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ONE MODEL FOR BREAKING DOWN BARRIERS

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Case Notes

D.C. Circuit Says that Enhanced-Voucher Tenants Have "Right to Remain" and Landlord's "Benign Motive" Does Not Justify Source-of-Income Discrimination

Between 2004 and 2008 the District of Columbia's active real estate market and the accompanying rise in sales prices for residential property increasingly pressured low-income tenants. Eager landlords saw opportunities to turn affordable rental housing into luxury properties. Our litigation (see *Feemster v. BSA Limited Partnership*, 548 F.3d 1063 (D.C. Cir. 2008)) and transactional efforts during this period allowed ten low-income tenants to keep their homes.

Legal Framework

We based our legal claims on our clients' federal-law "right to remain" in their subsidized housing units and on District of Columbia landlord-tenant law.

The Project-Based Section 8 Program and Enhanced Vouchers. Our clients lived in a property that until 2003 was part of what is commonly known as the project-based Section 8 program. The program, which subsidizes thousands of units across the country, authorizes the U.S. Department of Housing and Urban Development (HUD) to provide rental assistance payments to landlords of multifamily properties on behalf of low-income tenants. In exchange, landlords charge rent equal to approximately 30 percent of a family's income. Once the contract expires, the property owner may renew or may opt out of the program. If the owner chooses to opt out, the subsidy ends.

In the mid-1990s a growing number of project-based contracts began expiring, placing large numbers of subsidized tenants at risk of homelessness. To protect these tenants, Congress passed the Multifamily Assisted Housing Reform and Affordability Act of 1997. As amended in 1999, the Act requires that if a landlord opts out of the program, tenants will receive "enhanced vouchers" in place of the project-based subsidy. These vouchers permit families to remain in their current units and owners to receive market rent even if that rent is above what the local housing authority normally will pay for a voucher unit (see 42 U.S.C. § 1437f(t)).

Local public housing authorities issue enhanced vouchers and administer them through the Section 8 Housing Choice Voucher Program. Unlike the project-based subsidy, which is attached to a particular apartment or building, the voucher is attached to an individual tenant and may be used either to rent the current unit or to relocate to other housing. Tenants pay approximately 30 percent of monthly income in rent, and the local housing authority pays the remainder. If unused, vouchers in the District of Columbia expire after six months.

As amended in 2000, the enhanced-voucher statute and accompanying regulations give tenants in an expiring project-based property the right to remain in their units and use their enhanced vouchers to pay the rent (see 42 U.S.C. § 1437f(t)(1); 24 C.F.R. § 402.8(c)). The statute (1) authorizes local housing authorities to pay "enhanced" rent that is reasonable and necessary to allow a family to remain, (2) creates a federal right to remain in the unit so long as the voucher is available to pay the rent, and (3) requires owners who formerly received project-based subsidies to accept rent in the form of enhanced-voucher payments.

HUD issued two policy guides for opt-out situations. Under the Section 8 Renewal Policy Guide, "[t]enants who receive an enhanced voucher have the right to remain in their units as long as the units are offered for rental housing …," and an owner may not evict a tenant who exercises the right "except for cause under Federal, State or local law." Under HUD's Office of Public and Indian Housing Notice 01-41, "[a] family that receives an enhanced voucher has the right to remain in the project as long as the units are used for rental housing …."

District of Columbia Landlord-Tenant Law. In the District of Columbia the primary source of landlord-tenant law is the Rental Housing Act of 1985, which protects tenants from eviction except under specified circumstances, such as nonpayment of rent, breach of lease terms, and the landlord's desire to occupy, renovate, or discontinue use of the property for housing. Absent one of these bases for eviction, the parties have an "indeterminate tenancy" for residential property. Most important for this case, an owner's desire to sell a unit is not grounds to terminate a tenancy. The owner may sell, but the sale is subject to the tenancy's terms.

District of Columbia Tenant Purchase Law. Under the District of Columbia's Rental Housing Conversion and Sale Act of 1985, as amended, tenants and tenant associations have the right of first refusal to purchase rental housing offered for sale. Of significance for this case, this purchase right also applies when the property owner wants to discontinue the rental housing use of the property.

Background

Our clients were tenants in ten of thirty-seven rental units in the Bates Street Townhomes in Northwest Washington, D.C. The landlord, BSA Limited Partnership, purchased the town-

homes in the early 1980s as part of an urban-renewal effort. BSA entered into a project-based Section 8 contract and, over the next two decades, rented out the homes with the assistance of the project-based subsidy.

