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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
L. Casey Manning, Circuit Court Judge

Case No. 2021-CP-40-01599

DEBORAH MIHAL, and the AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTH CAROLINA,

APPELLANTS,

v.

GOVERNOR HENRY D. MCMASTER, in His Official Capacity; and MARCIA S. ADAMS, Executive Director of the South Carolina Department of Administration, in Her Official Capacity,

RESPONDENTS.

NOTICE OF APPEAL

TO THE HONORABLE JUDGES OF THE SOUTH CAROLINA SUPREME COURT:

The above-named Appellants hereby appeal the Order of the Honorable L. Casey Manning, attached hereto as Exhibit A, dated and filed with the Richland County Clerk of Court on April 9, 2021. Appellants received written notice of the entry of this judgment April 9, 2021.

Respectfully Submitted,

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EXHIBIT A

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Deborah Mihal, and American Civil Liberties Union Foundation of South Carolina, Plaintiffs, v. Governor Henry McMaster, in his official capacity, and Marcia S. Adams, Executive Director of the South Carolina Department of Administration, in her official capacity, Defendants.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT C/A No.: 2021-CP-40-01599 **ORDER DENYING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION**

THIS MATTER came before this Court on April 8, 2021, on Plaintiffs' Motion for Temporary Restraining Order ("TRO") and/or Preliminary Injunction requesting that this Court prohibiting Defendants, Governor Henry McMaster and Marcia S. Adams, Executive Director of the South Carolina Department of Administration ("SCDOA"), and anyone acting on their behalf from enforcing the provision in from Executive Order 2021-12 (March 5, 2021) that requires non -essential employees to return to the workplace without reasonable accommodations.

For the reasons set forth below, I hereby DENY the Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction.

STANDARD OF REVIEW

Rule 65, SCRCP, permits a party to seek injunctive relief, such as a Temporary Restraining Order ("TRO") and/or Preliminary Injunction, if it believes it will suffer irreparable harm or injury during the pendency of the action.

"An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). In order to obtain this type of relief, Plaintiffs must establish three elements. First, the Plaintiffs must convince the Court that they have a likelihood of success on the merits. Second, the Plaintiffs must show that they have an inadequate remedy at law. Third, the Plaintiffs must demonstrate that they will suffer irreparable harm in the absence of an injunction. *County of Richland v. Simpkins,* 348 S.C. 664, 669, 560 S.E.2d 902, 904 (2002); *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 50, 674 S.E.2d 505, 508 (S.C. App. 2009)

PLAINTIFFS' COMPLAINT AND MOTION

To begin, on April 5, 2021, Plaintiffs filed a Complaint asking this Court to declare that the "Return in Person Order" contained in Executive Order 2021-12, as implemented by the South Carolina Department of Administration, is "unenforceable" to the extent that it requires non-essential state employees to return to their workplaces in person "without reasonable accommodations for caregiving, health risk, and disability." They also request that the Court enjoin the Defendants from implementing the Return in Person Order. (Plaintiffs' Complaint, p. 19).

They base these demands on an allegation that the Executive Order "exceed[s] the scope of authority granted to the Governor and/or the Department of Administration and is *ultra vires*[.]" (Plaintiffs' Complaint, p. 19). At its essence, Plaintiffs' argument is based on the theory that the "Return in Person Order, as implemented by the Memorandum, creates requirements for non-essential state employees that are contrary to the safety, security, and welfare of the State. Both the Governor and the Department of Administration, therefore, have exceeded their statutory authority, usurped the legislative power of the General Assembly, and improperly imposed

unlawful burdens on non-essential state employees in violation of Art. I, § 8 of the South Carolina Constitution." (Plaintiffs' Complaint, ¶ 53). Similarly, they also claim that the Governor exceeded his authority under S.C. Code Ann. § 25-1-440 (i.e., committed an *ultra vires* act) by issuing the Return in Person Order contained in EO-2021-12. (Plaintiffs' Complaint, ¶¶ 57-58).

For the reasons listed below, I find that Plaintiffs have failed to demonstrate sufficiently any of the three elements required for an injunction. They have not demonstrated a likelihood of success on the merits, have failed to show that they have no other adequate remedy at law, and have failed to show that they will otherwise suffer irreparable harm.

LEGAL DISCUSSION

I. PLAINTIFFS CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS AT THIS STAGE OF THE LITIGATION, WHERE THE GOVERNOR HAS AMPLE AUTHORITY TO AMEND OR RESCIND HIS PRIOR EXECUTIVE ORDERS DURING THE CURRENT COVID-19 EMERGENCY.

