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APPENDIX A

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 22-5256

September Term, 2023

FILED ON: SEPTEMBER 25, 2023

ROBERT M. MILLER,

APPELLANT

v.

MARTIN J. GRUENBERG, CHAIRMAN,
FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:21-cv-03035)

Before: SRINIVASAN, *Chief Judge*, GARCIA, *Circuit Judge*, and RANDOLPH, *Senior Circuit Judge*.

JUDGMENT

The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is:

ORDERED and **ADJUDGED** that the judgment of the district court be affirmed.

* * *

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In 2020, the Federal Deposit Insurance Corporation placed employee Robert Miller on an indefinite suspension. Miller appealed to the Merit Systems Protection Board. In September 2021, an Administrative Judge issued an initial decision finding that the Agency should have ended the suspension. Although the Judge ordered the Agency to “retroactively restore” Miller and pay him “the appropriate amount of back pay with interest,” the Judge’s decision was silent on whether Miller should be afforded interim relief under Section 7701 of the Civil Service Reform Act during the pendency of an appeal to the Board. *See* 5 U.S.C. § 7701(b). The Agency appealed the Judge’s decision without reinstating or paying Miller.

While the Board was considering the Agency’s administrative appeal, Miller filed this civil action. *See* 5 U.S.C. § 7702(e). He sought a preliminary injunction that would require the agency to restore his pay and benefits until the Board issued a final order. The district court denied the motion, and Miller appealed.

Miller’s motion relied on the Civil Service Reform Act, which provides that a “prevailing” employee “shall be granted the relief in the [Board’s initial] decision” until “the outcome of any petition for review,” with two exceptions. 5 U.S.C. § 7701(b)(2). He argued that as a prevailing party, he was entitled to interim relief as a matter of law and that neither statutory exception applied.

The Agency now agrees. The Board recently issued a precedential opinion holding that § 7701(b)(2) of the

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Act entitles prevailing employees to interim relief “by default.” *Stewart v. Dep’t of Transp.*, 2023 M.S.P.B. 18 ¶ 10 (May 16, 2023). In May 2023, the Board also issued a final order (1) vacating the Administrative Judge’s finding that the Agency should have ended Miller’s suspension and (2) holding that Miller was entitled to the interim relief described in the initial decision.

The Agency has conceded that it owes Miller back pay for the period between the initial and final decisions. In August 2023, the Agency gave Miller this back pay, plus interest. When an accepted payment fully satisfies a plaintiff’s claim, the claim is moot. *Campbell-Ewald Co. v. Gomez*, 557 U.S. 153, 163-64 (2016). But at oral argument, Amicus stated that Miller disputes both the payment amount and the terms of his benefits. So the appeal is not moot.

But injunctive relief is discretionary. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 193 (1978). The Agency has represented that it is working to calculate the correct payment and benefits. We presume that federal officers will adhere to the law as pronounced by the court. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985) (Scalia, J.). That law now includes Miller’s statutory entitlement to back pay, so a preliminary injunction ordering that relief is unnecessary.

And, regardless, Miller did not show a probability of success on the merits. His underlying civil action did not include any claims based on § 7701(b)(2). Miller

asked the district court to grant the preliminary injunction without “relying on any facts relating to the merits of [his] case.” The district court did not abuse its discretion in denying preliminary-injunctive relief based on a claim that was not presented in the case.

In addition to seeking back pay, Miller also requested various forms of nonmonetary relief. Any claim to interim reinstatement was mooted by the Board’s final order. *See* 5 U.S.C. § 7701(b)(2)(A). Miller cannot be retroactively reinstated. And Miller’s other requests fall outside the scope of interim relief contemplated by the Act.

To the extent Miller based his nonmonetary claims not on the Act but on the district court’s general equitable powers, the argument was inadequately developed and therefore forfeited.

Finally, any challenge to the substance of the Board’s final order is outside the scope of this appeal.

The district court did not abuse its discretion in denying the preliminary injunction.

* * *

This disposition is unpublished. *See* D.C. CIR. R. 36(d). The Clerk will withhold the mandate until seven days after any timely petition for rehearing or rehearing *en banc* is resolved. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

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FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

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APPENDIX B

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 22-5256

September Term, 2023

1:21-cv-03035-CJN

Filed on: December 4, 2023

Robert M. Miller,

Appellant

v.

