
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*

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

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Statutes

42 U.S.C. § 3612(l).	1, 2, 3
42 U.S.C. § 3612(k)(3).	1, 3

Introduction

HUD gave four reasons in its opening brief why its application for enforcement should be granted: (1) a final order is conclusive if no petition for review is filed within 45 days of the order, 42 U.S.C. § 3612(l); (2) respondent Bassali failed to raise his arguments before the ALJ, 42 U.S.C. § 3612(k)(3); (3) Bassali explicitly waived his right to challenge the consent order in the consent order itself, Short Appendix at Section IX; and (4) HUD did not breach the consent order despite respondent's concerns about the internet. Bassali fails to contest those reasons. He admits that no petition for review was filed. That fact alone entitles HUD to automatic enforcement. Bassali acknowledges that the arguments he raises were not raised before the administrative law judge. Barring extraordinary circumstances, therefore, his arguments cannot be raised before this Court. Bassali acknowledges signing the consent order while represented by counsel and does not deny or even address the fact that in the order, he explicitly waived his right to challenge the order at any time. And Bassali does not deny that the case *was* dismissed, although he complains that the availability of the information on the internet has not given him "closure." Bassali Br. at 9.

The majority of Bassali's brief is taken up with his belated, waived version of the facts of the underlying discrimination charge and the impact of the availability of public information about this case on the internet. Neither argument should affect this enforcement proceeding.

Argument

A. HUD Is Entitled to Automatic Enforcement.

HUD argued in its opening brief that under 42 U.S.C. § 3612(l), Congress intended the consent order to be both conclusive and automatically enforced. Bassali's only mention of this argument is his wholly unsupported assertion that HUD did not tell the truth to the ALJ and that "Congress certainly intended they tell the truth to the ALJ, in the Order and on the Internet." Bassali Br. at 2. There is not a scintilla of evidence that HUD told other than the truth to the ALJ. Bassali has tried to use this enforcement proceeding twice now to belatedly present his version of the underlying discrimination case. Bassali's allegations about the merits of the case he settled are not merely not at issue before this court; they are nowhere to be found in the administrative record. That is because Bassali made the choice, represented by counsel, not to attempt to vacate the default judgment and have a hearing on those facts. He instead settled the case with a consent order. Bassali cannot now attempt to relitigate the default judgment. As discussed in HUD's opening brief, the default was well supported, and the ALJ made detailed findings of facts, which are conclusive under 42 U.S.C. § 3612(l) just like the consent order itself. In any case, there is no evidence whatever that HUD did not tell the truth to the ALJ, and Bassali has provided none.

Bassali has not denied that he did not file a petition for review of HUD's final order. Congress has determined that without an appeal, the underlying merits of a

discrimination action shall not be heard in the enforcement action. 42 U.S.C. § 3612(l). This order should be enforced.

B. Bassali's Objections Were Forfeited.

Bassali argues the “extraordinary circumstances” exception to the rule that issues not raised before the ALJ cannot be raised in this court. 42 U.S.C. § 3612(k)(3). But Bassali’s list of “extraordinary circumstances” is without merit. The first is that HUD is alleged to have intimidated both of his lawyers. Bassali Br. at 2. This is a baseless charge. HUD did seek sanctions against Bassali’s first attorney, in a response to the attorney’s own motion, because HUD believed she had made material misrepresentations to the ALJ and had revealed confidential settlement information. App. 119. That response is in the record and demonstrates on its face and by reference to the other documents in the record that it was not intimidation. *Id.* Bassali’s allegation that his second attorney was intimidated is also meritless. Bassali contends that when HUD wrote to that attorney stating that Bassali was in breach of the consent order, the attorney filed a motion to withdraw. Bassali Br. at 7. That is not evidence that HUD intimidated the second attorney, only that HUD informed him of Bassali’s breach, and he chose to withdraw. The intimidation charge is meritless.

