IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-51132

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CITY OF AUSTIN,

Defendant-Appellee

v.

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 975, *et al.*,

Proposed Intervenors-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

OPPOSITION OF THE UNITED STATES TO APPELLANTS' RENEWED MOTION TO STAY

INTRODUCTION

This is the second time within six weeks that the eleven appellants – the International Association of Firefighters, Local 975 (AFA), and ten firefighters of the City of Austin Fire Department (appellants) – have moved this Court for a stay of district court proceedings pending this Court's review of the district court's

denial of their motion to intervene in this litigation pursuant to Federal Rule of Civil Procedure 24. Nothing has changed the merits of appellants' challenges in the interim. Thus, just as this Court rejected appellants' initial emergency motion for a stay, the Court should reject appellants' pending motion – which is, in large part, verbatim of their original motion.

FACTS AND PROCEDURAL HISTORY

1. In June 2014, appellants moved to intervene in district court shortly after the parties, the United States and the City of Austin (City), submitted a proposed consent decree that resolves this litigation under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.* (Title VII). R. 4-5, 16-17.[1] Appellants raised several bases for intervention as of right, but relied primarily on: (1) contractual rights regarding entry-level hiring under an *expired* collective bargaining agreement (CBA) with the City; and (2) alleged state law rights concerning collective bargaining and seniority. R. 16:6-9, 31. The parties separately opposed intervention. R. 24, 27, 36-37. The AFA and the City had

[1] "R. __:__" refers to the document number on the district court docket sheet and the document's original page number. "Emerg. Mot. __" refers to the original pagination of the Appellants' Emergency Motion To Stay And To Expedite Appeal and not the pagination recorded by this Court. "2d Mot. ___" refers to the original pagination of appellant's pending motion. "App. __" refers to the original pagination of Appendix A, which is attached to appellants' pending motion. "U.S. Att. __" refers to the Attachment appended to this opposition.

entered into a CBA in December 2009 that, among other things, addressed the selection procedure for fire cadets and seniority rights of incumbent employees. R. 16-2:16, 23, 34-36. But that CBA expired, by its terms, on October 1, 2013. R. 16-2:60. Accordingly, the City was no longer required to implement the CBA after that date.

On September 15, 2014, the district court denied appellants' motion to intervene, holding that they did not meet the criteria for intervention as of right or permissive intervention. R. 38.[2] Citing this Court's precedent, the district court held that appellants lacked any "direct, substantial, legally protectable interest in the action, meaning 'that the interest be one which the *substantive* law recognizes as belonging to or being owned by the applicant.'" R. 38:2-3 (citation omitted). Absent state law rights or an existing collective bargaining agreement, the district court explained, appellants had no cognizable interest under Rule 24. R. 38:3-4 (citing *Stallworth* v. *Monsanto Co.*, 558 F.2d 257, 269 (5th Cir. 1977)). The district court also held that "the AFA's *speculative* interests in safety, seniority, and promotion standards, as well as the AFA's fear of the preclusive effect on future litigation, are insufficient to establish a direct and substantial interest required for intervention under Rule 24." R. 38:4.

---

[2] Appellants did not raise the court's denial of permissive intervention in their present motion for a stay.

Appellants sought reconsideration on the merits or, in the alternative, a stay of the district court proceedings (R. 39), both of which the parties opposed. R. 40-41. The district court reiterated that appellants had no "legally-protectable interest in this case" based on their asserted interest in collective bargaining. R. 44:2. The court also concluded that AFA's argument that the proposed decree allegedly interferes with individual appellants' seniority rights for promotions "remain insufficient to establish a direct and substantial interest required for intervention." R. 44:3. Finally, the court held AFA had failed to establish it would suffer irreparable harm without a stay. R. 44:3.

On October 9, 2014, appellants filed with this Court their Emergency Motion To Stay And To Expedite Briefing. They sought to stay all district court proceedings (including the fairness hearing that was scheduled for October 29, 2014) pending their appeal, and sought expedited briefing. Emerg. Mot. 1, 6, 20. The parties separately opposed. The United States asserted that appellants failed to meet any of the four criteria for a stay: they did not establish a strong likelihood of success on the merits based on an expired CBA or statutory rights; they did not show irreparable injury to themselves; a stay would impose substantial injury on the parties; and a stay would be contrary to the public interest. U.S. Resp. in Opp'n 8-19.

