No. 10-15976

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ALABAMA DEPARTMENT OF
MENTAL HEALTH AND MENTAL RETARDATION

Defendant-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

UNITED STATES' OPPOSITION TO APPELLANT'S MOTION TO STAY INJUNCTIVE RELIEF PENDING APPEAL

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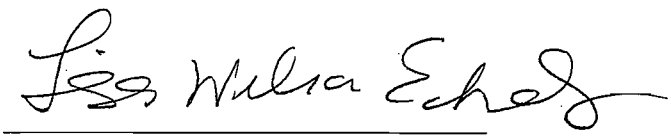
CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Local Rule 26.1-1, I hereby certify that the Amended Certificate of Interested Persons And Corporate Disclosure Statement filed with this Court on February 9, 2011, by Appellant Alabama Department of Mental Health and Mental Retardation with its Motion To Stay Injunctive Relief Pending Appeal, is correct.



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FOR THE ELEVENTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ALABAMA DEPARTMENT OF
MENTAL HEALTH AND MENTAL RETARDATION,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

UNITED STATES' OPPOSITION TO APPELLANT'S MOTION TO STAY INJUNCTIVE RELIEF PENDING APPEAL

Plaintiff-Appellee United States of America hereby opposes defendant-appellant Alabama Department of Mental Health's (ADMH) Motion to Stay Injunctive Relief Pending Appeal filed on February 9, 2011. ADMH fails to demonstrate that it is entitled to such relief under Federal Rule of Appellate Procedure 8(a)(2).

BACKGROUND

1. This case involves a suit brought against the Alabama Department of Mental Health and Mental Retardation (ADMH) for alleged violations of the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301-4335 (USERRA). The United States brought suit against ADMH on December 30, 2008, alleging that ADMH violated USERRA by failing to promptly re-employ a longtime ADMH employee, Roy Hamilton, after he returned from active military service in Iraq. The United States sought declaratory, injunctive, and monetary relief that would require ADMH to comply with all provisions of USERRA and compensate Hamilton for his lost earnings, seniority, and benefits.

ADMH's answer, filed January 29, 2009, asserted a number of "affirmative defenses," including an argument that the Eleventh Amendment barred the action against the state agency. Doc. 8.[1] On June 5, 2009, the United States moved for partial summary judgment, and argued that as a matter of law the arguments relating to the Eleventh Amendment, comity, federalism, and abstention raised by ADMH were inapplicable to this action. Doc. 15. On June 5, 2009, ADMH moved for dismissal and, alternatively, judgment on the pleadings, under Federal Rule of Civil Procedure 12. Doc. 17. ADMH also moved for summary judgment (Doc. 19), which the United States opposed (Doc. 31).

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[1] "Doc. __ at ___" refers to documents listed in the district court's docket sheet and filed by the parties in this action, and to pages within those documents.

2. On February 9, 2010, the district court entered an order denying ADMH's motion to dismiss and/or judgment on the pleadings, and granted the United States' motion for partial summary judgment. Doc. 52. The district court determined that ADMH's motion for dismissal and/or judgment on the pleadings filed pursuant to Federal Rule of Civil Procedure 12 was "untimely." Doc. 52 at 7. The district court next determined that "neither Alabama's sovereign immunity, nor the Eleventh Amendment, bars this action brought by the federal government to enforce" USERRA. Doc. 52 at 7. The district court noted that USERRA expressly authorizes the Attorney General to bring an action against a State. Doc. 52 at 8 (citing 38 U.S.C. 4323(a)) ("If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter for such person. In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action."). The district court also determined that no abstention doctrine bars the action. See Doc. 52 at 9.

On February 10, 2010, the district court denied ADMH's motion for summary judgment. Doc. 53. The district court rejected ADMH's assertion that the United States' claims were barred by the statute of limitations or laches. The

district court stated that USERRA "expressly provides, in a section titled 'Inapplicability of statutes of limitations' that 'there shall be no limit on the period for filing the complaint' under USERRA. 38 U.S.C. 4327(2)(b)." Doc. 53 at 12. The district court also rejected ADMH's laches claim, because ADMH "fail[ed] to offer either factual or legal support for its assertion that laches is a bar." Doc. 53 at 12.

