IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIVIL DIVISION

CHARLES TAYLOR, et al.	)	
	)	
Plaintiff	)	
	)	Case Number: 1:01CV00561
v.	)	Judge: Henry H. Kennedy
	)	
DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY	)	
	)	
Defendant	)	
	)	

WASA'S AMENDED OPPOSITION TO PLAINTIFF TAYLOR'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Defendant, District of Columbia Water and Sewer Authority ("WASA"), by counsel, and pursuant to Rules 52 and 65 of the Federal Rules of Civil Procedure, respectfully files its opposition to Plaintiff Taylor's motion for a temporary and permanent injunction barring WASA from directing Plaintiff Taylor to submit to a fitness for duty examination in response to threats of violence against his second level supervisor, James Shabelski.

FACTUAL BACKGROUND

Mr. Taylor's version of the facts is set forth in an unsigned declaration appended to his motion for injunctive relief. Significantly, Mr. Taylor admits to facts that substantiate WASA's grounds for directing him to submit to a fitness for duty examination to assess his proclivity for violence against his second-level supervisor, James Shabelski. Mr. Taylor acknowledges that during a meeting with three WASA representatives[1] on the afternoon of March 25, 2004, he stated that "[he] didn't know

[1] Two of the three WASA representatives present at the interview are African American : Mr. Londra Watson, Mr. Taylor's immediate supervisor, and Barbara Grier, WASA's Director of Human Resources .

what [he] would do if he [Mr. Shabelski] put his hands on [him] [Mr. Taylor] again." Declaration of Charles N. Taylor in support of his Motion for Temporary Restraining Order, ¶ 18.

Based on Mr. Taylor's demeanor in making this threat of potential violence against Mr. Shabelski, WASA acted within its rights as an employer to remove Mr. Shabelski from the workplace (albeit with paid leave), and to require him to submit to a fitness for duty psychiatric examination. Indeed, WASA has required other employees to submit to such examinations, including a member of the bargaining unit represented by Plaintiff Taylor's collective bargaining representative. *See Affidavit of Barbara Grier,* attached hereto as Exhibit B, ¶ 6.

It is well established that employers who fail to address threats of violence can be held liable for negligence in the event of a future incident.[2] The desire to avoid liability for negligence constitutes a legitimate, non-discriminatory reason for requiring a fitness for duty examination. Mr. Taylor apparently has elected to disregard this legitimate directive from WASA even though he has been warned directly and through counsel that if he failed to comply he would be placed on leave without pay and would be subject to disciplinary action.

Significantly, WASA recently learned that Mr. Taylor has a history of violent behavior. At his February 6, 2004 deposition in this case, Mr. Taylor testified that in 2002 he was charged with first, second, third, and fourth degree assault against a Prince George's County police officer while resisting service of a restraining order filed by his

[2] The Supreme Court has upheld recovery under a direct negligence theory given proof that the employer failed to prevent reasonably foreseeable danger to an employee from intentional or criminal misconduct. *Harrison v. Missouri Pac. R.R.*, 372 U.S. 248, 249 (1963). *See also Brooks v. Washington Terminal Co.*, 593 F.2d 1285 (DC Cir.), *cert. denied*, 442 U.S. 910 (1979); *McMillan v. National R.R. Passenger Corp.*, 648 A.2d 428, *435 (D.C. 1994).

ex-wife. After fighting with the officer and resisting arrest, Mr. Taylor was arrested and detained over night. The magistrate judge who heard the charges against Mr. Taylor the following day ordered Mr. Taylor to remain incarcerated because he failed to demonstrate contrition for his conduct. Mr. Taylor's account of the disposition of the criminal case is somewhat muddled and it is unclear whether trial is still pending.[3]

In addition to the foregoing incident, Mr. Taylor testified regarding the circumstances leading to the issuance of the temporary restraining order obtained by his ex-wife. Apparently, Mr. Taylor got into a fight with his ex-wife's boyfriend over visitation rights with his grandson. Mr. Taylor retaliated against his wife for obtaining a restraining order allegedly by getting a restraining order directing her to stay away from him.[4]

Mr. Taylor's admissions regarding his involvement in violent behavior, coupled with his emotional reaction to the events of March 25, 2004 – including his claim that he cried when told by a union steward that he should return to his work station – demonstrate sufficient evidence of instability to warrant the actions taken by WASA. In the absence of any other act of alleged retaliation on the part of WASA, there is simply no grounds for involving the Court in this matter. Further, as Mr. Taylor himself recites, he has obtained a commitment from his Union to pursue a grievance in his behalf assuring him of adequate remedies without invoking the extraordinary preliminary injunctive powers of the federal court. *See* Declaration of Charles N. Taylor, ¶ 26.