Plaintiffs argue that the Governor does not have the authority to amend or rescind his earlier order from March 19, 2020 (EO-2020-11) that directed non-essential personnel to cease reporting to work, physically or in-person, effective Friday, March 20, 2020. (Plaintiffs' Complaint, ¶ 19). Specifically, Plaintiffs appear to argue that the Governor's exercise of his authority in mandating a "return to work" in the current executive order is *ultra vires*.

At first glance, such an argument is contrary to the very language of the statute in which the General Assembly authorized the Governor to issue Executive Orders during a declared emergency, stated as follows:

> (a) The Governor, when an emergency has been declared,[1] as the elected Chief Executive of the State, is responsible for the safety, security, and welfare of the State and is empowered with the following additional authority to adequately discharge this responsibility:

[1] All parties appear to agree that an "emergency has been declared" and, to some degree, still exists. The General Assembly retains the power to terminate the declared emergency. S.C. Code Ann § 25-1-440(a)(2).

> (1) **issue emergency proclamations and regulations and amend or rescind them**. These proclamations and regulations have the force and effect of law as long as the emergency exists;

S.C. Code Ann. § 25-1-440 (emphasis added).

In this case, the Governor has determined that it is "appropriate to modify, amend, or rescind certain emergency measures as part of the process of regularly reviewing such measures to account for new and distinct circumstances and the latest data related to the impact of COVID-19 and to ensure that any remaining restrictions are targeted and narrowly tailored to address and mitigate the current public health threats in the least restrictive manner possible…" (EO-2021-12, p. 4). As a part of this determination, the Governor ordered the following:

> I hereby direct all state agencies to immediately expedite the transition back to normal operations. **All Agency Heads, or their designees, shall submit to the Department of Administration, for review and approval, a plan to expeditiously return all non-essential employees and staff to the workplace on a full-time basis**. This Section shall apply to state government agencies, departments, and offices under the authority of the undersigned. I further direct the Department of Administration to continue to provide or issue any necessary and appropriate additional or supplemental guidance, rules, or regulations regarding the application of this Section, or to otherwise provide clarification regarding the same, to such agencies, departments, and offices and to any additional agencies, departments, and offices so as to facilitate and expedite implementation of these initiatives.

(EO-2021-12, p. 12). In reviewing the Department of Administration's guidance to other state agencies, the Department encourages agencies to consider requests for lawful accommodations, to observe measures to mitigate risk of exposure to COVID-19, to consider whether to require appropriate masking measures, to permit employees additional time to develop a child care plan,

It is apparent that the Plaintiffs disagree with the policy determinations of the Governor in ordering State Employees to return to the workplace on a full-time basis, as was the near-universal working condition of State employees prior to the initial promulgation of EO-2020-11 in March

2020. They have failed, however, to set forth a *legal* reason in law why the Governor cannot act to return State employees to work. For this reason, Plaintiffs have failed to demonstrate a "likelihood of success."

In South Carolina, "the powers of the General Assembly are plenary as to all matters of legislation unless limited by some provision of the Constitution." *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, ___, 181 S.E. 481, 486 (1935). Stated differently, it is up to the General Assembly "to exercise discretion as to what the law will be." *Hampton v. Haley*, 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013). As for the executive branch, our Supreme Court explained as follows:

> The executive branch is constitutionally tasked with ensuring "that the laws be faithfully executed." Of course, the executive branch . . . may exercise discretion in executing the laws, but only that discretion given by the [General Assembly]. Thus, while non-legislative bodies may make policy determinations when properly delegated such power by the [General Assembly], absent such a delegation, policymaking is an intrusion upon the legislative power.

Id. at 404, 743 S.E.2d at 262 (quoting S.C. CONST. art. IV, § 15).

There appears to be no dispute that the General Assembly specifically granted the Governor the power to issue, amend, or rescind emergency proclamations and regulations during the pending declared emergency. S.C. Code Ann. § 25-1-440. There also appears to be no dispute about the statute's constitutionality.

In any event, while Plaintiffs may certainly prefer one set of policies over another, and may believe that their preferred policies would better secure the "safety, security, and welfare of the State" than those of the Governor, they have offered no cogent *legal* argument to support their claims. They have, instead, given voice to their beliefs that (1) the Executive Order exposes State employees to increased health risks, or (2) that State employees can do work from home as well as they can at the worksite, or (3) that returning to work may have a disparate impact on some State employees on the basis of sex and disability. (Plaintiffs' Memorandum of Law, pp. 13-19).