The district court rejected ADMH's contention that Hamilton failed to meet the statutory requirements of re-employment rights for persons who serve in the uniformed services. Under USERRA "'any person who is absent from a position of employment by reason of service in the uniformed services shall be entitled to re-employment rights' so long as the following three conditions are met: (1) the employee gives proper notice to his employer when leaving; (2) the absence is for less than five years; and (3) the employee timely applies for reemployment upon his return." Doc. 53 at 12 (citing 38 U.S.C. 4312(a)(1)-(3)). If an employee meets these requirements, the employer must reemploy the servicemember in the position he would have held had his employment not been interrupted by military service, or "a position of like seniority, status, and pay." Doc. 53 at 13 (citing 38 U.S.C. 4312(a)(2)(A)). The district court found that Hamilton "provided sufficient evidence from which a reasonable jury could find in his favor," and that "[a]t best, there exist genuine issues as to the material facts relating to the timely notice

elements of the claim and relating to whether the [ADMH] actually properly terminated his employment after what it viewed as his resignation by declining a transfer." Doc. 53 at 13.

The district court also rejected ADMH's contention that it was entitled to summary judgment on all three of USERRA's statutory affirmative defenses to reemployment. The three statutory affirmative defenses to the reemployment obligation under USERRA are: "(1) 'the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period,' (2) the person has returned with a service-related disability or is otherwise not qualified for his or her pre-service position, and employing such a person in a position for which he is now qualified 'would impose an undue hardship on the employer,' and (3) 'the employer's circumstances have so changed so as to make such reemployment impossible or unreasonable.'" Doc. 53 at 14 (citing 38 U.S.C. 4312(d)(1)(A)-(C)). The burden of proof of each defense is on the employer. 38 U.S.C. 4312(d)(2). The district court concluded that ADMH failed to carry its burden of proof with respect to these three affirmative defenses because "[g]enuine issues of material fact exist." Doc. 53 at 14.

3. A bench trial was held from June 7-10, 2010. On July 27, 2010, the district court entered its Memorandum Opinion and Order in favor of the United States and against ADMH. Doc. 80. The district court determined that Hamilton was entitled to reemployment rights and benefits under USERRA because he "gave advance notice of his military service, served for less than five years, and timely sought reemployment." Doc. 80 at 16. Furthermore, the district court found that Hamilton had not waived his USERAA right to reemployment at ADMH. The district court concluded that

> [a]lthough Hamilton declined a transfer, which the [ADMH] considered a voluntary resignation effective one month later, when the Tarwater facility was scheduled to close, Hamilton had already notified [ADMH] of his impending military duty when he declined the transfer. Therefore his voluntary resignation could not operate to terminate his reemployment rights. * * * Further, other than declining the transfer, Hamilton did not expressly or by conduct engage in the kind of behavior that could establish a knowing, voluntary, clear and unequivocal waiver of his USERRA rights. * * * Accordingly, Hamilton was entitled to reemployment despite his declination of the transfer.

Doc. 80 at 17.

The district court awarded Hamilton monetary damages and ordered injunctive relief, "including amendments to the [ADMH's] policies and procedures, to ensure the [ADMH's] future compliance with USERRA and mandatory training for all the [ADMH] managers and personnel officials." Doc. 80 at 19. The district court directed the United States to file a proposal regarding injunctive relief. Doc. 80 at 19. Following submissions by the parties, the court,

on November 3, 2010, entered injunctive relief requiring revision and dissemination of ADMH's military re-employment policies. Doc. No. 89 at 1-3. The court also required that ADMH provide "mandatory training regarding the reemployment requirements set forth in USERRA and its implementing regulations, as well as the revised policies and procedures described in Paragraph 1 [of the order], to all supervisory employees and personnel officials." Doc. No. 89 at 3. The court enjoined ADMH officials from retaliating or interfering with individuals exercising rights under USERRA because they gave testimony or participated in proceedings in this case, and the court retained jurisdiction to ensure compliance with the order. Doc. 89 at 4-5.

