UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDIAN EDUCATORS FEDERATION (Local 4524 of the American Federation of Teachers, AFL-CIO) Plaintiff, v. GALE A. NORTON, Secretary, United States Department of the Interior, Defendant.	Civil Action No. 1:04CV01215 (RWR)

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Apparently not content to await the disposition of the parties' pending cross-motions for summary judgment, Plaintiff has filed a motion for a preliminary injunction requesting the ultimate relief sought in this action. Plaintiff, however, has not made the requisite clear and convincing showing of irreparable harm or a likelihood of success on the merits. Rather, Plaintiff's motion rests solely on unsubstantiated allegations of lost employment opportunities and the same arguments presented in Plaintiff's pending motion for summary judgment. The injunction requested here is all the more improper because Plaintiff is seeking to change, rather than preserve, the status quo until this Court decides the motions for summary judgment. Such extraordinary relief is completely unwarranted under these circumstances. The Court should deny the instant motion.

BACKGROUND

This action challenges the Secretary of the Interior's interpretation of Section 12 of the Indian Reorganization Act. That section provides that

> The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

Indian Reorganization Act, 48 Stat. 986 § 12 (codified at 25 U.S.C. § 472). The Secretary has interpreted the term "Indian Office" to mean the Bureau of Indian Affairs ("BIA") or any former BIA unit transferred intact elsewhere within the Department of Interior. Plaintiff, however, would prefer that the Indian preference apply to any Indian-related positions within the Department, in particular, to positions within two units – the Office of Special Trustee for American Indians and the Office of the Assistant Secretary for Indian Affairs – that did not even exist at the time Congress passed the preference statute.

The Secretary moved to dismiss this action or in the alternative for summary judgment on the grounds that the ordinary rules of statutory construction compel upholding the Secretary's interpretation. Plaintiff has also moved for summary judgment. Both motions have been fully briefed and are pending before the Court.

ARGUMENT

As demonstrated by the absence of a supporting affidavit and the bare-bones arguments advanced, Plaintiff has failed to meet the standard for a preliminary injunction. A preliminary injunction "is considered an extraordinary remedy" that should "be granted *only* upon a clear

showing of entitlement." *Emily's List v. Federal Election Comm'n*, 362 F. Supp. 2d 43, 51 (D.D.C. 2005); *Arrow Air, Inc. v. United States*, 649 F. Supp. 993, 998 (D.D.C. 1986) (emphasis added); *see also Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004) ("A preliminary injunction is an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion."); *Association of Flight Attendants-CWA v. Pension Benefit Guar. Corp.*, 372 F. Supp. 2d 91, 98 (D.D.C. 2005) ("A preliminary injunction is an extraordinary form of relief that should not be granted absent a clear and convincing showing by the moving party."). Motions for preliminary injunction "shall be supported by all affidavits on which the plaintiff intends to rely." L. R. Civ. P. 65.1(c); *see also City of Tempe, Arizona v. Federal Aviation Admin.*, 239 F. Supp. 2d 55, 64 (D.D.C. 2003). In addition, the movant must demonstrate that (1) there is a substantial likelihood plaintiff will succeed on the merits; (2) plaintiff will be irreparably injured if an injunction is not granted; (3) the threatened injury to plaintiff outweighs the harm to others; and (4) the public interest will be furthered by the injunction. *See Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998). Although courts may balance weakness in one or more of these factors against strong showings in the others, two factors – the likelihood of success on the merits and irreparable harm – must be established. *See CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995); *District 50, United Mine Workers of Am. v. International Union, United Mine Workers of Am.*, 412 F.2d 165, 167 (D.C. Cir. 1969). Neither has been established here.