When we met them in the fall of 2004, our ten clients and their families had lived in Bates Street Townhomes for periods ranging from five years to nearly three decades. In September 2003 BSA informed the tenants by letter that it would opt out of the Section 8 program effective September 30, 2004, that the tenants would receive tenant-based Section 8 vouchers, and that BSA would honor their right to remain.

However, in the summer of 2004, before tenants received their vouchers, BSA began pressuring the Bates Street tenants to move out. To "assist" in this process, BSA employed two individuals who repeatedly visited tenants at home to help them with paperwork for their tenant-based vouchers—which, the employees informed the tenants, would have to be used to secure other housing. The BSA employees told the tenants that they would receive $2,500 if they vacated within thirty days of receiving their vouchers and that they could not, under any circumstances, use the vouchers to remain in Bates Street Townhomes.

On issuing the tenant-based vouchers, however, the D.C. Housing Authority informed residents that they *could* use their new enhanced vouchers to remain in their current units. Acting on this information, Bridgette Feemster, who became the lead plaintiff, contacted BSA and asked to use her voucher to remain in her townhouse. She was told that BSA would not accept her voucher and that she had no choice but to move.

The tenants sought information about their rights and help in remaining in their homes from D.C. legal aid providers. We explained to BSA that accepting enhanced vouchers for all residents of the Bates Street Townhomes was legally required. BSA's counsel denied that BSA had told the tenants to vacate their units or that their vouchers would not be accepted.

Once they received the enhanced vouchers, Feemster and a second tenant, Sabrina Lymore, again requested BSA to let them use their vouchers to remain in their Bates Street homes. Both received letters from BSA stating that the landlord would not accept their enhanced vouchers. The letters reiterated that the Section 8 contract was being terminated and stated that, "as to the use of any Housing Choice Voucher, BSA will not be signing or executing any lease agreements or lease addenda." Nevertheless, acknowledging the tenants' continued right of occupancy under D.C. law, the letters said that BSA was willing to rent the tenants their units providing they paid in cash—$1,199 and $1,086, respectively—rather than with vouchers.

As more tenants made similar requests, they received similar letters. BSA even filed eviction actions against the tenants who did not pay rent in cash. As a result of relentless pressure to move, twenty-seven of the thirty-seven families at the Bates Street Townhomes relocated with their vouchers, leaving ten who sued to enforce their right to remain.

Filing the Lawsuit

Our suit, filed in federal district court on November 2, 2004, asserted that BSA was violating the tenants' right to remain under the Multifamily Assisted Housing Reform and Affordability Act and that the refusal to accept the tenants' vouchers and subsequent demand of rent in cash constituted discrimination based on source of income, in violation of the D.C. Human Rights Act. Along with the complaint, we sought a temporary restraining order requiring BSA to begin accepting vouchers in order to "toll" their expiration.

At the hearing on the temporary restraining order BSA, which had not prepared a written response, asserted a variety of arguments—among them that BSA was not required to accept the vouchers because it did not intend to continue to offer the properties as rental housing, had dismissed the eviction actions, and would not insist on cash rental payments until the case was resolved. The court granted our temporary restraining order, requiring BSA "to initiate the process of accepting Tenants' enhanced vouchers." BSA did so, thereby tolling the vouchers' expiration, but it otherwise refused to complete the voucher process, including signing the paperwork the housing authority needed to pay rent for the tenants' units. BSA claimed, without any legal or factual support, that completing the voucher process would obligate it to sign "new one-year leases" with each tenant, thereby frustrating the goal of discontinuing the rental housing use of the properties.

To bolster its argument that it planned to discontinue rental housing use, BSA issued offers of sale to the tenants under the Rental Housing Conversion and Sale Act. Although the tenants could not afford to purchase the units on their own, they could form a limited-equity cooperative that would purchase the homes, and then use their vouchers to pay monthly carrying charges toward the mortgage. Four tenants agreed to engage in this process, and we recruited a transactional attorney, a nonprofit housing developer, and a tenant education organization to assist in the process.

After initial discovery and some depositions, we moved for a preliminary injunction that would have required BSA to begin accepting the vouchers. The motion was denied by a judge other than the one who had granted our temporary restraining order; the new judge found that we were not likely to succeed on the merits of our claims.

The District Court's Ruling

Both parties moved for summary judgment. On the federal-law claim, we contended that as a matter of law BSA was required to accept the tenants' enhanced vouchers and permit them to remain in their homes. We requested partial summary judgment on our state-law claim alleging source-of-income discrimination.