Martin J. Gruenberg, Chairman,
Federal Deposit Insurance Corporation, et al,

Appellees

BEFORE: Srinivasan, Chief Judge; Garcia, Circuit
Judge, and Randolph, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for
panel rehearing filed on November 9, 2023, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy

Deputy Clerk

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APPENDIX C

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 22-5256

September Term, 2023

1:21-cv-03035-CJN

Filed on: December 4, 2023

Robert M. Miller,

Appellant

v.

Martin J. Gruenberg, Chairman,
Federal Deposit Insurance Corporation, et al,

Appellees

BEFORE: Srinivasan, Chief Judge; Henderson, Mil-
lett, Pillard, Wilkins, Katsas, Rao, Walker,
Childs, Pan, and Garcia, Circuit Judges;
and Randolph, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for re-
hearing en banc, and the absence of a request by any
member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy

Deputy Clerk

APPENDIX D
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT M. MILLER,

Plaintiff,

v.

MARTIN J. GRUENBERG,
Acting Chairman, Federal
Deposit Insurance Corp., *et al.*,

Defendants.

Civil Action No.
1:21-cv-03035 (CJN)

ORDER

(Filed Aug. 24, 2022)

This matter is before the Court on Plaintiff Robert Miller’s “Motion for Interim Relief, a Temporary Restraining Order, and Preliminary Injunction,” ECF No. 39. Miller asks the Court to grant emergency relief ordering Defendants to restore his salary and other employment benefits, to cease demands for medical examinations, and to refrain from taking further disciplinary action.

“In evaluating a motion for both a temporary restraining order and preliminary injunctive relief, generally the same standard is applied.” *Open Tech. Fund v. Pack*, 470 F. Supp. 3d 8, 16 (D.D.C. 2020). Both remedies are “extraordinary,” *id.* at 16 (quotations omitted), and both require the movant to prove “that he is likely to succeed on the merits, that he is likely to

suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest,” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Because the “basis of injunctive relief in the federal courts has always been irreparable harm,” a plaintiffs “failure to show a likelihood of irreparable harm [is] sufficient to defeat the motion.” *Navajo Nation v. Azar*, 292 F. Supp. 3d 508, 512 (D.D.C. 2018) (quotations omitted).

Here, Miller has failed to show that he is likely to suffer irreparable harm in the absence of preliminary relief. To qualify as “irreparable,” an injury must be “certain and great,” and it must be “beyond remediation” in the ordinary course of litigation. *Id.* at 512-13 (quotations omitted). The injuries alleged by Miller – the loss of income and benefits, and the prospect of intrusive medical examinations and workplace discipline – are not of that character. See *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297-98 (D.C. Cir. 2006) (“The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation[,] weighs heavily against a claim of irreparable harm.” (citation omitted)); see also *Veitch v. Danzig*, 135 F. Supp. 2d 32, 36 (D.D.C. 2001) (loss of salary and benefits insufficient to establish irreparable injury). Miller’s eight-month delay in seeking such relief bolsters the Court’s conclusion that irreparable harm is lacking here. See *Open Top Sightseeing USA v. Mr. Sightseeing, LLC*, 48 F. Supp. 3d 87, 90 (D.D.C. 2014) (“Courts have found

that an unexcused delay in seeking extraordinary injunctive relief may be grounds for denial because such delay implies a lack of urgency and irreparable harm.” (cleaned up)).

Miller’s failure to show that he is likely to suffer irreparable harm “is grounds alone for denying” his motion. *Navajo Nation*, 292 F. Supp. 3d at 512 (citing *Chaplaincy*, 454 F.3d at 297). But Miller has also failed to make a “clear showing” that he is likely to succeed on the merits. *Id.* (quotations omitted). Nor has Miller established that the balance of equities and public interest, which are factors that “merge when the Government is the opposing party,” *id.* (quotations omitted), favor preliminary relief, see *Sampson v. Murray*, 415 U.S. 61, 84 (1974) (recognizing factors “cutting against the general availability of preliminary injunctions in Government personnel cases”).

Accordingly, it is

ORDERED that Plaintiffs Emergency Motion for Interim Relief, a Temporary Restraining Order, and a Preliminary Injunction, ECF No. 39, is **DENIED**.

DATE: August 24, 2022

/s/ Carl J. Nichols
CARL J. NICHOLS
United States District Judge
