UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF MANUFACTURERS, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 11-1629 (ABJ)
NATIONAL LABOR RELATIONS BOARD, *et al.*,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiffs brought this action against the National Labor Relations Board ("NLRB" or "Board") and its members and General Counsel in their official capacities, alleging that (1) the Board exceeded its authority by issuing the final rule entitled "Notification of Employee Rights Under the National Labor Relations Act" ("Rule"), in violation of the Administrative Procedure Act, and (2) the Rule violated plaintiffs' First Amendment right to refrain from speaking. The parties cross-moved for summary judgment. On March 2, 2012 this Court issued its final appealable Order, upholding the part of the Rule that requires certain employers to post a notice of employee rights, and striking down two parts of the Rule that would have created a new unfair labor practice for failure to post and would have allowed the Board to toll the statute of limitations for any unfair labor practice charge against an employer who was not in compliance with the notice-posting requirement [Dkt. # 60]. Plaintiffs have appealed the part of the Order that upholds the Rule's notice-posting requirement and now move this Court to enjoin the Board

from implementing or enforcing that part of the Rule pending appeal, pursuant to Fed. R. Civ. P. 62(c) [Dkt. # 62].

An injunction pending appeal is an extraordinary remedy. *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985).[1] It is "an intrusion into the ordinary process of administration and judicial review . . . and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 129 S. Ct. 1749, 1757 (2009) (internal quotation marks and citation omitted). Instead, an injunction is an exercise of judicial discretion, and whether to grant it depends upon the specific circumstances of the case. *Id.* at 1760. The moving party bears the burden of justifying why the court should grant this extraordinary remedy. *Id.* at 1761.

The Court considers four factors in reviewing the motion:

> (1) whether the stay applicant has made a strong showing that it 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.

Id. The first two factors are the most critical. *Id.* The moving party must make a strong showing on at least one of them and some showing on the other. *Baker v. Socialist People's Libyan Arab Jamahirya*, 810 F. Uspp. 2d 90, 97 (D.D.C. 2011), citing *Cuomo*, 772 F.2d at 974. So, the movant's failure to make any showing of irreparable harm is grounds for refusing to grant a stay, even if the other three factors merit relief. *Nken*, 129 S. Ct. at 1761 ("[S]imply showing some possibility of irreparable injury . . . fails to satisfy the second factor.") (internal quotation marks and citations omitted); *see also Winter v. Natural Resources Def. Counsel, Inc.*,

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1 *Cuomo* and *Nken* actually concerned motions for stays pending appeal, rather than injunctions pending appeal. However courts apply the same test for a stay or injunction pending appeal, which "substantial[ly] overlap[s]" with, but is not the same as, the test for a preliminary injunction. *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009); *Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 193 n.5 (D.D.C. 2005).

555 U.S. 7, 22 (2008) (rejecting the premise that "when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a 'possibility' of irreparable harm."); *Wis. Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985) ("We believe that analysis of the second factor disposes of these motions and, therefore, address only whether the petitioners have demonstrated that in the absence of a stay, they will suffer irreparable harm."). Because the second factor is potentially dispositive, the Court will begin by discussing this factor.

In support of their motion, plaintiffs argue that employers will be irreparably harmed absent an injunction because they will be forced to choose between surrendering their First Amendment rights by posting the notice or facing penalties imposed by the Board if they choose not to post. Pls.' Mot. for Inj. Pending Appeal ("Pl.'s Mot.") at 6–7. But, this Court's opinion struck down the part of the Rule that would have made failure to post an unfair labor practice. Instead, the Court made clear that the Board may only sanction employers for failure to post if it finds that the employer's action in a particular case "interferes with, restrains or coerces employees" in the exercise of their guaranteed rights. *See* Mem. Op. at 28–33. Furthermore, the Board's power to fashion sanctions is purely remedial, so employers who fail to post will not be subject to harsh punitive penalties.[2] *See Consolidated Edison of New York, Inc. v. NLRB*, 305 U.S. 197, 235–36 (1938).

Nor will those employers who comply with the Rule suffer the irreparable harm that plaintiffs' motion foresees. Employers are required to obtain a pre-printed copy of the poster from a regional NLRB office or download it from the Board's website and then staple it to a

2 The preamble to the Rule, which described what the typical sanction for failure to post would have been had the Court allowed the Board to make it an unfair labor practice, states: "When the Board finds a violation, it will customarily order the employer to cease and desist and to post the notice of employee rights as well as a remedial notice." 76 Fed. Reg. 54031–32 (Aug. 30, 2011).

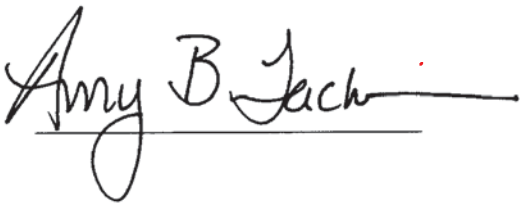
bulletin board or upload it to their own internet or intranet sites. If the Court of Appeals ultimately determines that the Board exceeded its authority in promulgating the Rule, the employers can take the notice down. And since the notice simply notifies employees of the rights that they are already guaranteed by law, any increased employee awareness that may result cannot be deemed "irreparable harm."

Plaintiffs cite authority for the proposition that a violation of a party's First Amendment rights can constitute irreparable harm in and of itself. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). The Court does not quarrel with that proposition. But in this case, plaintiffs have not actually demonstrated a constitutional violation, and they are unlikely to succeed on the merits of any appeal on those grounds. Indeed, plaintiffs' strategy seems to reflect that their First Amendment argument is their weakest, since they accorded that argument summary treatment in their pleadings and chose to put it aside entirely at the hearing. And since the Court must consider both the degree of irreparable injury and the probability of success, it cannot find that the mere possibility that the DC Circuit will find the Rule to violate employers' First Amendment rights is enough alone to warrant a stay. *See Nken*, 129 S.Ct. at 1761 ("It is not enough that the chance of success on the merits be better than negligible.") (Internal quotation marks omitted); *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) ("[P]robability of success is inversely proportional to the degree of irreparable injury evidenced.").

Since plaintiffs have failed to demonstrate two of the four factors necessary for the injunction – the likelihood of success on the merits and irreparable harm – the motion will be denied. The Court does not believe that the NLRB will be irreparably harmed by a stay, but it does conclude that the public interest also favors denying the requested injunction. The purpose

of the Rule is to increase employees' awareness of their rights, which are protected by the law regardless of the outcome of this suit. Increasing awareness of the law is undoubtedly in the public interest. The Court is unpersuaded by plaintiffs' arguments that the absence of injunctive relief will lead to uncertainty and confusion in the business community, and, in any event, in light of the Court's grant of summary judgment in favor of the plaintiffs on the remaining issues, a failure to post will not automatically constitute an unfair labor practice.

The Board has already delayed implementation of the Rule twice while the Court took the time to consider the matter closely, and the Court sees no reason why it should be delayed further. Because plaintiffs have failed to show that the balance of the factors that the Court must consider tips in favor of issuing an injunction, it is ORDERED that their motion for injunction pending appeal [Dkt. # 62] is DENIED.



AMY BERMAN JACKSON
United States District Judge

DATE: March 7, 2012