'Bryant, Administrative Law Judge

**BRIEF OF THE SECRETARY OF
HOUSING AND URBAN DEVELOPMENT**

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Introduction

This case is before this court on the application of the Secretary of the Department of Housing and Urban Development (“HUD”) for enforcement of an administrative consent order. The matter arose when Roziel Reyes filed a familial status discrimination complaint with HUD, alleging that landlord Michael Bassali refused to rent her an apartment because she has children. HUD investigated Reyes’ complaint and issued a “Charge of Discrimination” for violations of the Fair Housing Act. The case, which was assigned to an administrative law judge for a hearing, was resolved with an “Initial Decision and Consent Order” (“Consent Order”) signed by the parties and by the ALJ. The Consent Order became final when the Secretary of HUD did not overturn it within 30 days.

The Secretary filed an “Application for Enforcement of an Order of the United States Department of Housing and Urban Development” with this court, because Bassali has failed to attend fair housing training and has failed to pay Reyes the \$15,000 provided for in the Consent Order. Bassali filed an “Answer to the Application for Enforcement,” and this court ordered briefing. In this brief, the Secretary argues that the application for enforcement should be granted because (1) a final order of an ALJ, from which no petition for review was filed, is conclusive; (2) objections not raised before the ALJ will not be considered by this court absent extraordinary circumstances; (3) a respondent who explicitly waived his right to challenge a consent order is bound by that agreement; and (4) HUD did not breach its agreement.

Jurisdictional Statement

This court has jurisdiction over an application for enforcement of a final order of an administrative law judge under 42 U.S.C. § 3612(j) and 28 U.S.C. § 2342(6). Title 42 U.S.C. § 3612(j) provides: “The Secretary may petition any United States court of appeals for the circuit in which the discriminatory housing practice is alleged to have occurred . . . for the enforcement of the order of the administrative law judge . . . by filing in such court a written petition praying that such order be enforced” 42 U.S.C. § 3612(j). The alleged discriminatory housing practice in this case took place in Evanston, Illinois, within this circuit. Pursuant to 28 U.S.C. § 2342(6), this court has exclusive jurisdiction of “all final orders under section 812 of the Fair Housing Act.”

Issue Presented

Whether HUD’s application for enforcement of a consent order in an administrative housing discrimination case should be enforced because: (1) a final order of an ALJ, from which no petition for review was filed, is conclusive, 42 U.S.C. § 3612(l); (2) objections not raised before the ALJ are forfeited and will not be considered by this Court, absent extraordinary circumstances, 42 U.S.C. § 3612(k)(3); (3) the respondent explicitly waived his right to challenge the consent order at any time; and (4) the agency did not breach the consent order.

Statement of the Case

On July 9, 2007, the Department of Housing and Urban Development issued an administrative “Charge of Discrimination” against landlord Michael Bassali under the

Fair Housing Act, 42 U.S.C. §§ 3604, 3612. App. 368-69.¹ On September 18, 2007, the ALJ granted the Secretary's motion for a default judgment. App.53. The administrative case was eventually resolved when a consent order was signed by the parties on November 9, 2007, and by the ALJ on November 13, 2007. App. 7. When Bassali failed to comply in full with the consent order, HUD filed this enforcement action in this court, and after Bassali filed an answer, this court ordered briefing.

Statement of Facts

Roziel Reyes filed a familial status discrimination complaint on September 30, 2004 with HUD, alleging that Michael Bassali violated the familial status provisions of the Fair Housing Act, 42 U.S.C. § 3604(a) and (c), by refusing to rent an apartment to her and making discriminatory statements to her because of her children who would be living there. App. 159, 161 ("Charging Party's List of Witnesses and Exhibits," Exhs.7-8). HUD investigated the complaint, found reasonable cause to believe that discrimination had occurred, and issued a "Charge of Discrimination" ("the Charge") against Bassali on July 9, 2007. App. 375, 368-69. The Charge alleged that Bassali had violated 42 U.S.C. § 3604(a) and (c). App. 368-69. Pursuant to the Fair Housing Act, 42 U.S.C. § 3612(b) and (g), the matter was assigned to an administrative law judge for resolution. App. 56.

¹ "App." refers to the Secretary's Appendix. Because the certified administrative record is not paginated, for the convenience of the court and the parties, the Secretary has included in his Appendix a paginated copy of the full record with one exception. In the unnumbered certified administrative record, four pages into the section labeled "Charging Party," is one document (with exhibits) presumably included in error from an entirely different case. That document is not in this Appendix.