This showing is simply inadequate to demonstrate a likelihood of success. Most unavailing is their reliance on *Hearon v. Calus*, 178 S.C. 381, 183 S.E. 13 (1935), in which our Supreme Court declared that then-Governor Johnston exceeded his authority when he instituted martial law and directed the state militia to occupy state highway commission offices to suppress an alleged "insurrection." The Court wryly observed that there was:

> no particle of evidence, nor even suggestion, that there existed a state of war, or anything approaching disorder. It is common knowledge that in the area where a state of insurrection was said to exist, the militia was called out and martial law declared, all was as calm, quiet, and peaceful as a May morn; and the courts were open and functioning. Under the Governor's proclamation, the defendants, by force and arms, have taken over the offices, the physical offices, books, properties, and all things pertaining to the state highway department and the state highway commission.

183 S.E. at 21.

Respectfully, it is difficult to follow how the bizarre facts referenced in *Hearon* have any bearing on the current case before the Court. Indeed, in the current case, the Governor is actually *easing* emergency restrictions set forth earlier in the COVID-19 crisis, as the Governor has determined that conditions in South Carolina are better than they were in March 2020.

In sum, Plaintiffs have made no showing of any likelihood of success in this matter, and for that reason alone, their motion must be dismissed.

II. IN ANY EVENT, PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THEY HAVE NO ADEQUATE REMEDY AT LAW.

Plaintiffs' argument that they have no adequate remedy at law for the ills that may come to State employees who return to their physical worksites is also unavailing. On the contrary, it appears that such a State employee would have any number of statutory remedies. For instance:

- If the employee believed that his employing agency did not sufficiently accommodate a qualified disability, he could bring an action under the S.C Human Affairs Law ("SCHAL") or Americans with Disabilities Act ("ADA").

- If the employee believed that his employing agency improperly denied him leave under the Family Medical Leave Act ("FMLA"), he could bring an FMLA claim.

- If the employee believed that his employing agency subjected him to an adverse action that is grievable under the South Carolina Grievance Procedure Act, S.C. Code Ann. § 8-17-310, *et seq.*, he could file a grievance and/or appeal under the Act.

- If the employee believed that his employing agency subjected him to race, gender, or disability discrimination under the SCHAL, ADA, or Title VII of the Civil Rights Act of 1964, as amended, he could bring an act pursuant to these statutes.

- If the employee believed that his employing agency subjected him to conditions that cause a workplace injury or illness as defined by the South Carolina Occupational Safety and Heath ("SCOSH") law or the South Carolina Worker's Compensation Act, he could pursue remedies under these statutes.

In sum, Plaintiffs have made no showing that other legal remedies are inadequate, and for that reason alone, their motion must be dismissed

III. PLAINTIFFS HAVE FAILED TO SHOW THAT THEY WILL SUFFER IRREPARABLE HARM IF THE INJUNCTION IS NOT GRANTED.

As an initial matter, neither the single identified Plaintiff – Deborah Mihal – nor any other State employee has shown that she has or likely will suffer any "irreparable" harm if an injunction is not issued. Indeed, the plethora of remedies available to Mihal and other State employees indicate that even a presumed economic loss on the part of the State employees cannot constitute an "irreparable harm." *See District of Columbia v E. Trans-Waste of Md., Inc.*, 758 A.2d 1, 15 (D.C. 2000). Nor is this case similar to one where a plaintiff alleges "irreparable harm" in the form of the loss of an entire business or professional practice. *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 455, 626 S.E.2d 34, 37 (S.C. App. 2005), *holding modified by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010).

Notably, the General Assembly has already authorized the Department, in coordination with agencies served, to "develop policies and programs concerning…other conditions of employment as may be needed." S.C. Code Ann. § 8-11-230(6). Furthermore, the evidence before this Court indicates that the Department's guidance provides state entities with significant flexibility to address the needs of the myriad State employees who may actually require some form of accommodation or assistance in meeting the demands of their position.

CONCLUSION

For the reasons stated above, this Court denies Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction.

AND IT IS SO ORDERED.

The Honorable L. Casey Manning
Presiding Judge
Fifth Judicial Circuit

_____, 2021
Columbia, South Carolina

Richland Common Pleas

Case Caption: Deborah Mihal , plaintiff, et al vs Herny D Mcmaster , defendant, et al

Case Number: 2021CP4001599

Type: Order/Temporary Injunction

So Ordered

s/L. Casey Manning, 2061