On October 22, 2014, this Court, in a two-sentence per curiam order, denied the motion for a stay and the request for expedited appeal.

2. Following this Court's order, the district court held a fairness hearing. The parties addressed: (a) the United States' investigation; (b) the evidence supporting the proposed consent decree; (c) the reasons why the district court should approve the decree; and (d) appellants' objections to the proposed decree. App. 3-28, 58-66. Appellants also had a full opportunity to argue their objections, speaking almost as long as the parties. App. 33-55; R. 60.[3] At the conclusion of the hearing, the court withheld approval of the decree pending receipt and review of the parties' proposed findings of fact and conclusions of law. App. 67-68.

After that review, on November 7, 2014, the district court adopted as its own the proposed findings of fact and conclusions of law that the parties had jointly submitted in support of the consent decree, and approved the decree. R. 63-64.

On November 12, 2014, appellants filed a second motion for a stay of the district court's proceedings. R. 65. Appellants again argued that they had a likelihood of success on the merits, based on the same arguments that had been

---

[3] Prior to the fairness hearing, the parties had submitted a joint memorandum with extensive exhibits that both addressed why the district court should approve the decree and responded to the objections that had been filed, including appellants'. R. 47-57. Appellants filed an opposition to the parties' joint memorandum. R. 61.

rejected by the district court in denying their initial motion to intervene. R. 65:2. They also asserted irreparable injury to themselves if a stay were denied, and lack of substantial harm to the parties and public interest if a stay were granted. R. 65:3-4. The United States opposed. R. 67.

On November 18, 2014, the district court denied appellants' motion for a stay. R. 68/U.S. Attachment (U.S. Att.).[4] The court held that appellants

> fail[] to raise an intervening change in controlling law or argument warranting a stay of the Consent Decree pending appeal. Further, the AFA has failed to demonstrate that they will suffer irreparable harm without a stay. Finally, the court finds that a stay will substantially injur[e] the parties to the Consent Decree by unreasonably delaying the hiring of additional firefighters by the City of Austin.

R. 68:2/U.S. Att. 2.

ARGUMENT

APPELLANTS MEET NONE OF THE NECESSARY CRITERIA FOR A STAY PENDING APPEAL

A. Standard Of Review

This Court reviews a district court's denial of a stay pending appeal for abuse of discretion. See *United States* v. *Transocean Deepwater Drilling, Inc.*, 537 F. App'x 358, 360 (5th Cir. 2013) (citing *Beverly* v. *United States*, 468 F.2d 732, 740 n.13 (5th Cir. 1972)); *Planned Parenthood of Greater Tex. Surgical Health Servs.* v. *Abbott*, 734 F.3d 406, 410 (5th Cir. 2013).

[4] That Order is contained in the Attachment appended to this opposition.

B. Criteria For A Stay

The standard for issuance of a stay pending appeal is well-established, and requires this Court to consider four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Abbott, 734 F.3d at 410 (citation omitted). "A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Ibid.* (internal quotation marks omitted) (quoting *Nken* v. *Holder*, 556 U.S. 418, 427 (2009)).

C. Appellants Have Failed To Show A Strong Likelihood Of Success On The Merits

The only procedural development since this Court's denial of their prior motion for a stay is that the district court held a fairness hearing and approved the consent decree. R. 59, 63-64; App. 3-71. Yet appellants' first motion sought a stay of *all* district court proceedings, precisely to forestall any decision by the district court regarding approval of the consent decree. Emerg. Mot. 1, 6, 20. Therefore appellants' current request and alleged need for a stay have already been considered and rejected by this Court.

In addition, appellants' arguments in their pending motion are, in large part, verbatim of their original motion. The headings of the arguments are identical. Compare, *e.g.*, 2d Mot. 8-9, 12 and Emerg. Mot. 7, 9-11. Entire sections are

verbatim. Compare, *e.g.*, 2d Mot. 11-12 and Emerg. Mot. 10-11 (argument on alleged statutory seniority rights). The remaining sections have minor edits that do not change the substance of their arguments. Compare, *e.g.*, 2d Mot. 15-18 and Emerg. Mot. 14-18 (challenging evidentiary basis for disparate impact of the 2012 and 2013 selection process). The United States' arguments in opposition to a stay thus remain the same, and remain sufficiently persuasive to justify denial of appellants' motion.

