

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION**

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

JANET NAPOLITANO, *et al.*,

Defendants.

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Civil Action No. AW-08-3444

ORDER

I. BACKGROUND

Plaintiffs the Chamber of Commerce of the United States of America, the Associated Builders and Contractors, Inc., the Society for Human Resource Management, the American Council on International Personnel, and the HR Policy Association (collectively “Plaintiffs”) commenced this action against Defendants the United States of America, Janet Napolitano (Secretary of Homeland Security), and Albert A. Matera (Chairman of the Civilian Agency Acquisition Council) (collectively “Defendants”) challenging the legality of Executive Order 13,465, a final rule amending the Federal Acquisition Regulation (“FAR”), and a designation notice issued by the Secretary of Homeland Security. On August 26, 2009, this Court entered its memorandum opinion and a final order granting Defendants’ Cross Motion for Summary Judgment and denying Plaintiffs’ Motion for Summary Judgment, finding the Executive Order 13,465, the final rule amending the FAR, and the designation notice issued by the Secretary of Homeland Security all within the scope of power of their authorizing officials. On August 31,

2009, Plaintiffs noticed an appeal of this Court's final order to the United States Court of Appeals for the Fourth Circuit.

Currently pending before the Court is Plaintiffs' Emergency Motion for an Injunction Pending Appeal.¹ The Court has reviewed the entire record,² and for the reasons stated more fully below, the Court will deny Plaintiffs' Emergency Motion for an Injunction Pending Appeal.

II. PRELIMINARY INJUNCTION STANDARD

To obtain the "extraordinary remedy" of a preliminary injunction, a plaintiff must show each of four elements: "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 374, 172 (2008). The Fourth Circuit recently explained that the standard set in *Winter* is stricter and harder to meet than the previous standard set by the Fourth Circuit in *Blackwelder Furniture Co. of Statesville v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977):

The *Winter* requirement that the plaintiff clearly demonstrate that it will *likely succeed* on the merits is far stricter than the *Blackwelder* requirement that the plaintiff demonstrate only a grave or serious *question* for litigation.

Second, *Winter* requires that the plaintiff make a clear showing that it is likely to be irreparably harmed absent preliminary relief. 129 S. Ct. at 374-76. *Blackwelder*, on the other hand, requires that the court *balance* the irreparable harm to the respective parties,

¹ As described by Plaintiffs:

The regulations at issue in this case will go into effect nationwide on September 8, 2009....Beginning September 8, 2009, all federal contracting officers must do two things. First, they must include the E-Verify contract clause in solicitations for new contracts, Notice Regarding Employment Eligibility Verification, 74 Fed. Reg. 26,981 (June 5, 2009) (explaining September 8, 2009 enforcement of the Final Employment Eligibility Verification Rule ("Final Rule"), 73 Fed. Reg. 67,651 (Nov. 14,2008)). Second, and perhaps more importantly for present purposes, all federal contracting officers must "modify, on a bilateral basis, *existing* indefinite-delivery/indefinite-quantity contracts . . . to include the clause for future orders if the remaining period of performance extends beyond March 8, 2010, and the amount of work or number of orders expected under the remaining performance period is substantial." *Id.*

(Plaintiff's Motion, Docket No. 55, at 2).

² In a telephone conference on September 3, 2009, Plaintiffs waived their Reply.

requiring only that the harm to the plaintiff outweigh the harm to the defendant. 550 F.2d at 196.

Real Truth About Obama, Inc. v. FEC, 2009 U.S. App. LEXIS 17437 (4th Cir. Va. Aug. 5, 2009).

III. ANALYSIS

A. Likelihood of Success on the Merits

Plaintiffs argue that because the case presents serious questions of first impression, the Court should find Plaintiffs satisfy the “likelihood of success” requirement for obtaining a preliminary injunction.

Defendants argue that to meet the “likelihood of success” requirement for obtaining a preliminary injunction, the plaintiff must show it is more likely than not that plaintiff will succeed on the merits, or must at least show that the district judge failed to consider all legal authorities the parties claimed to be pertinent, or incorrectly applied them. Defendants contend that the questions in the case have, in fact, been addressed by the courts, and that the Court considered and correctly applied all relevant legal authorities the parties noted.

The Court agrees with Defendants and does not find that Plaintiffs have met their burden of showing a likelihood of success on the merits. First, the Court carefully considered each of Plaintiffs’ claims and examined all relevant legal authorities the parties cited, and parties have not presented any new legal authorities or facts to warrant a new decision. Additionally, while the Court recognizes that Plaintiffs have presented a serious question, and arguably a factually novel case, the Court does not find that presentation of a serious question is sufficient to show it is more likely than not that the plaintiff will succeed on the merits in this case. *See Munaf v. Geren*, 128 S. Ct. at 2219. Furthermore, the Court concurs with Plaintiffs that “the issues in this case have been decided in other circuits in the same way that this Court decided them here.”