Moreover, because Plaintiff seeks an injunction that "would alter, rather than preserve, the status quo[1] . . . [Plaintiff] must meet a higher standard than in the ordinary case by showing 'clearly' that . . . [it] is entitled to relief or that 'extreme or very serious damage' will result from the denial of the injunction." *Columbia Hosp. for Women Found., Inc. v. Bank of Tokyo-Mitsubishi, Ltd.*, 15 F. Supp. 2d 1, 4 (D.D.C. 1997). "A district court should not issue a mandatory preliminary injunction unless the facts and the law clearly favor the moving party." *National Conference on Ministry to Armed Forces v. James*, 278 F. Supp. 2d 37, 43 (D.D.C. 2003) (internal quotations omitted). Here, they do not. Accordingly, the Court should deny Plaintiff's motion.

I. PLAINTIFF HAS NOT MET ITS BURDEN OF DEMONSTRATING IRREPARABLE HARM.

"[I]rreparable harm to the moving party is 'the basis of injunctive relief in the federal courts.'" *Almurbati v. Bush*, 366 F. Supp. 2d 72, 77-78 (D.D.C. 2005); *Experience Works, Inc. v. Chao*, 267 F. Supp. 2d 93, 96 (D.D.C. 2003) ("The *sine qua non* of granting any preliminary injunctive relief is a clear and convincing showing of irreparable injury to the plaintiff."). Thus, a plaintiff's failure to meet its burden of establishing irreparable harm alone is sufficient to deny preliminary relief. *See CityFed Financial*, 58 F.3d at 747; *see also CWA*, 372 F. Supp. 2d at 98 (noting that "if a party makes no showing of irreparable injury, the court may deny the motion for injunctive relief without considering the other factors" (internal quotations omitted)); *Emily's*

[1] Specifically, Plaintiff seeks an injunction requiring the Secretary to "provide qualified Indians with preference when filling all vacant positions within the Office of Special Trustee for American Indians, the Office of the Assistant Secretary for Indian Affairs, and all other positions in the Department which directly or primarily relate to the providing of services to Indians pending further Order of this Court." Pl. Proposed Order.

List, 362 F. Supp. 2d at 52 (noting that "if the movant makes no showing of irreparable injury, that alone is sufficient for a district court to refuse to grant preliminary injunctive relief" (internal quotations omitted)). Although the phrase "irreparable harm does not readily lend itself to definition," courts have developed several "well known and indisputable" principles for making that determination. *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). First, the injury must be "both certain and great" and "of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Emily's List*, 362 F. Supp. 2d at 52 (internal quotations omitted); *Wisconsin Gas Co.*, 758 F.2d at 674 (same). "Injunctive relief will not be granted against something merely feared as liable to occur at some indefinite time." *Id.* (internal quotations omitted). Second, economic loss "does not, in and of itself, constitute irreparable harm." *Id.* Third, the plaintiff must substantiate the claim that irreparable harm is "likely" to occur. *Id.*; *see also* L. R. Civ. P. 65.1(c) ("An application for a preliminary injunction . . . . shall be supported by all affidavits on which the plaintiff intends to rely."). "Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur." *Wisconsin Gas Co.*, 758 F.2d at 674. Therefore, the plaintiff "must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future." *Id.* Finally, the alleged harm must result directly from the action the plaintiff seeks to enjoin. *Id.* Consideration of these guiding principles compels denial of the instant motion.

Plaintiff asserts that "IEF's members continue to suffer irreparable injury while this case is pending because the defendant continues to advertise and fill positions . . . without according the IEF's Indian members preference for all such positions." Memorandum of Points and

Authorities in Support of Plaintiff's Motion for a Preliminary Injunction ("Pl. Mot.") at 3. Even if such economic injury could constitute irreparable harm – and it does not – Plaintiff's assertion is completely unsupported. Plaintiff has not even submitted an affidavit by actual IEF members who were denied positions for which they were qualified and to which they contend the Indian preference should have applied. Instead, Plaintiff attempts to meets its burden by appending copies of three job vacancy announcements to its motion. Such paltry evidence is hardly the clear and convincing showing of irreparable harm that the law requires.