4. ADMH appealed on December 28, 2010. Doc. 94. On January 4, 2011, ADMH moved the district court to stay the execution of the judgment pending appeal. Doc. 98. The United States opposed the motion, to the extent that it sought a stay of the injunctive relief.[2] Doc. 102.[3] The district court denied the

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[2] The United States did not oppose, and does not now oppose, a stay of the remedial order insofar as it relates to the award of monetary relief.

[3] ADMH's motion to stay the execution of judgment filed in this Court on February 9, 2011, included as an attachment an incomplete copy of the United States' opposition to ADMH's motion to stay filed in district court. See ADMH Motion To Stay (filed Feb. 9, 2011) at Attachment 17 (Doc. 102). For ease of this Court, attached is a complete copy of Plaintiff United States' Opposition to Defendant's Motion To Stay filed in district court on January 28, 2011.

motion to stay on January 31, 2011, finding that ADMH had failed to demonstrate entitlement to a stay of the injunctive relief. Doc. 103.

ARGUMENT

ADMH HAS FAILED TO ESTABLISH THAT IT IS ENTITLED TO A STAY OF THE INJUNCTIVE RELIEF PENDING APPEAL

To prevail on its motion for a stay of the district court's injunctive relief pending appeal under Federal Rule of Appellate Procedure 8(a), ADMH must demonstrate: (1) a strong showing of likelihood of success on the merits; (2) irreparable injury to ADMH in the absence of a stay; (3) lack of substantial injury to other parties interested in the proceeding should a stay be granted; and (4) that the public interest weighs in favor of a stay. *Hilton* v. *Braunskill*, 481 U.S. 770, 776 (1987); *Venus Lines Agency* v. *CVG Industria Venezolana De Aluminio, C.A.*, 210 F.3d 1309, 1313-1314 (11th Cir. 2000). ADMH has failed to demonstrate that consideration of these factors warrants a stay of the injunctive relief pending appeal.

A. ADMH Has Failed To Demonstrate A Strong Likelihood Of Success On The Merits

ADMH's contention that it has a strong likelihood of success on the merits turns on its version of evidence that was presented during a four-day bench trial. Its version of the evidence, however, is in direct conflict with the factual findings of the district court, which are supported by substantial evidence. ADMH does not

claim, much less demonstrate, that the district court's findings of fact are clearly erroneous. Accordingly, it has failed to demonstrate a likelihood of success on the merits.

This Court reviews the district court's factual findings following a non-jury trial for clear error. *Anderson* v. *City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985). Under this standard, a district court's factual findings are entitled to great deference. "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighted the evidence differently." *Id.* at 573-574. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574. As we show below, each of ADMH's three arguments that it has shown a likelihood of success on the merits is based on its own version of the evidence, and is contrary to the district court's well-supported findings of fact.

First, ADMH asserts in support of its motion for stay that "USERRA does not afford a service member additional rights"; that there are facts that "Hamilton lost his employment and any expectation of future employment at the Tarwater facility * * * prior to the time he was to report to military duty"; and that he "was not going to have a place of employment to come back to after military

deployment, dissimilar from all other USERRA" cases. ADMH Motion 5. The district court, however, found facts to support its conclusion that "Hamilton did not waive his USERRA right to reemployment" at ADMH, and that, although "Hamilton declined a transfer * * * when the Tarwater facility was scheduled to close, Hamilton had already notified the Department of his impending military duty when he declined the transfer." Doc. 80 at 17; see also Doc. 80 at 4-6, ¶¶ 22-46.

Second, ADMH asserts that Hamilton had no expectation of employment after ADMH implemented its Consolidation Plan, and that "every employee was required to accept a directed transfer in order to preserve their employment." ADMH Motion 6. The district court, however, found that Hamilton was required to accept or decline the transfer offer after he had already told ADMH officials that he was being deployed to Iraq, and that his deployment "was scheduled to occur about the time the transfer would have become effective." Doc. 80 at 4. The district court found that ADMH "officials assured Hamilton that they would continue to look for other opportunities for him if he declined the transfer," and that after Hamilton declined the transfer, ADMH "successfully relocated several other [ADMH] employees from Tarwater who, like Hamilton, declined an initial offer of transfer." Doc. 80 at 4.

