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United States District Court,
E.D. New York.

UNITED STATES of America, Plaintiff,
v.
NEW YORK CITY BOARD OF EDUCATION, City of New York, William J. Diamond, Commissioner, New York City Department of Citywide Administrative Services (in his official capacity), and New York City Department of Citywide Administrative Services, Defendants,
and
John Brennan, James G. Ahearn, and Kurt Brunkhorst, Intervenors.
John Brennan, James G. Ahearn, Kurt Brunkhorst, Ernie Tricomi, Scott Spring, Dennis Mortensen, John Mitchell, and Eric Schauer, Plaintiffs,
v.
John Ashcroft, Ralph Boyd, United States Department of Justice, New York City Board of Education, City of New York, New York City Department of Citywide Administrative Services, and William J. Diamond, Defendants.

Nos. 96–CV–374 (FB)(RML), 02–CV–256 (FB)(RML). | Nov. 26, 2002.

Synopsis

Background: United States brought action under Title VII against school board alleging discriminatory hiring practices. White male employees intervened, 260 F.3d 123.

Holding: On male employees' motion for preliminary injunction, the District Court, Block, J., held that permanent status and retroactive seniority provisions of settlement, allegedly in violation of white male employees' rights under equal protection clause, did not constitute irreparable harm.

Motion denied.

Attorneys and Law Firms

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Opinion

MEMORANDUM AND ORDER

BLOCK, District Judge.

***1** On July 24, 2002, Magistrate Judge Levy issued an order denying the motion for a preliminary injunction made by intervenors in *United States v. New York City Bd. of Educ.,* 96–CV–374 ("1996 case") and a report and recommendation ("R & R") denying the preliminary injunction motion made by plaintiffs in *Brennan v. Ashcroft,* 02–CV–0256 ("2002 case"). The order and the R & R were consolidated in one decision ("R & R"). Familiarity with the R & R is presumed. The movants have filed timely objections to the R & R. For the reasons set forth below, the order is deemed part and parcel of the R & R, which the Court adopts.

BACKGROUND

Magistrate Judge Levy's thorough decision sets forth the relevant background and procedural history in these cases. *See also United States v. New York City Bd. of Educ.,* 85 F.Supp.2d 130 (E.D.N.Y.2000), *rev'd and remanded, Brennan v. N.Y.C. Bd. of Educ.,* 260 F.3d 123, 132–33 (2d Cir.2001). Briefly, the 1996 case involves a suit brought by the United States in 1996 against the New York City Board of Education, the City of New York, the New York City Department of Citywide Administrative Services and its commissioner William J. Diamond (collectively, the "Municipal Defendants") alleging a pattern or practice of intentional discrimination against blacks, hispanics, women and Asians under Title VII (42 U.S.C. § 2000e–6). The parties reached a settlement in 1999 ("Settlement"), which required, *inter alia,* that the Municipal Defendants provide retroactive seniority to 54 members of this group (collectively "Offerees"), and permanent civil service status to 43 of the Offerees.

In May of 1999, white male incumbent Custodians John Brennan, James Ahearn, and Kurt Brunkhorst ("intervenors") moved to intervene as of right pursuant to

Fed.R.Civ.P. 24(a)(2) in the 1996 case, seeking to challenge the retroactive seniority provisions of the Settlement. They claimed that the Settlement unconstitutionally affected their interest in "equal treatment and nondiscrimination." (Reply Br. in Support of Mot. to Intervene at 2). Magistrate Judge Levy denied the intervention motion. The intervenors appealed to the Second Circuit, which vacated Magistrate Judge Levy's order and remanded with instructions that the intervenors be allowed to intervene; the remand was based on the circuit court's holding that the intervenors had a cognizable interest in the 1996 case. *See Brennan,* 260 F.3d at 132–33. Notably, although Magistrate Judge Levy had assumed jurisdiction for all purposes based on the explicit consent of the original parties in the 1996 case pursuant to 28 U.S.C. § 636(c)(1), *see Brennan,* 85 F.Supp.2d at 135, the circuit court did not address the issue of whether by reason of their appeal the intervenors were deemed to have consented to the magistrate judge's jurisdiction.

In January of 2002, the intervenors in the 1996 case and five other white, male incumbent Custodians (collectively "plaintiff-intervenors"), filed the 2002 case, a collateral action in which they allege that the permanent status and retroactive seniority provisions of the Settlement violated their rights under the equal protection clause and Title VII. In February 2002, they moved for a preliminary injunction in both the 1996 and 2002 cases, seeking an order barring reliance on the benefits given to the Offerees under the Settlement for any future competitively distributed job benefits. On April 22, 2002, the Court referred the matter to Magistrate Judge Levy for an R & R.