On July 9, 2007, HUD served a copy of the Charge on Bassali at 1516 Hinman Avenue in Evanston, Illinois, by first class mail and Federal Express. App. 390. Bassali did not file an answer to the charge of discrimination, and on August 13, 2007, HUD moved for a default judgment. App. 336. On September 18, 2007, the ALJ granted the Secretary's motion, finding that a host of factors demonstrated that Bassali had been properly served at the correct address. App. 53. In particular, the ALJ found that (a) the Charge and other documents were served on Bassali by first-class mail and by Federal Express at 1516 Hinman Avenue; (b) the Federal Express package was delivered; (c) the first-class mail package was not returned; (d) the United States Postmaster confirmed that 1516 Hinman Avenue was the address at which Bassali received mail; (e) the Cook County Treasurer's Office had 1516 Hinman Avenue as Bassali's mailing address; (f) Illinois voter registration listed Bassali at 1516 Hinman Avenue; and (g) Bassali's Illinois driver's license showed him at 1516 Hinman Avenue.

Id. In conclusion, the ALJ stated:

Respondent has clearly been served with several documents in this case and in each instance has failed to respond. Respondent is on notice of the Charge and of the consequences of failing to respond, and has nonetheless chosen not to participate in these proceedings. A default judgment is therefore appropriate. Respondent will have no opportunity to present evidence or testimony, or to rebut the Charging Party's case.²

² The ALJ also noted that a document sent to respondent and labeled, "Important Document," warned respondent of a default if he failed to answer. App. 52.

App. 53. The ALJ also stated: “Respondent may submit evidence and testimony on the matter of damages.” *Id.* In fact, the ALJ later ordered Bassali to produce a list of witnesses and documents to HUD by November 2, 2007, for the November 13, 2007 damages hearing. App. 40-41 (“Order Granting Charging Party’s Motions”).

On November 2, 2007, attorney Leslie Matlaw filed a limited appearance on behalf of Bassali in which she stated that she was appearing “for the sole purpose of Settlement.” App. 111. Four days before the hearing, on November 7, 2007, HUD sought sanctions against attorney Matlaw for alleged misconduct in a pleading to the ALJ. App. 120-123 (“Charging Party’s Response In Opposition to Respondent’s Motion for a Settlement Conference”). On November 8, 2007, a second attorney, Gregory Goldstein, filed his appearance. App. 107. On November 9, 2007, Matlaw filed a motion to withdraw her limited appearance on the basis that Bassali had informed her that he was being represented for all purposes by another attorney. App. 61. On November 13, 2007, the ALJ granted the motion to withdraw, *nunc pro tunc* to November 9, 2007, and denied the motion to sanction Matlaw. App. 23, 26.

The case was resolved when a consent order was signed by the parties on November 9, 2007, and by the ALJ on November 13, 2007. App. 7. In the Consent Order, Bassali agreed to pay \$15,000 to Reyes, to pay a \$2,000 civil penalty to the Government, and to attend fair housing training. App. 9. The Consent Order further provided that it was voluntary and not the result of coercion or intimidation:

The parties acknowledge that this Consent Order is a voluntary and full settlement of the charge. No party has been coerced, intimidated, threatened or any way forced to

become a party to the Consent Order. The parties have read and fully understand the significance of all the terms set forth herein.

App. 12. In another provision, Bassali explicitly waived his right to challenge the Consent Order at any time:

The signatures of the parties to this Consent Order constitute a waiver of any right to withdraw their consent during the thirty (30) day Secretarial review period and a waiver of any right to challenge the validity of this Consent Order at any time.

App. 13. The signature page, just above where Bassali signed, again expressed his knowing and voluntary agreement to all of the terms:

The undersigned parties have read the foregoing Consent Order, HUD ALJ No. 07-044-FH and FHEO case No. 05-04-1459-8, and willingly consent to it with a full understanding of the rights it confers and the responsibilities it imposes on him, as signified by his signature below.

App. 16. Bassali was represented by attorney Goldstein when he signed the Consent Order. App. 107.

Summary of Argument

First, Bassali cannot challenge the Secretary's enforcement petition because no petition for review under 42 U.S.C. § 3612(i) was filed. In the absence of a petition for review, the Fair Housing Act, 42 U.S.C. § 3612(l), provides that the final order of an ALJ is conclusive for purposes of enforcement. Congress intended 42 U.S.C. § 3612(l) to be automatic. Second, none of Bassali's objections raised in his "Answer to Application for Enforcement" are properly before this court, because they were never

raised with the ALJ and are therefore forfeited. In the absence of extraordinary circumstances, the Fair Housing Act, 42 U.S.C. § 3612(k)(3), provides that objections not made before the ALJ will not be considered by this court. Third, in the Consent Order, itself, Bassali explicitly waived his right to challenge the Consent Order at any time. Bassali, who was represented by counsel, is bound by that waiver. Finally, HUD did not breach the Consent Order.