In an effort to bolster its flimsy demonstration, Plaintiff contends that the "Indian Preference Act does not provide a cause of action for individual relief in the form of monetary damages for non-selection." Pl. Mot. at 4. An injury is not rendered irreparable, however, "merely because the injuries claimed are not cognizable under the cause of action pursued by the plaintiff." *Breen v. Mineta*, 2005 WL 3276163, at *9 (D.D.C., Sept. 30, 2005) (noting that "[p]laintiffs cannot argue that they are irreparably harmed simply because the governing statute does not recognize such injuries"). Thus, it is irrelevant to this Court's determination that, according to Plaintiff, neither retroactive placement nor back pay is available under the Indian Preference Act. Since Plaintiff's proof of irreparable harm rests on nothing more, Plaintiff is not entitled to a preliminary injunction, and the Court should deny the instant motion.

II. PLAINTIFF HAS NOT DEMONSTRATED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

Notwithstanding the "fluid nature" of the Court's inquiry, "it is particularly important for the [plaintiff] to demonstrate a substantial likelihood of success on the merits." *Emily's List*, 362 F. Supp. 2d at 51 (internal quotations omitted). The failure to do so "effectively decides the

preliminary injunction issue." *Serono Labs.*, 158 F.3d at 1326. Here, Plaintiff relies exclusively on the same arguments presented in its pending motion for summary judgment. *See* Pl. Mot. at 3 ("The plaintiff hereby incorporates those arguments by reference and avers that they demonstrate that the plaintiff is likely to succeed on the merits . . . ."). The Secretary, however, has already demonstrated that Plaintiff seeks to rewrite a statutory provision that clearly is not as expansive as Plaintiff suggests. *See* Memorandum of Law in Support of Defendant's Motion to Dismiss or in the Alternative for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment at 14-22 ("The Statutory Language Requires the Rejection of Plaintiff's Position"); *id.* at 22-26 ("The Construction of the Preference Statute Advocated by Plaintiff Would Create Unacceptable, but Avoidable, Constitutional Issues"); *id.* at 26-29 ("Legislative History Provides Further Support for the Government's Position"); *see also* Reply Memorandum in Support of Defendant's Motion to Dismiss or in the Alternative for Summary Judgment at 2-18 (filed Feb. 4, 2005). Rather, consistent with the canons of statutory construction, "Indian Office" in the preference statute should be construed as referring only to the BIA and all BIA units transferred intact elsewhere in the Department of the Interior – and not as Plaintiff suggests, to all Indian-related positions in the Department. Since Plaintiff is not likely to succeed on the merits, the Court alternatively should deny the instant motion on that basis.

III. PLAINTIFF'S MOTION SHOULD BE DENIED FOR FAILURE TO COMPLY WITH LOCAL RULE 7(m).

Plaintiff did not discuss the instant motion with undersigned counsel before it was filed as required by Rule 7(m) of the Local Rules of Civil Procedure. That rule provides that:

> Before filing any nondispositive motion in a civil action, counsel *shall discuss the anticipated motion with opposing counsel*, either in person or by telephone, in a

> good-faith effort to determine whether there is any opposition to the relief sought and, if there is opposition, to narrow the areas of disagreement. A party shall include in its motion a statement that the required discussion occurred, and a statement as to whether the motion is opposed.

L. R. Civ. P. 7(m) (emphasis added). The failure to comply with that requirement is sufficient basis by itself to deny a motion. *See Alexander v. F.B.I.*, 186 F.R.D. 185, 187 (D.D.C. 1999) ("Any nondispositive motion filed by either side must comply with Local Rule 108(m) [the predecessor to Local Rule 7(m)], or it will be denied"). Plaintiff's motion therefore should be denied on this alternative basis.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiff's motion for a preliminary injunction.

Dated: March 30, 2006

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

STUART A. LICHT
Assistant Director, Federal Programs Branch

/s/
JACQUELINE E. COLEMAN (D.C. Bar No. 459548)
JUDRY L. SUBAR (D.C. Bar No. 347518)
U.S. Department of Justice, Civil Division
Federal Programs Branch
20 Massachusetts Avenue, N.W., Rm 7214
Washington, DC 20530
202-514-3418

Attorneys for the Secretary of the Interior