Third, ADMH asserts that Hamilton failed to seek re-employment within 90 days of his return from Iraq. ADMH Motion 6. The district court found, however, that Hamilton was released from active military service in April 2005, and during that same month "sought reemployment with" ADMH. Doc. 80 at 6. The district court found that Hamilton made repeated attempts throughout 2005 to get his job back at ADMH, but was not re-employed until August 2007. Doc. 80 at 6-8.

The district court's findings are not clearly erroneous, as they are fully supported by the evidence in this case. On this record, ADMH has plainly failed to establish a likelihood of success on the merits.

B. ADMH Will Suffer No Irreparable Injury Absent A Stay Pending Appeal

ADMH contends that the state may have been immune from the action under the Eleventh Amendment, and that the United States has "no entitlement to the relief granted by the trial court." ADMH Motion 8. The district court determined in the February 9, 2010, Memorandum Opinion and Order, however, that Congress abrogated states' sovereign immunity under USERRA, which expressly authorizes the Attorney General to bring suits on behalf of complainants in federal court. See 38 U.S.C. 4323(a); see also *supra* at p. 3. ADMH has made no showing that it is likely to succeed on appeal on its Eleventh Amendment argument.[4]

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[4] In any event, because we do not oppose the stay of monetary relief that the district awarded to Hamilton (see footnote 2, *supra*), ADMH's Eleventh Amendment argument is irrelevant for purposes of its motion before this Court to

ADMH also contends that a denial of a stay of the injunctive relief will interfere with state resources. ADMH Motion at 8. When considering irreparable harm, however, "mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." *United States* v. *Jefferson County*, 720 F.2d 1511, 1520 (11th Cir. 1983) (quoting *Sampson* v. *Murray*, 415 U.S. 61, 90 (1974)). Rather, courts have found irreparable harm where there is a "threat of substantial loss of business and certainly bankruptcy." *Rio Grande Cmty. Health Ctr., Inc.* v. *Rullan*, 397 F.3d 56, 76 (1st Cir. 2005). This heightened showing is not present here. Indeed, ADMH has presented no information regarding the cost of providing USERRA compliance training for its managers.

The district court's injunctive relief requires policy modifications and training that mirror the language of USERRA and its implementing regulations. Conducting mandatory USERRA training under the district court's injunctive order presents no risk to ADMH of irreversible injury. Thus, this factor also weighs against granting a stay. See *Siegel* v. *Lepore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (absence of a substantial likelihood of irreparable injury, standing alone, makes a stay improper).

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stay the injunctive relief. See *Gamble* v. *Florida Dep't of Health and Rehab. Svcs.*, 779 F.2d 1509, 1511-1512 (11th Cir. 1986) (citing *Edelman* v. *Jordan*, 415 U.S. 651, 664 (1974) (Eleventh Amendment no bar to prospective injunctive relief by federal court)).

C. *ADMH Personnel And Current And Future Servicemembers Will Suffer Injury If A Stay Of The Injunctive Relief Is Granted*

ADMH contends that there is no likelihood of a recurrence of harm. In support of that contention, ADMH asserts that "Hamilton's case is an exception because State employees do not ordinarily resign prior to leaving for military service." ADMH Motion 10. Again, the ADMH's factual contention that Hamilton waived his USERRA rights by resigning from ADMH is contrary to the district court's factual finding that Hamilton *did not* resign when he declined the initial transfer request, because prior to that time he had already notified ADMH that he would soon be deployed and thus fully expected re-employment on his return. See Doc. 80 at 4-8. Based on evidence presented at trial, the district court correctly found that "Hamilton did not waive his USERRA right to reemployment at the [ADMH]." Doc. 80 at 17.

In any event, ADMH's contention that the harm caused by ADMH's noncompliance with USERRA is limited ignores the risk that ADMH employees who are servicemembers may be misinformed regarding their rights under USERRA, or that ADMH managers will proceed without knowing their obligations to departing and returning servicemembers under USERRA. The United States has a strong interest in ensuring that ADMH complies with federal law establishing the employment rights of servicemen and servicewomen. Thus, this factor also weighs heavily against the grant of a stay.