***2** Magistrate Judge Levy denied the preliminary injunction motion in the 1996 case and recommended denial of the motion in the 2002 case because he concluded that the movants had failed to establish irreparable harm. The magistrate judge based this conclusion largely on two factors: first, that the movants' "significant delay in seeking a preliminary injunction undermines their claim that the harm they allege is irreparable," R & R at 11, and second, that the movants "cannot show that the injur[ies] they would suffer [are] incapable of being fully remedied by money damages." *Id.* at 15.

In their objections, the intervenors argue that Magistrate Judge Levy improperly characterized his decision as an "order" in the 1996 case because they never explicitly consented to his jurisdiction. On the merits, plaintiff-intervenors argue that they are entitled to a preliminary injunction by reason of irreparable injury because: 1) they allege an equal protection violation, which constitutes irreparable injury; 2) their potential injuries are incapable of being remedied by money damages because they " 'may well find it impossible to reconstruct' whether [they] had been harmed by the benefits provided to the Offerees," and 3) they intend to apply for openings and transfers, which they may be denied as a result of the Settlement. As to delay in making the motion, the intervenors argue that they could not have moved for a preliminary injunction earlier because Magistrate Judge Levy had denied them the right to intervene.

DISCUSSION

Once objections are filed to a Magistrate Judge's R & R, the district court is required to make a *de novo* determination as to those portions of the Report and Recommendation to which objections were made. *See* 28 U.S.C. § 636(b)(1); *Grassia v. Scully,* 892 F.2d 16, 19 (2d Cir.1989).

I. Magistrate Judge Levy's Order in the 1996 Case Is Reviewable as an R & R

Although Magistrate Judge Levy deemed his denial of a preliminary injunction in the 1996 case an "order," the Court agrees with the intervenors that in the absence of their explicit consent, they should not be subject to Magistrate Judge Levy's jurisdiction. *See* 28 U.S.C. § 636(c)(1) (requiring consent of parties before magistrate judge may exercise jurisdiction over case); *New York Chinese TV Programs, Inc. v. U.E. Enter., Inc.,* 996 F.2d 21, 23–25 (2d Cir.1993) (holding that consent of all parties, *including intervenors,* is required before magistrate judge has jurisdiction over case). Such consent may not be inferred from conduct. *See id.* (noting that consent must be in writing and cannot be inferred from conduct; "Consent of all parties must be clear and express.") (citing *Hall v. Sharpe,* 812 F.2d 644, 647 (11th Cir.1987) (consent cannot be inferred from the conduct of parties); *E.E.O.C. v. West Louisiana Health Servs., Inc.,* 959 F.2d 1277, 1281 (5th Cir.1992) (consent to trial by magistrate judge under § 636(c) cannot be implied)). The Court will therefore review the order and R & R as one collective R & R, pursuant to Fed.R.Civ.P. 72. *See id.* at 25 ("Without the consent of the 'intervenors', the magistrate judge's order has the effect only of [an R & R] to the district judge....").

II. Plaintiff–Intervenors Have Failed to Establish That They Would Suffer Irreparable Harm in the Absence of a Preliminary Injunction

***3** Ordinarily, "a party seeking a preliminary injunction must demonstrate (1) that it will be irreparably harmed in the absence of an injunction, and (2) either (a) a

likelihood of success on the merits or (b) sufficiently serious questions going to the merits of the case to make them a fair ground for litigation, and a balance of hardships tipping decidedly in its favor." *Forest City Daly Housing, Inc. v. Town of North Hempstead,* 175 F.3d 144, 149 (2d Cir.1999). As Magistrate Judge Levy noted, a preliminary injunction is an "extraordinary ... remedy" that should not be granted routinely. *Twentieth Century Fox Film Corp. v. Marvel Enterp., Inc.,* 277 F.3d 253, 258 (2d Cir.2002).

The Court need not address plaintiff-intervenors' objections to Magistrate Judge Levy's consideration of the timeliness of their motion because the Court concludes that, in any event, the alleged constitutional violation does not constitute irreparable harm and plaintiff-intervenors can be compensated for any alleged injuries with monetary damages.[1]

[1] The Court notes that "[o]ne exception to the ordinary standard is that, where a preliminary injunction is sought against government action taken in the public interest pursuant to a statutory or regulatory scheme, the less-demanding 'fair ground for litigation' standard is inapplicable, and therefore a 'likelihood of success' must be shown." *Forest City,* 175 F.3d at 149. Because the Court concludes that there is no irreparable harm, the Court need not determine whether this exception is applicable here.