(Defendants' Response, Docket 56, at 4, citing *AFLCIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979)).

B. Irreparable Harm

Plaintiffs argue they will be irreparably harmed absent an injunction pending appeal as, “According to the Federal Government, implementation of the Final Rule will cost government contractors and subcontractors approximately \$190 million in startup costs during the first fiscal year in which the Final Rule is in effect. Final Rule, 73 Fed. Reg. at 67,702.” (Plaintiffs’ Motion, Docket No. 55, at 7). Plaintiffs allege this monetary harm is irreparable because, “in the event Plaintiffs succeed on their appeal to the Fourth Circuit, Plaintiffs’ members will not have access to a money-damages remedy to compensate them for the time and money spent on complying with the Final Rule and the contract provision it will add to countless government contracts and subcontracts,” as the Administrative Procedure Act does not provide for monetary relief and does not “waive the Federal Government’s sovereign immunity with respect to actions seeking monetary relief.” (Plaintiffs’ Motion, Docket No. 55, at 7). Plaintiffs also note that through operation of the Final Rule, many contractors will become contractually obligated to participate in E-Verify. (Plaintiffs’ Motion, Docket No. 55, at 7). Finally, Plaintiffs contend that “the Final Rule poses significant challenges for thousands of individual employees who will be burdened by the E-Verify program,” due to increased risk of employment discrimination. (Plaintiffs’ Motion, Docket No. 55, at 8).

Defendants respond that Plaintiffs are not likely to suffer irreparable injury because according to Plaintiffs’ declarations, Plaintiffs will bill the additional costs their use of E-verify incurs back to the Federal Government. (*See* Defendants’ Response, at 5, citing DiFranco Decl. ¶ 30). Defendants also reassert that “any of plaintiffs’ members who wish to avoid the

inconvenience of electronically verifying the work status of its employees can simply abstain from entering into contracts requiring E-Verify.” Finally, Defendants note that the risk of employment discrimination does not qualify as likely irreparable harm to Plaintiffs as “plaintiffs do not have standing to assert the interests of employees.” (Defendants’ Response, Docket No. 56, at 5).

While the Court understands that some harm and inconvenience always accompanies changes, the Court agrees with Defendants that Plaintiffs have failed to show they are likely to suffer irreparable harm as a result of implementation of Executive Order 13,465, the Final Rule amending the FAR, and the designation notice issued by the Secretary of Homeland Security. As discussed in the Opinion on the merits of the case, contractors can avoid contracting with the government if they do not want to use E-Verify, for whatever reason. Furthermore, the Federal Government will bear a significant portion of the costs of implementation of E-Verify. Finally, as noted by Defendants, Plaintiffs, as employers, do not have standing to raise concerns employees may have about implementation government contractors’ implementation of the E-Verify system.

C. Balance of Equities

Plaintiffs argue that while they will be irreparably harmed if the injunction is not granted, Defendants will not face any significant burden if the injunction is granted. Plaintiffs note that “Defendants have delayed enforcement of the Final Rule four times since Plaintiffs commenced their lawsuit on December 23,2008,” for a period totaling six months, and claim, “[t]here is no reason to believe that a delay of a few months more will substantially injure Defendants.” (Plaintiffs’ Motion, Docket No. 55 at 9).

Defendants posit that there is no cogent justification for delaying implementation. (Defendants' Response, Docket No. 56 at 6). The Court agrees with Defendants that the previous stays of implementation of the Executive Order for the valid purpose of allowing the new President to review it do not legitimate further delay of implementation of the order.

D. Public Interest

Finally, Plaintiffs contend that the injunction is in the public interest because “the brief delay Plaintiffs seek, which will benefit the greatest number of persons—approximately 168,624 contractors and subcontractors and roughly 3.8 million employees, according to the Final Rule, 73 Fed. Reg. at 67,702—counsels that the public interest lies in granting an injunction pending Plaintiffs’ appeal.” (Plaintiffs’ Motion, Docket No. 55, at 11). Plaintiffs also argue that “the likelihood that legislative action will be taken during the coming weeks to resolve this controversy also counsels that the public interest lies in granting an injunction pending appeal.” *Id.*

Defendants counter that the government’s interests are the public’s interests, whereas the Plaintiffs’ interests are purely private. Furthermore, Defendants contend that no matter the resolution of the current Congressional conferencing on this issue “the injunction sought by plaintiffs would defeat Congressional and Executive intent and therefore disserve the public interest in lawful government by the elected branches.”

The Court agrees with Defendants that the granting the injunction, which would reverse the Executive Order of two Presidents for the benefit of private subcontractors, is not in the public interest.