D. The Public Interest Lies Against The Grant Of Stay Of Injunctive Relief In This Case

Finally, ADMH has failed to show that a stay is in the public interest. ADMH argues that a stay would relieve Alabama citizens of "the intrusion of the Federal Government." ADMH Motion 11. Citizens of Alabama, however, are entitled to the protections of USERRA, and the district court's injunctive order merely requires that ADMH revise its policies and train ADMH managers on USERRA requirements. See Doc. 89. The United States' role in this process is quite limited. Under the district court's injunctive order, the United States reviews ADMH's policies and training materials and can provide recommendations for improvement. Thus, the public interest weighs against a stay of injunctive relief pending appeal.

CONCLUSION

For the foregoing reasons, ADMH's Motion To Stay Injunctive Relief Pending Appeal should be denied.

Respectfully submitted,

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ATTACHMENT:

DISTRICT COURT DOCKET 102

PLAINTIFF UNITED STATES' OPPOSITION TO DEFENDANT'S MOTIO NTO STAY EXECUTION OF JUDGMENT PENDING APPEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 2:08-cv-1025-MEF
	)	
ALABAMA DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION,	)	
	)	
Defendant.	)	

PLAINTIFF UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION TO STAY EXECUTION OF JUDGMENT PENDING APPEAL

Plaintiff United States of America ("United States"), by and through the undersigned attorneys, opposes Defendant Alabama Department of Mental Health's ("ADMH") Motion to Stay Execution of Judgment Pending Appeal, Doc. No. 98, with respect to injunctive relief.[1] As explained below, ADMH has failed to satisfy the exacting standard necessary to warrant a stay. Accordingly, ADMH's motion should be denied.

I. INTRODUCTION

On July 27, 2010, this Court issued a Memorandum Opinion and Order granting judgment in favor of the United States. Doc. No. 80. In its Order, the Court found, among other things, that the United States was entitled to injunctive relief to ensure ADMH's future compliance with the Uniformed Services Employment and Reemployment Rights Act of 1994,

[1] In its motion, ADMH also seeks a stay of the monetary judgment and a waiver of the supersedeas bond under Federal Rule of Civil Procedure 62(d). Def.'s Mot. ¶ 3. Based on ADMH's representations that it is solvent and financially able to satisfy a judgment of the Court of Appeals without delay, the United States does not oppose ADMH's request for a waiver of the bond nor does the United States oppose a stay of the monetary relief.

("USERRA"), 38 U.S.C. § 4301, *et seq.* On November 3, 2010, the Court entered a final judgment and order specifying the parameters of the injunctive relief awarded to the United States. Doc. Nos. 89, 90. The Court's Order requires that ADMH (i) revise its military reemployment policies to bring them into compliance with USERRA; and (ii) disseminate the revised policies to employees. Doc. No. 89. The Order also requires mandatory training regarding USERRA's reemployment requirements for all ADMH managers and personnel officials within 120 days of the Order. *Id.*[2]

ADMH now asks this Court to stay, pending appeal, implementation of the Court's Order regarding injunctive relief. However, a stay under Rule 62(c) is considered "extraordinary relief" for which the moving party bears a "heavy burden." *Gay Lesbian Bisexual Alliance v. Sessions*, 917 F. Supp. 1558, 1561 (M.D. Ala. 1996) (citation omitted). To prevail on its motion, ADMH must demonstrate that balancing the following four factors favors a stay: (1) a strong showing of likelihood of success on the merits; (2) irreparable injury to ADMH in the absence of a stay; (3) lack of substantial injury to other parties interested in the proceeding should a stay be granted; and (4) a weighing of where the public interest lies. *See id.; see also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), *Venus Lines Agency v.* CVG *Industria Venezolana De Aluminio, C.A.*, 210 F.3d 1309, 1313 (11th Cir. 2000). A careful review of these factors, as applied to the facts here, demonstrates that a stay is not warranted.

[2] While ADMH has promptly identified its compliance officer in compliance with the Order, and provided the United States with a copy of its revised policy, ADMH did not provide the United States with an opportunity to review the revised policy prior to its dissemination to employees. On January 10, 2011, the United States sent a letter to ADMH with recommended changes to the revised policy. *See* letter from Antoinette Barksdale et al., counsel for the United States, to Courtney W. Tarver, et al., counsel for ADMH (January 10, 2011) (Exhibit 1).