BSA claimed that we were not entitled to recovery under any theory. On the federal-law issue, BSA argued that the enhanced-voucher statute's "right to remain" applied only where a landlord intends to maintain the premises as rental property. BSA focused on an isolated sentence in HUD's policy guide, which states that the tenants have a right to remain with their enhanced vouchers so long as the units are "offered for rental housing." BSA interpreted "offered" to re-

late to the landlord's subjective intent toward the property rather than—as we argued—the property's current status under state law. BSA also contended that it was not liable for source-of-income discrimination because it had no "animus" toward voucher holders but simply wanted to vacate its units for sale.

After BSA filed its motion, the four purchasing tenants and BSA met to close on the sale. At closing, BSA insisted on recovering all back rent that had allegedly accrued between the filing of the lawsuit and the date of closing. A lender supplied the additional funds, which were placed in escrow until resolution of the litigation. The parties completed the closing, and the four tenants became first-time cooperative homeowners, thereby preserving their homes regardless of the outcome of the court action. We also filed supplemental papers, with an affidavit from the cooperative's transactional attorney, informing the court that BSA was continuing to treat the property as rental housing by charging rent to the tenants.

Ruling on summary judgment eighteen months after we filed our motions, the court found in our favor on the claim that under federal law the tenants had a right to remain in their homes and use their enhanced vouchers to pay the rent. The court rejected BSA's claim that, due to the owner's future plans for the tenants' houses, those units were no longer "offered for rental housing" within the meaning of federal law. The court held that the homes qualified as rental property until local courts found a valid basis for eviction.

The court granted summary judgment to BSA, however, on our claim of source-of-income discrimination. The court held that because BSA had "made it perfectly clear that it no longer offers any of the units in the Bates Street Townhomes as rental housing," the tenants' status as voucher holders was not a "motivating factor" in BSA's refusal to accept their vouchers. Accordingly the tenants could not recover under the Human Rights Act because their source of income had not played "a motivating or substantial role in the action [BSA] has or has not taken."

The Appeal

BSA appealed the grant of summary judgment in our favor on the right to remain, and we cross-appealed the ruling on source-of-income discrimination. The D.C. Circuit rejected all of BSA's claims. The court noted that the phrase "offered for rental housing"—the "caveat upon which BSA rests its entire appeal"—appeared neither in the enhanced-voucher statute nor in HUD's regulations but rather in a policy manual to which the "degree of deference" owed was "uncertain" (see *Feemster*, 548 F.3d at 1068). And, more important, the court agreed with the tenants that even if the policy guide was controlling authority, BSA's interpretation was simply incorrect. The court adopted our view that the phrase "offered for rental housing" was synonymous with the term "remains rental housing" and that whether a property is or remains rental housing is a question of state and federal law. The court also agreed that the policy guide, interpreting the underlying statute, gave tenants the right to remain in their homes and use their vouchers until and unless the landlord evicted them under state law (*id.* at 1069). The court concluded: "In light of the statute's plain text, its anti-displacement purpose, and HUD's reasonable and persuasive interpretation, the district court correctly determined that the tenants' right under § 1437f(t) to remain in their homes, and to pay their rent with enhanced vouchers, is secure unless and until their tenancies are validly terminated under D.C. law" (*id.*).

The court of appeals went on to reverse the district court with respect to our Human Rights Act claim and rejected BSA's argument that a source-of-income discrimination claim required a showing of "animus" by the defendants against the tenants or the voucher program. Analogizing to facial race or gender discrimination cases brought under Title VII of the Civil Rights Act of 1964, the court found that "to accept payment in cash and not in vouchers" violated the law on its face, regardless of BSA's reasons for its actions (*id.* at 1070 (citing *Trans World Airlines Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Automobile Workers v. Johnson Controls Inc.*, 499 U.S. 187, 199 (1991); and *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 716–17 (1978)). The court rejected BSA's defense that the voucher program requirements were too onerous:

> Were we to accept that excuse … we would render the Human Rights Act's definition of "source of income" nugatory. The Act expressly defines "source of income" as encompassing the Section 8 program; indeed, Section 8 vouchers are the source-of-income provision's paradigm case. *See* D.C. Code § 2-1402.21(e). Permitting BSA to refuse to accept Section 8 vouchers on the ground that it does not wish to comply with Section 8's requirements would vitiate that definition and the legal safeguard it was intended to provide [(*id.* at 1071)].