Argument

A. Standard of Review

There is no “standard of review” because this is not an appeal from a district or administrative court. The legal standards to be applied to an application for enforcement of a HUD order are set out in the Fair Housing Act, 42 U.S.C. § 3612, as discussed in sections B. and C. below.

B. HUD is Entitled to Automatic Enforcement

The Fair Housing Act provides for automatic enforcement by this court of an order by an administrative law judge in the absence of a petition for review. The application for enforcement before this court was filed under the Fair Housing Act, 42 U.S.C. § 3612(j), providing for enforcement of a final agency order by the court of appeals in the circuit where the discriminatory housing practice is alleged to have occurred. The Fair Housing Act provides that a final order is conclusive if no petition for review was filed within 45 days of the ALJ’s final order:

If no petition for review is filed under subsection (i) of this section before the expiration of 45 days after the date the

administrative law judge's order is entered, the administrative law judge's findings of fact and order shall be *conclusive in connection with any petition for enforcement [] which is filed by the Secretary under subsection (j) of this section*

42 U.S.C. § 3612(l)(emphasis added). The ALJ's Initial Decision and Consent Order was entered on November 13, 2007, and became final upon the expiration of 30 days without review by the Secretary. App. 7; 42 U.S.C. § 3612(h). It is undisputed that no petition for review ever has been filed with this court.³

That the order in the instant case is a consent order in no way changes this result. As the Supreme Court stated in *Rufo v. Inmates of Suffolk County Jail*, a consent decree or order is an agreement that the parties “expect will be reflected in, *and be enforceable as*, a judicial decree that is subject to the rules generally applicable to other judgments and decrees.” 502 U.S. 367, 378 (1992) (internal citation omitted)(emphasis added). As this court has recognized, citing *Rufo, supra*, “consent decrees are subject to the same rules applicable to other judgments.” *Kindred v. Duckworth*, 9 F.3d 638, 644 (7th Cir. 1993).

Under the Fair Housing Act, the “clerk of the court of appeals in which a petition for enforcement is filed under subsection (l) . . . of this section shall forthwith enter a

³ This court has held that no appeal can be taken from a consent order, because in the absence of an explicit provision in the order preserving the right to appeal, the presumption is that “the consent operates as a waiver of the right to appeal.” *ACORN v. Edgar*, 99 F.3d 261, 262 (7th Cir. 1996). Here, as stated *infra* at 10, Bassali did not preserve that right and in fact explicitly *waived* his right to challenge the consent order.

decree enforcing the order.” 42 U.S.C. § 3612(n). The legislative history makes clear that entry of a decree enforcing the order is intended to be automatic:

Section 812(n) provides for the clerk of the court of appeals to enter forthwith a decree enforcing the ALJ’s order, upon petition filed under Sections 812(l) or (m), and to transmit a copy of the decree to the Secretary and the parties before the ALJ. The Committee intends that enforcement in these circumstances be automatic.

H.R. Rep. No. 711, 100th Cong., 2d Sess. 39 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2200. The Secretary is thus entitled to enforcement of the ALJ’s order. 42 U.S.C. § 3612(j) and (l). *United States v. Simpson*, 1995 WL 283837 (6th Cir. May 10, 1995).

C. Bassali’s Objections Are Forfeited.

Bassali’s objections to enforcement of the Consent Order were not presented to the ALJ, and the Fair Housing Act provides that objections not made before the ALJ will not be considered by this court. 42 U.S.C. § 3612(k)(3). Thus, even if Bassali were not prevented from attacking the Consent Order by 42 U.S.C. § 3612(l) , which makes the Consent Order conclusive, his objections would still not be properly before this court. The Fair Housing Act, 42 U.S.C. § 3612(k)(3), provides: “No objection not made before the administrative law judge shall be considered by this court, unless the failure or neglect to urge such objection is excused because of extraordinary circumstances.” In his “Answer to Application for Enforcement” (“Answer”) filed with this court, Bassali challenges: the posting of the HUD charge on the Internet at the time it was issued;

the default judgment entered against him;⁴ sanctions entered against him because he failed to respond to discovery;⁵ the motion by HUD to sanction his first attorney;⁶ and factors he alleges cumulatively made him decide to sign the Consent Order. Answer, *passim*. He also objects to the enforcement of the Consent Order based on the merits of the underlying discrimination case. *Id.* at 2-4. As a search of the record makes clear, none of the objections Bassali raises with this court were ever raised before the ALJ.⁷