II. ARGUMENT

A. ADMH Is Unlikely To Prevail On The Merits

ADMH contends that it is likely to prevail on the merits because (1) USERRA does not afford a servicemember additional rights under the circumstances presented; (2) servicemember Roy Hamilton did not have an expectation of employment due to the closure of his work location and failure to elect a transfer; and (3) Hamilton failed to seek reemployment within a 90-day period. However, ADMH's arguments are premised largely upon findings of fact following a four-day bench trial and the Court's weighing of all credible evidence. It is well-settled that a district court's credibility determinations are entitled to great deference since the trial court is better positioned "than a reviewing court to assess the credibility of witnesses." *United States v. Ramirez-Chilel*, 289 F.3d 744, 749 (11th Cir. 2002). ADMH has made no effort to demonstrate how the findings of fact in this case were "clearly erroneous," which is the standard the Eleventh Circuit must apply to reverse factual findings on appeal. See *id.*; see also *United States v. Villarreal*, 613 F.3d 1344, 1358 (11th Cir. 2010) (quoting *United States v. Robertson*, 493 F.3d 1322, 1329 (11th Cir. 2007)). Without such a showing, ADMH cannot meet its burden of proving a strong likelihood of success on the merits, which alone can defeat ADMH's application for a stay. See *Church v. City of Huntsville*, 30 F.3d 1332, 1342 (11th Cir. 1994) (failure to demonstrate a "substantial likelihood of success on the merits" defeated the party's request for relief, regardless of its ability to establish any of the other elements.).

B. ADMH Has Not Shown Irreparable Harm Absent A Stay

ADMH also makes no showing of irreparable harm in the absence of a stay. ADMH merely argues, without any supporting evidence, that it will "be forced to incur burdensome

cost" if it is required to provide mandatory training. When considering irreparable harm, however, "mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." *United States v. Jefferson Cnty.*, 720 F.2d 1511, 1520 (11th Cir. 1983) (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). Rather, courts have found irreparable harm where there is a "threat of substantial loss of business and certainly bankruptcy," Rio Grande Cmty. Health Ctr., Inc. v. Rullan, 397 F.3d 56, 76 (1st Cir. 2005), or the court found where the moving party has shown the threat of "criminal prosecution," Doe v. Miller, 216 F.R.D. 462, 471 (S.D. Iowa 2003). ADMH has not come close to making this heightened showing.

Furthermore, even assuming ADMH's cost argument is worthy of consideration, ADMH provides no proof of the *actual cost* to ADMH of providing USERRA mandatory training; nor, has ADMH provided any showing of what irreparable injury ADMH will suffer by incurring the cost and providing the training. To the contrary, ADMH claims solvency to pay the monetary judgment in this case, which will certainly exceed any in-house training costs associated with the mandatory training requirement. Furthermore, ADMH will suffer no nonmonetary harm in changing its policy and conducting training. The Court's injunctive relief merely requires policy modifications and training that mirror the language of USERRA and its implementing regulations. Accordingly, conducting mandatory USERRA training under the Court's Order presents no risk to ADMH of irreversible injury, making this factor also weigh against granting a stay. *See Siegel v. Lepore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (absence of a substantial likelihood of irreparable injury, standing alone, makes a stay improper.).

C. Granting A Stay Could Substantially Injure ADMH Employees

ADMH argues that there is no risk of substantial injury to others in granting a stay because a delay in training will have no "direct affect of harm" on the United States or Hamilton. However, ADMH ignores the risk that more than 3,000 ADMH employees will continue to be provided misinformation regarding their USERRA rights; or that ADMH managers will proceed without knowing their USERRA obligations with respect to departing and returning servicemembers. Furthermore, contrary to ADMH's position, the United States has a strong interest in ensuring that ADMH complies with federal law, particularly with respect to our servicemen and servicewomen. Accordingly, this factor also weighs against granting a stay of injunctive relief.