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[3] The pertinent portions of Mr. Taylor's deposition testimony is appended hereto as Exh. A., pp. 15-19.

[4] Exh. A, pp. 19-20.

II. LEGAL STANDARD AND ANALYSIS

In order to succeed on a preliminary injunction, the movant must demonstrate: (1) a substantial likelihood of success on the merits; (2) that irreparable injury will result in the absence of the requested relief; (3) other interested parties will not suffer substantial harm if the injunction is granted, and; (4) that the public interest favors entry of a preliminary injunction. See *Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1506 (D.C.Cir. 1995). A preliminary injunction is not granted as a matter of right. *See Eli Lilly and Co. v. Premo Pharmaceutical Labs.*, 630 F.2d 120, 136 (3d Cir.1980). Indeed, injunctive relief is an extraordinary remedy and must be sparingly granted. *See Dorfmann v. Boozer,* 414 F.2d 1168 (D.C.Cir.1969). Thus, a court should not grant injunctive relief absent a clear and convincing showing by the moving party. *See Yakus v. United States*, 321 U.S. 414 (1944); *accord Kahane v. Secretary of State*, 700 F.Supp. 1162, 1165 (D.D.C.1988). If the movant fails to demonstrate any irreparable injury, however, the court will not inquire further before denying the injunction. *See Role Models America, Inc. v. White*, 193 F. Supp. 2d 76, 79- 80 (D.C. 2002).

Herein, Plaintiff Taylor cannot satisfy any of the elements of the standard for preliminary injunctive relief, as discussed below. Moreover, Plaintiff Taylor has failed as a matter of law to demonstrate a cognizable claim of irreparable harm.

A. Plaintiff Taylor Has Failed to Demonstrate A Strong Likelihood of Success on the Merits.

Plaintiff Taylor appears to be proceeding on the assumption that he is entitled to invoke the jurisdiction of this Court to prevent a fitness for duty examination on the ground that WASA's request that he submit thereto constitutes unlawful retaliation for his participation as the lead plaintiff in the instant lawsuit. Plaintiff Taylor has failed to

allege a single incident of alleged retaliation during the three year pendency of this lawsuit other than the events of March 25, 2004. Under such circumstances it is highly unlikely that Plaintiff Taylor can satisfy the first element of his claim for preliminary relief.

To meet the fourth prong of a *prima facie* claim for retaliation, the plaintiff must show, "a causal connection between the protected activity and the adverse employment action taken against him. *Cones v. Shalala*, 199 F3d 512 (D.C. Cir. 2000); *Sullivan-Obst v. Powell*, 300 F. Supp. 2d 85 (D.C. 2004); *Allen v. Michigan Dept. of Corrections*, 165 F.3d 405, 413 (6th Cir. 1999). A plaintiff needs to show more than "vague or generalized claims" of causation. *Allen,* 165 F.3d at 413. To show a causal connection, a plaintiff must produce sufficient evidence from which an inference can be drawn that employer took the adverse action because the plaintiff engaged in the protective activity. *Cones, supra.; Sisay v. Greyhound Lines, Inc.*, 34 F. Supp. 2d 59, 65 (D.C. 1998); *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997).

Here, Mr. Taylor fails to meet the causation element based on the passage of a substantial time period between the initiation of this lawsuit and the complained of action, approximately 3 years. *Sisay*, 34 F. Supp. 2d at 65 (plaintiff failed to establish a causal connection where the alleged retaliation did not occur shortly after the protected activity). Moreover, the intervening event, namely the threats of potential future violence against his second-line supervisor, break the chain of causation necessary to establish a claim of retaliation because WASA had a legitimate, non-discriminatory reason for its action. *Slade v. Billington*, 700 F. Supp. 1134, 1151 (D.C. 1988) (legitimate, non-discriminatory rationale for action rebutted claim of retaliation).

B. Plaintiff Taylor Cannot Show that He's In Danger of Suffering Irreparable Harm During the Pendency of the Action.

Plaintiff Taylor alleges that he will suffer irreparable harm if the Court does not restrain WASA from placing him on leave without pay for failing to submit to a fitness for duty examination. Plaintiff asserts that he will suffer economic injury because he will be unable to pay his bills and buy necessities. This showing is insufficient to merit preliminary injunctive relief.

The United States Supreme Court in *Sampson v. Murray* held even if a plaintiff "had made a satisfactory showing of loss of income and had supported the claim that her reputation would be damaged as a result of the challenged agency action, we think the showing falls far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction in this type of case." Sampson, 415, U.S. at 91-92.