Indeed, the arguments against granting a stay are, if anything, more persuasive now. The district court correctly concluded that appellants "fail[] to raise an intervening change in controlling law or argument warranting a stay of the Consent Decree pending appeal." R. 68:2/U.S. Att. 2. As before, appellants cannot show how the district court abused its discretion in denying a stay, and continue to be unable to satisfy the criteria to warrant a stay.

AFA newly asserts (2d Mot. 10-11) that the parties' decision to discuss the terms of the draft consent decree with the AFA before the proposed decree was submitted to the district court establishes the requisite interest for intervention under Rule 24. Not so. The parties' wholly voluntary, good-faith communications with the AFA, and our decision to modify certain provisions of the draft consent decree as a result of those communications, do not create a *legally protectable* interest sufficient to warrant intervention of right. Such an interest must be "one

which the *substantive* law recognizes" under Rule 24. *New Orleans Pub. Serv., Inc.* v. *United Gas Pipe Line Co.*, 732 F.2d 452, 463-464 (5th Cir.), cert. denied, 469 U.S. 1019 (1984), rather than simply a factor voluntarily taken into account by the parties for reasons other than their legal obligations.

Appellants previously asserted that there was insufficient evidence of discrimination in the 2012 and 2013 selection process to support the proposed consent decree (Emerg. Mot. 13-18), and now repeat their argument (2d Mot. 14-18) that the district court had insufficient bases to approve the consent decree. First, as we explained before, appellants' assertion (2d Mot. 17-18) that the district court's factual findings of discrimination were unsupported is irrelevant to this Court's assessment of whether appellants have a sufficient interest for intervention under Rule 24. Even if considered, appellants ignore the parties' submissions and the ample evidence of the City's vulnerability under Title VII regarding the 2012 and 2013 selection practices. R. 63:8-15. The mere fact that the district court adopted the parties' joint submission of proposed findings of fact and conclusions of law does not, as appellants suggest (2d Mot. 15), establish *a fortiori* that the district court abused its discretion in approving the consent decree. Moreover, the district court's approval of the consent decree – after full consideration of the issues and evidence, briefing by the parties and objectors, and a fairness hearing – was well within its discretion. *Williams* v. *City of New Orleans*, 729 F.2d 1554,

1559 (5th Cir. 1984); *Parker* v. *Anderson*, 667 F.2d 1204, 1209 (5th Cir.), cert. denied, 459 U.S. 828 (1982).

D. Appellants Cannot Meet The Other Criteria For A Stay

Appellants' new assertion (2d Mot. 19) that they have suffered irreparable injury based on how the district court conducted the fairness hearing also has no merit. Prior to the hearing, the parties – and appellants – had submitted briefs regarding the merits of approving the consent decree. R. 47, 61. At the hearing, the district court heard extensive argument by the parties regarding the evidence supporting the consent decree, the decree's terms, and the analysis of the decree's fairness. It also entertained appellants' challenges to the evidence and scope of the decree's terms and the parties' responses to appellants' arguments. App. 3-66. Appellants ignore the extensive opportunity they had to argue their objections. App. 33-55; R. 60. There is no basis for appellants to assert the hearing was inadequate simply because the district court, at the conclusion of the hearing, stated it would consider approval of the consent decree subject to review of the parties' submission of proposed findings of fact and conclusions of law. App. 67-68. The district court's procedure for the fairness hearing, at which it permitted argument but did not request live testimony, is not an abuse of discretion or a basis to establish irreparable injury. See *Union Asset Mgmt. Holding A.G.* v. *Dell, Inc.*, 669 F.3d 632, 642 (5th Cir. 2012) (stating "a fairness hearing is not a trial"), cert.

denied, 133 S. Ct. 317 (2012). In addition, appellants' citation to *Edwards* v. *City of Hous.*, 78 F.3d 983, 1002-1003 (5th Cir. 1996), does not support their claim. 2d Mot. 7. In *Edwards*, this Court stated that an opportunity to participate at a fairness hearing is not a substitute for party status – but that distinction only matters when the individual or entity satisfies the criteria under Rule 24 for party status – which appellants do not. 78 F.3d at 1002-1003.