If Bassali wanted to argue the merits of the underlying discrimination case, he should have challenged the default judgment before the ALJ. He never did, and he cannot challenge it now or argue the merits of the underlying discrimination case. He also never challenged or attempted to modify the Consent Order before the ALJ or HUD after it was entered, even though he was represented by counsel. There are no “extraordinary circumstances” which excuse Bassali’s failure to raise his objections with the ALJ when, instead, and with the assistance of counsel, he decided to resolve the matter by signing the Consent Order, explicitly agreeing that he was in no way

⁴ The ALJ’s findings of fact with respect to the basis for the default are also conclusive under 42 U.S.C. § 3612(l), like the Consent Order, itself.

⁵ Bassali states incorrectly that he was prohibited from testifying at the damages hearing. Answer 4. In fact, the ALJ twice stated that Bassali could submit documents and testimony on damages. App. 53, 40-41.

⁶ Bassali also errs when he states that “HUD sanctioned” his first attorney. Answer 5. In fact, the ALJ denied HUD’s motion to sanction Bassali’s first attorney. App. 26.

⁷ In addition, attachments 1-3, 5-8, 14 and 15 to Bassali’s Answer filed with this court are not in the record before the court.

coerced or intimidated and had a full understanding of his rights and responsibilities under that Consent Order. App. 12, 16. Bassali's objections are forfeited and should not be considered now by this court. 42 U.S.C. § 3612(k)(3).

D. Bassali Waived His Current Challenge.

The third basis for enforcement is the Consent Order itself. Section IX provides: "The signatures of the parties to this Consent Order constitute a waiver of any right to withdraw their consent during the thirty (30) day Secretarial review period and *a waiver of any right to challenge the validity of this Consent Order at any time.*" App. 13 (emphasis added). Thus, Bassali explicitly waived his right to challenge the consent order at any time. Bassali is bound by this term and cannot challenge the validity of the Consent Order in response to the Secretary's Petition for Enforcement.

Bassali agreed that he had "read and fully under[stood] the significance of all the terms set forth herein." App. 12. He signed immediately below the following statement: "The undersigned parties have read the foregoing Consent Order, HUD ALJ No. 07-044-FH and FHEO case No. 05-04-1459-8, and willingly consent to it with a full understanding of the rights it confers and the responsibilities it imposes on him, as signified by his signature below." App. 16. Bassali was represented by counsel when he made the decision to sign the Consent Order. App. 107. He has explicitly waived his right to challenge it now.

E. HUD Did Not Breach the Consent Order.

Bassali's argument that the availability of the HUD Charge on the Internet somehow violates the Consent Order is not properly before this court for all the reasons

stated above, but in any case it is without merit. HUD's promise was to dismiss the Charge against Bassali, not to expunge reference to this governmental activity in public sources. App. 13. As is provided in the Consent Decree, the Charge *was* dismissed by the entry of the Consent Decree. *Id.* at VII. In fact, the Consent Decree, itself, which shows that the Charge was dismissed, can also be found on the Internet. <http://www.hud.gov/offices/fheo/enforcement/bassali-consent.pdf> (last visited Jan. 30, 2009). Bassali's objections to the Internet postings are not a defense to the enforcement of the Consent Decree.

Conclusion

For the reasons stated above, the Secretary's Application for Enforcement should be granted.

Respectfully submitted,

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Certificate of Service

Joan Laser, an attorney, certifies that on February 4, 2009, she caused two copies of the forgoing Appellee's Brief along with an digital copy of the same to be served by First Class U.S. mail upon the following:

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Certificate of Compliance with Circuit Rule 30(d)

The undersigned certifies pursuant that all of the materials required by Circuit Rule 30(a) and (b) are included in the Short Appendix and Appendix.

JOAN LASER
Assistant United States Attorney

Dated: 2/4/2009

Certificate of Compliance with Circuit Rule 31(e)

The undersigned certifies pursuant to Circuit Rule 31(e) that there is no digital version of the Short Appendix because no documents in the Short Appendix are available electronically in non-scanned Portable Document Format.

JOAN LASER
Assistant United States Attorney

Dated: 2/4/2009

Certificate of Compliance with Rule 32(a)

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) along with Circuit Rule 32 and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using WordPerfect Version X3 in 12-point font size, Century Schoolbook type style.

Dated: 2/4/2009

JOAN LASER
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SHORT APPENDIX

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