Implications

The D.C. Circuit's resounding verdict in favor of the tenants confirms two important legal propositions. First, a tenant who receives an enhanced voucher has the right to remain in her home and to use her voucher to pay the rent so long as the tenancy is valid under state or local law. The enhanced-voucher statute does not limit a tenant's state or local right to remain; to the contrary, it prevents displacement by giving tenants a means to pay the rent after the project-based subsidy ends. Second, the D.C. Circuit joined a series of state courts in holding that, for purposes of a source-of-income claim, a landlord may not justify its refusal to accept vouchers by asserting either a "benign motive" or overly burdensome administrative hurdles. That the D.C. Human Rights Act specifically defines "source of income" to include Section 8 payments was helpful in removing any doubt as to the statute's intent to eliminate housing barriers for voucher holders. Equally important, the court held that source-of-income discrimination was no different from other forms of illegal bias and that, regardless of the reason for doing so, a defendant was liable for discriminating against voucher holders.

The decision cannot, however, undo the toll that time and pressure took on other tenants. Twenty-seven households did not engage in the litigation, and, of the ten who did, one moved shortly after we obtained the temporary restraining order and another released all claims in settling an unrelated matter. The litigation was lengthy, and the loss of the motion

for preliminary injunction, which we should have obtained quickly following the temporary restraining order, was difficult for the plaintiffs.

Nevertheless, four families became first-time cooperative homeowners, and four more are now renting their homes with their vouchers. The litigation was critical to sustaining the tenants' hope of keeping their homes. Also paramount to the success of the purchase were the involvement of a transactional attorney who was knowledgeable about low-income tenant purchases, flexible funding sources, and a pool of tenant educators to support the contentious purchase.

This case demonstrates that collaboration not only among litigators from different legal aid organizations but also with transactional counsel yields maximum benefits for low-income tenants.

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Jury Awards Cook $84,250 for Unpaid Overtime and Retaliation

For almost ten years, Jose Lopez worked as a cook for a chain of restaurants operating in Mission, Texas, under the name of Danny's Mexican Restaurant. By all accounts, including testimony from the owners of Danny's, Lopez was a hard worker, a valued employee, and a good cook. Lopez regularly worked more than forty hours per week, thus entitling him to overtime pay equal to one and one-half his regular rate of pay under the federal minimum wage and overtime law called the Fair Labor Standards Act (29 U.S.C. §§ 201 *et seq.*). Danny's did not pay Lopez overtime, and Lopez never complained because he did not know about the law. That all changed in June 2006 when, after a routine investigation by the U.S. Department of Labor, Lopez learned that he was entitled to overtime pay.

After its investigation, the Labor Department concluded that Danny's owed Lopez back wages for work performed up to the time of its investigation. Shortly after the investigation and after requesting that his future overtime hours be properly recorded and paid, Lopez's employment with Danny's ended. The reasons for the termination were hotly contested: Lopez claimed that his employment ended because of Danny's continued refusal to pay overtime for future work, and Danny's claimed that Lopez's employment ended because Danny's had told Lopez that, due to the Labor Department's investigation, Danny's could no longer pay Lopez part of his wages in cash.

The Labor Department attempted to settle Lopez's overtime claim but failed. About a year after the investigation, Texas RioGrande Legal Aid took on Lopez's cause, and, after a one-day jury trial, the jury awarded him $84,250 (*Lopez v. Ramirez*, No. M-07-186m (S.D. Tex. Oct. 16, 2008) (jury verdict)).

Fair Labor Standards Act

The Fair Labor Standards Act is a product of the Great Depression. It protects workers by setting a minimum wage and establishing an overtime system. Congress enacted the Act in 1938 in order to "give specific minimum protections to individual workers and to ensure that each employee covered by the Act would receive [a] fair day's pay for a fair day's work and would be protected from the evil of overwork as well as underpay" (*Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 739 (1981)). Congress intended not only to establish minimum protections for workers but also to have the time-and-a-half-for-overtime provision be an incentive to get employers to create more jobs in order to decrease unemployment. The Act was also meant to create a standard floor for wages across the nation so that businesses engaged in interstate commerce could compete fairly.

More than seventy years later, Fair Labor Standards Act lawsuits are now among the fastest-growing type of civil litigation filed in federal court. The Act provides a private right of action for the minimum-wage, overtime, and retaliation provisions (there are child labor and record-keeping provisions, too) and provides for the award of unpaid wages and an equal amount of liquidated damages. The current wave of such lawsuits is due partly to the realization by some private plaintiff's lawyers that even small claims for unpaid wages under the Act, with

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