In *Sampson*, the plaintiff, when notified of her termination from employment as a government employee, filed an action seeking an injunction to stop her dismissal. Id. at 63. The plaintiff alleged that her dismissal would deprive her of income and "cause her to suffer embarrassment of being wrongfully discharged...." Id. at 66. The plaintiff's former governmental employer, the General Service Administration (hereinafter "GSA") stated that the reason for the plaintiff's discharge was her "complete and unwillingness to follow office procedure and to accept direction from (her) supervisors." Id. at 64 (internal quotations omitted). The United States District Court for the District of Columbia granted interim injunctive relief for the Plaintiff. Id. at 67. The United States Court of Appeals for the District of Columbia affirmed the District Court's ruling. Id.

The United States Supreme Court reversed the Court of Appeals based on the reasoning that "the Government has traditionally been granted the widest latitude in the

dispatch of its own internal affairs. . . ." Id. at 83 (internal citations omitted). The plaintiff's allegation in *Sampson* simply did not show irreparable injury sufficient to override the Government's wide latitude in dealing with its internal affairs. Id. at 83-84. More importantly, the *Sampson* Court stated that the keyword in determining irreparable harm is the term "irreparable." Id at 90. "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." Id.[5] Plaintiff's allegations in the present matter directly parallel the allegations of the plaintiff in *Sampson.* Plaintiff's fears concerning reputation and income do not rise to the high threshold of "irreparable" harm. Any finding to the contrary would fail to meet the clear and concise precedent set forth by the United States Supreme Court.

Moreover, it is clear that Plaintiff Taylor has access to remedies under the collective bargaining agreement between WASA and the American Federation of Government Employees ("AFGE" or the "Union") and that the Union has agreed to file a grievance in his behalf challenging the fitness for duty examination and any adverse action flowing from Mr. Taylor's refusal to submit thereto. Given the availability of these remedies and Plaintiff Taylor's failure to have exhausted them, there is no need to invoke the extraordinary preliminary injunctive powers of the federal court.

C. WASA will Suffer More Harm from the Granting of the Injunction than Plaintiff will Suffer from the Denial of the Injunction.

By granting Plaintiff Taylor's Temporary Restraining Order, WASA will suffer greater harm than Plaintiff will suffer from the denial of this injunction. Plaintiff Taylor has threatened his second level supervisor with risk of bodily harm. By preventing

[5] The United States Supreme Court did recognize that there may be instances in which circumstances surrounding an employee's discharge may warrant an injunction. However, such situations are rare and inapplicable to this matter. The present matter, in fact, directly parallels the employer's successful arguments made in Sampson.

WASA from requiring him to submit to a fitness for duty examination under penalty of loss of pay and potential discipline, a message that will be sent to other employees that WASA has no authority to prevent violent conduct in the workplace. As the Supreme Court observed in the *Sampson* case, the Courts should refrain from interfering in the exercise of the personnel authority of governmental agencies, particularly where administrative procedures exist for the vindication of employee rights. Here the collectively bargained grievance and arbitration procedure, backed by the enforcement authority of the District of Columbia Public Employee Relations Board and the courts of the District of Columbia provide ample procedural safeguards for the vindication of Plaintiff Taylor's concerns with respect to WASA's workplace violence policies and procedures.

D. The Public Interest will be Disserved by the Issuance of an Injunction.

It is obviously in the public's interest to ensure that WASA maintains a workplace free of violence and intimidation, particularly at a time when the resources of the agency are strained by external challenges to its water quality programs. Mr. Taylor has no right to threaten the well-being of any co-worker, let along a supervisor, regardless of the alleged provocation.

CONCLUSION

Plaintiff Taylor has failed to meet the requisite requirements for a preliminary injunction. As previously noted, Plaintiff has dual burdens of proof and persuasion. There is ample evidence that there is not a substantial likelihood that Plaintiff will prevail on the merits. Furthermore, as found by United States Supreme Court, loss of income does not rise to a level of irreparable harm actionable through an injunction. It is entirely

within Mr. Taylor's power to avoid such injury by complying with WASA's reasonable directive to submit to examination by medical professionals who will assess whether he poses an imminent threat to the well-being of any co-worker or supervisor. WASA will clearly suffer greater harm than Plaintiff Taylor if denied the authority to follow its workplace violence compliance procedures.

WHEREFORE, WASA respectfully requests that the Court **DENY** "Plaintiff's Motion for a Temporary and Preliminary Injunction" and **GRANT** WASA such further relief the Court deems appropriate.

April 6, 2004

Respectfully submitted,

/s/

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Defendant	)	
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ORDER

Upon consideration of Plaintiff Taylor's Motion for A Temporary Restraining Order and Preliminary Injunction, Defendant's opposition, and the record herein;

The Court **DENIES** Plaintiff's motion.

So ordered, this ____ day of _____, 2004.

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Judge Henry H. Kennedy