As we argued before, implementation of the consent decree prior to resolution of this appeal on the merits will not irreparably harm appellants.[5] If appellants ultimately are successful in this appeal, the Court may issue a ruling that appropriately protects their interests on remand. However, a stay, which will delay implementation of the consent decree, will substantially harm the United States, the City, hundreds of individuals who will benefit from the decree, and the public at large. The parties, represented by experienced counsel, have determined that resolution of this matter without further litigation is in their best interests. A stay will delay, among other things, (a) the congressional goal of voluntary resolution of Title VII claims, (b) individual relief to meritorious claimants, and (c) the City's ability to hire additional entry-level firefighters under an interim procedure when it

---

[5] Appellants' asserted interests concern only limited aspects of the consent decree. Even if this Court ultimately found appellants had a protected interest in entry-level firefighter hiring or seniority rights – which we do not concede – this appeal likely would be resolved before the City's development and implementation of a new hiring procedure or any promotion of a priority hire candidate.

has a significant shortage of such employees. Finally, staying implementation of the decree will adversely affect the public interest in redressing discriminatory employment practices by the City in a timely manner.

CONCLUSION

This Court should deny appellants' renewed motion for a stay of the district court proceedings pending this appeal.

Respectfully submitted,

VANITA GUPTA
Acting Assistant Attorney General

s/ Jennifer Levin Eichhorn
DENNIS J. DIMSEY
JENNIFER LEVIN EICHHORN
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 305-0025

CERTIFICATE OF SERVICE

I certify that on December 4, 2014, I electronically filed the foregoing OPPOSITION OF THE UNITED STATES TO APPELLANTS' RENEWED MOTION TO STAY with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate 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/ Jennifer Levin Eichhorn
JENNIFER LEVIN EICHHORN
Attorney

ATTACHMENT

FILED
2014 NOV 18 PM 12:37
CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY ______ DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, PLAINTIFF,	§ §	
	§	CAUSE NO. A-14-CV-533-LY
V.	§ §	
CITY OF AUSTIN, TEXAS, DEFENDANT.	§ §	

ORDER

Before the court are the Motion to Stay Consent Decree and Request for Expedited Determination by International Association of Fire Fighters, Local 975; Andrews Arreola; Andrew Blair; Caroline Bull; John Edmiston; Daniel Hatcherson; Steven Herrera; William Kana; Matthew Martin; Matthew Rettig; and Meagan Stewart (collectively referred to as "Austin Firefighters Association" or "AFA") filed November 12, 2014 (Doc. #65) and United States' Memorandum in Opposition to Motion to Stay the Proceedings filed November 14, 2014 (Doc. #67). Having considered the motion and response, the applicable law, and the record in this cause, the court determines that the motion to stay should be denied.

In determining whether a stay pending appeal is warranted, a district court must consider: (1) whether the movant has made a strong showing that he is likely to succeed on the merits; (2) whether the movant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *See Nken v. Holder,* 556 U.S. 418, 426 (2009) (quotation marks and citation omitted). "A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Id.* at 427 (quotation marks and citations omitted). "The party requesting a stay bears the burden of showing

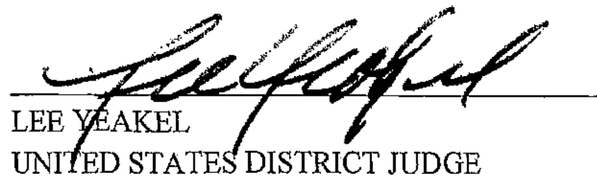
U.S. Att. 1

that the circumstances justify an exercise of that discretion." *Id.* at 433–34.

The AFA's motion fails to raise an intervening change in controlling law or argument warranting a stay of the Consent Decree pending appeal. Further, the AFA has failed to demonstrate that they will suffer irreparable harm without a stay. Finally, the court finds that a stay will substantially injury the parties to the Consent Decree by unreasonably delaying the hiring of additional firefighters by the City of Austin.

IT IS THEREFORE ORDERED that the Motion to Stay Consent Decree and Request for Expedited Determination by International Association of Fire Fighters, Local 975; Andrews Arreola; Andrew Blair; Caroline Bull; John Edmiston; Daniel Hatcherson; Steven Herrera; William Kana; Matthew Martin; Matthew Rettig; and Meagan Stewart (collectively referred to as "Austin Firefighters Association" or "AFA") filed November 12, 2014 (Doc. #65) is **DENIED.**

SIGNED this 18th day of November, 2014.



LEE YEAKEL
UNITED STATES DISTRICT JUDGE

U.S. Att. 2