D. Granting A Stay Will Serve The Public Interest

ADMH has not shown that a stay is against the public's interest. Instead, ADMH simply argues that Alabama citizens will be "forced to endure the intrusion of the federal government" without a stay. However, Alabama citizens are also citizens of the United States and are entitled to the protections of federal law, including USERRA. This Court's Order does nothing more than require Alabama to comply with USERRA by (i) ensuring its policies and procedures are consistent with USERRA; and (ii) training ADMH managers regarding USERRA's rights and requirements. As noted above, the substance of the policy revisions and mandatory training simply mirror USERRA's requirements. Accordingly, it is hard to envision how these two injunctive requirements would run afoul of the public's interest. Moreover, any "intrusion" by the United States on ADMH's business operations is exceedingly minimal. In accordance with

the Court's Order, the United States will only review ADMH's policies and training materials and make recommendations.

Finally, there is a strong public interest in ADMH promptly revising its policies and procedures to comport with USERRA because (i) more than 3,000 employees will be protected by the changes; and (ii) training managers and personnel officials about USERRA's requirements will avoid future violations of USERRA.

III. CONCLUSION

ADMH has failed to establish (1) any likelihood that it will prevail on the merits on appeal; (2) any likelihood that it will be irreparably injured in the absence of a stay; (3) any lack of harm to third parties should a stay be granted; or (4) any strong public interest that granting a stay will serve. For these reasons, ADMH's motion to stay injunctive relief must be denied.

January 28, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiff United States' Memorandum in Opposition to Defendant's Motion to Stay Execution of Judgment Pending Appeal was served this 28th day of January 2011, via the Court's electronic filing system to:

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s/ Antoinette Barksdale
Antoinette Barksdale

U.S. Department of Justice
Civil Rights Division

LK:EGL:AB:SCB:jw
DJ 170-USE-2-5

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JAN 10 2011

By U.S. Mail and Electronic Mail

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Re: *United States of America v. Alabama Department of Mental Health and Mental Retardation*, No. 2:08-cv-1025-MEF (M.D. Ala.)

Dear Counsel:

Pursuant to paragraphs three and four of the Order for injunctive relief entered by the Court in the above-referenced case, Docket No. 89 (Nov. 3, 2010), this letter communicates the results of the United States' review and comment on Alabama Department of Mental Health's ("ADMH") revised USERRA/Military Leave of Absence Policy ("policy"), as submitted to the United States on December 23, 2010. At this time, the United States does not approve of the policy. We would ask that in compliance with the Court's Order and the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), ADMH make the proposed changes outlined below and resubmit a revised policy as soon as possible. Then, we may again review and consider it for approval, pursuant to the Court's Order.

First, the opening paragraph of Section I, Policy, is incomplete. An employer must not only grant leaves of absence to those who request it in order to perform military service, but reemploy an employee after service in the uniformed services if he or she meets the requirements of USERRA. Please clarify this first paragraph to reflect that if an employee complies with USERRA's reemployment provisions, ADMH will reemploy him or her.

Second, paragraph II.b, the definition of "Service in the Uniformed Service" would be more complete and correct if it included "active duty" between "includes" and the clause beginning "active duty for training." Including "active duty" without the qualifier of "for training" comports with USERRA's definition of service in the uniformed services.

Third, the policy omits the provision required by paragraph 1.b of Court's Order, that "an employee's notice of uniformed service may be given to a supervisor in the employee's rating chain or an ADMH personnel official." The policy states that "notice of application for reemployment may be given to the immediate supervisor, anyone in the rating chain of command during employment or to an ADMH personnel official," paragraph III.9; however, it is silent regarding the person to whom an employee may give notice of uniformed service. The United States proposes that ADMH include the required provision in policy paragraphs II.d.1 and III.2. In addition, to clarify the notice standard in paragraph III.2 of the policy, we suggest that ADMH add "of service in the uniformed service" after "Verbal notice."

Please contact us if you have any questions about the United States' comments. This letter serves as a good faith effort to obtain compliance with the Court's order for injunctive relief without Court intervention. However, this letter also serves as written notice that if the United States does not receive ADMH's revised policy comporting with the Court's Order and USERRA, as described in the above comments, by January 28, 2011, the United States intends to move for enforcement of the Order by the Court.

Sincerely,

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Employment Litigation Section

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2011, a copy of the United States' Opposition To Appellant's Motion To Stay Injunctive Relief Pending Appeal was sent by Federal Express, overnight delivery, to the following counsel of record:

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