As Magistrate Judge Levy aptly explained, though irreparable harm is presumed in the context of certain alleged constitutional violations, *see, e.g., Jolly v. Coughlin,* 76 F.3d 468, 482 (2d Cir.1996) ("the denial of the plaintiff's right to free exercise of his religious beliefs is a harm that cannot be adequately compensated monetarily"), "courts are loathe to grant preliminary injunctions in employment cases" in the absence of first amendment violations. R & R at 18; *see Sampson v. Murray,* 415 U.S. 61, 89–92, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974) (holding that injuries generally associated with discharge from employment—loss of reputation, loss of income and difficulty in finding other employment—do not constitute "irreparable harm"); *American Postal Workers Union, AFL–CIO v. United States Postal Service,* 766 F.2d 715, 721 (1985) ("[E]xcept in a 'genuinely extraordinary situation,' irreparable harm is not shown in employee discharge cases simply by a showing of financial distress or difficulties in obtaining other employment.") (quoting *Sampson,* 415 U.S. at 92 n. 68); *Shady v. Tyson,* 5 F.Supp.2d 102, 109 (E.D.N.Y.1998) ("Irreparable injury [in employment cases] can only be established by a clear demonstration that the plaintiff (1) has little chance of securing future employment; (2) has no personal or family resources; (3) has no private unemployment insurance; (4) is unable to finance a loan privately; (5) is ineligible for public assistance; and (6) there are no other compelling circumstances weighing heavily in favor of interim relief.") (citing *Williams v. State Univ. of N.Y.,* 635 F.Supp. 1243, 1248 (E.D.N.Y.1986)).

Plaintiff-intervenors do not cite to any case standing for the proposition that an alleged equal protection violation in the employment context constitutes irreparable harm; they rely on two cases outside the employment context, neither of which can be read to hold, as plaintiffs suggest, that the mere incantation of an equal protection violation gives rise to irreparable harm: *Able v. United States,* 88 F.3d 1280, 1288 (2d Cir.1996) and *Brewer v. West Irondequoit Central Sch. Dist.,* 212 F.3d 738, 744 (2d Cir.2000).

***4** *Able* did not involve an alleged violation of equal protection; it involved a challenge by gay and lesbian members of the armed forces to the constitutionality of 10 U.S.C. § 654, the popularly termed "Don't Ask, Don't Tell" policy governing the participation of homosexuals in military service, as violative of their First Amendment right to free speech. As the *Able* court noted, the Supreme Court has held "that even minimal impairments on [the right to free speech] create irreparable injury." 88 F.3d at 1288 (citing *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)). There is no claim of impairment of free speech rights in the present case.

In *Brewer,* which involved an action under Title VI and the equal protection clause brought by parents of a white student who was denied a transfer from her city school to a suburban elementary school on the basis of her race, the court did recognize that an alleged equal protection violation could, under certain circumstances, constitute irreparable harm:

> while it may be true that the majority of cases in which we have based an irreparable harm finding on the alleged deprivation of a constitutional right have arisen in the First Amendment context, we have also found irreparable harm in the allegation of Fourth Amendment violations ..., and Eighth Amendment violations.... Therefore, to the extent that defendants suggest that only alleged First Amendment violations give rise to constitutional claims for which monetary compensation would be insufficient, this is clearly incorrect.

Id. at 744–45.

However, the injury caused by the alleged equal protection violation in *Brewer* was distinct from the types of injuries the plaintiff-intervenors allege they will suffer. In *Brewer,* the Second Circuit emphasized the "unique and somewhat outrageous facts of [the] case" and that the injury would be suffered by a fourth-grader, whose education would be irrevocably affected. *Id.* at 745. Such an injury would clearly be impossible to adequately compensate with monetary damages. Here, plaintiff-intervenors allege employment-related economic injuries, the types of injuries long ago held insufficient to warrant the extraordinary relief of a preliminary injunction. *See Sampson,* 415 U.S. at 89–92. The injury suffered by a fourth grader who is kept out of a preferred school is sufficiently distinct from the employment-related injuries alleged by plaintiff-intervenors

As to the impracticality of measuring damages, plaintiff-intervenors have failed to establish that this is the type of extraordinary case where employment related injuries are impossible to compensate. *See American Postal Workers Union,* 766 F.2d at 721. The Court agrees with Magistrate Judge Levy's conclusion that "movants can be adequately compensated by monetary damages and other post litigation relief...." R & R at 20; *see Twentieth Century Fox Film Corp.,* 277 F.3d at 258 ("[W]hen a party can be fully compensated for financial loss by a money judgment, there is simply no compelling reason why the extraordinary equitable remedy of a preliminary injunction should be granted."). The Court also agrees with Magistrate Judge Levy's notation that the likelihood of injury is attenuated since plaintiff-intervenors "state that they intend to apply for transfers at some undetermined time in the future." R & R at 13.

CONCLUSION

***5** Magistrate Judge Levy's decision is adopted.

SO ORDERED.