Bassali’s second alleged “extraordinary circumstance” is that the “primary issues I bring were learned about after the Order.” Bassali Br. at 2. Bassali is apparently referring here to his concern about the availability of the HUD Charge on the internet when his name is searched via various search engines. That issue is not related to this enforcement proceeding and cannot be raised in this action. Bassali attempts to tie the

availability of public information on the internet to this enforcement action by claiming that HUD has breached its agreement to “dismiss” the case as provided for in the settlement agreement, because he does not have “closure.” *Id.* But the attempt to show a HUD breach is wholly meritless as discussed *infra* at 5-6. Indeed, Bassali states that he did not even think of the internet when he signed the consent order. Bassali Br. at 8. This enforcement action is not a forum to raise a privacy claim. This case is about one consent order, and HUD met its obligations under the settlement when it dismissed the case.

The third “extraordinary circumstance” asserted is that “I have been given no guidance about their court though I requested it.” Bassali Br. at 2. There is no elaboration or support for this vague statement. The fourth is: “They have brought me here.” *Id.* The court of appeals is the appropriate forum for enforcement of consent orders, which is why Bassali finds himself in this forum. That is not extraordinary. Indeed, none of the circumstances Bassali recites in his brief as “extraordinary” come close to being the kind of extraordinary circumstances that would excuse Bassali from raising his issues with the ALJ, when instead, and with the advice of counsel, he decided to settle the case.

C. Bassali Waived His Current Challenge.

Nowhere does Bassali dispute the fact that he explicitly in the consent order waived his right to challenge the consent order at any time. Short App. at Section IX; App. 13. Bassali was represented by counsel at the time. Bassali does not even address the provision in the Order that he was not “coerced, intimidated, threatened,

or in any way forced to become a party to the Consent Order” or the statement above his signature that he was signing willingly and with a full understanding of the responsibilities the Order imposes upon him. Short App. at V.A. and Bassali Signature Page; App. 12, 16.

Bassali has described his reasons for feeling he had to settle the case. In summary, his father was sick, he had been defaulted and could no longer contest the merits, and he worried that the ALJ might order him to pay more than the settlement amount. He was concerned about his first attorney but solved that problem by finding another attorney. Bassali Br. at 7. Those reasons for settling a case are not unusual. They do not constitute fraud. Second thoughts are not a defense. Bassali’s decision was made with the advice of counsel, whom he describes as “a recent law school graduate” but never asserts was incompetent. Bassali Br. at 6. Bassali is bound by his agreement, including the provision not to challenge the enforcement of the consent order.

D. HUD Did Not Breach the Agreement.

Bassali alleges that HUD “breached” the consent order because the internet availability of the public information was not a dismissal which provided “closure,” and the consent order promised dismissal of the case. There is simply no ambiguity about the meaning of the word “dismiss” in the consent order. It refers to the dismissal of the case before the ALJ, and the consent order itself embodies the very dismissal contemplated: “[T]he Charging Party [HUD] agrees to the dismissal, without a formal determination of the allegations that Bassali injured Complainant by violating the Act.

Therefore, the Charge against Bassali is hereby dismissed with prejudice.” Short App. VII; App. 13. HUD specifically “dismisses [its] complaint against Michael Bassali.” Short App. III.D.; App. 11. It meant dismissal of the action before the ALJ, and Bassali does not deny that dismissal of the case was what was contemplated by the parties at the time. He admits not even having considered the internet at that point. Bassali Br. at 6. The *case* was, as Bassali agrees, dismissed. That Bassali lacks closure because there is a public record of this case is not a breach of this consent order. Bassali has provided no evidence whatever of any breach of the consent order by HUD.

Conclusion

For all the reasons given in the Secretary’s opening brief and reiterated above, this order should be enforced.

Respectfully submitted,

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Certificate of Service

Thomas P. Walsh, an attorney, certifies that on March 16, 2009, she caused two copies of the forgoing Petitioner's Reply 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 Rule 32(a)

This reply 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.

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