

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CATHERINE McNEILLY,)	
)	
<i>Plaintiff,</i>)	
)	
vs.)	Civil Action No. 06-1685
)	
THE CITY OF PITTSBURGH, and)	
NATHAN HARPER, both in his official)	
capacity as the Chief of Pittsburgh Bureau of)	
Police and in his individual capacity, and)	
LUKE RAVENSTAHL, both in his official)	
capacity as the Mayor of the City of Pittsburgh)	
and in his individual capacity,)	
)	
<i>Defendants.</i>)	

**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S
MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR
PRELIMINARY INJUNCTION**

AND NOW, come The City of Pittsburgh, Nathan Harper, and Luke Ravenstahl, (the "City Defendants" or "Defendants"), by and through their attorneys of record, George Specter, Esquire Michael E. Kennedy, Esquire, and Yvonne Schlosberg, Esquire and file the within Memorandum, averring in support thereof, as follows:

INTRODUCTION

In October of 2006, Plaintiff Catherine McNeilly sent two e-mails concerning the fitness of a potential candidate, Dennis Regan, for the position of Public Safety Director. Attached to each of the e-mails was a disciplinary action report ("DAR") of a particular police officer with an alleged connection to Mr. Regan. DARs are confidential personnel information within the Pittsburgh Bureau of Police ("Bureau") pursuant to established rules and regulations. As a consequence of her inclusion and disclosure of the

confidential DARs without following protocol, Plaintiff was demoted from the position of commander to lieutenant within the Bureau. Plaintiff subsequently filed her Verified Complaint as well as a Motion for Temporary Restraining Order and/or Preliminary Injunction with this Court on December 21, 2006. In her Complaint, Plaintiff alleges a violation of her First Amendment rights and brings a second claim for relief under the Pennsylvania Whistleblower Act, 43 P.S. §§ 1421 *et. seq.*

An evidentiary hearing has since been scheduled by this Honorable Court for the Motion for the TRO/Preliminary Injunction for Thursday, January 4, 2007.

ARGUMENT

II. PLAINTIFF HAS NOT MET THE STANDARDS ENTITLING HER TO A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

It is well settled that federal preliminary injunctive relief is an “extraordinary remedy” that is to be utilized in only the most extreme circumstances. *P.C. Yonkers, Inc. v. Celebrations: the Party and Seasonal Superstore*, 428 F.3d 504, 508 (3d Cir. 2005) (quoting *Nutrasweet Co. v. Vit-Mar Enterprises*, 176 F.3d 151, 153 (3d Cir. 1991) and *Maldonado v. Houstoun*, 157 F.3d 179, 184 (3d Cir. 1998)). As a general rule, a petition for injunctive relief cannot be appropriately considered unless the moving party can meet the following four-prong test:

- 1) A reasonable probability of success on the merits;
- 2) Irreparable injury occasioned by the denial of relief;
- 3) That the granting of preliminary relief will not result in even greater harm to the nonmoving party; and
- 4) That the granting of preliminary relief will be in the public interest.

Tanimura & Antle, Inc. v. Packed Fresh Produce, 222 F.3d 132, 140 (3d Cir. 2000). The burden of establishing every element lies with the plaintiff. *P.C. Yonkers*, 428 F.3d at 508. The grant or denial of a preliminary injunction rests within the “sound discretion of the district judge, who must balance all of these factors in making a decision.” *FM 103.1, Inc. and Jukebox Radio, Inc. v. Universal Broadcasting of New York*, 929 F. Supp. 187, 193 (D.N.J. 1996) (quoting *Kershner v. Mazurkiewicz*, 670 F.2d 440, 443 (3d Cir. 1982)).

In both the First Amendment context as well as on her state law Whistleblower Claim, it would appear that the first prong is the most critical hurdle. In this case, it is one that Plaintiff fails to clear on either claim.

A. PLAINTIFF HAS NOT DEMONSTRATED A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS ON HER FIRST AMENDMENT OR WHISTLEBLOWER CLAIMS.

Plaintiff’s complaint raises two specific causes of action. She alleges a violation of her first amendment right to free speech under the United States Constitution and a state whistleblower claim, brought under the Pennsylvania Whistleblower Act, 43 P.S. §§ 1421 *et. seq.*

1. First Amendment Claim

Plaintiff first contends that she has been unjustly demoted from commander to lieutenant as a result of her “protected speech” related to the nomination of Dennis Regan to serve as public safety director. That “protected speech” was made in the form of two e-mails sent by Plaintiff in October of 2006. The first e-mail, sent on October 6, 2006 from Plaintiff’s personal email account was directed to Defendant Mayor Luke

Ravenstahl. The second e-mail, sent on October 9, 2006 from Plaintiff's city-provided computer via her city-provided e-mail server, was directed to all City council members. Blind copies were also sent to both assistant chiefs in the police department, then Acting Police Chief Paul Donaldson, Emergency Management Services Chief Robert McCaughan, Fire Chief Michael Huss, numerous police commanders, as well as to Plaintiff's brother and husband, neither of whom are City employees.

Both of the e-mails are highly critical of Dennis Regan, and question his qualifications and suitability for the position of public safety director. Both of the e-mails are additionally highly critical of a certain City of Pittsburgh Police Officer named Frank Rende. Plaintiff implies in the emails that Regan has taken steps to improperly advance the career of Rende, who is the brother of Regan's housemate. Plaintiff further implies but does not state as fact that Regan influenced a DAR she had initiated against Rende. (True and correct copies of each of the e-mails will be provided to the court as exhibits at the time of the TRO hearing, and the defense invites the court to scrutinize and review the e-mails.) Of paramount importance to the City Defendants was the fact that Plaintiff attached to each of the e-mails an electronic version of the DAR she had initiated against officer Rende. The DAR contained extensive information gleaned from Rende's personnel file, both the hard copy and electronic version.¹ Although Plaintiff alleges in her complaint and legal memorandum that she was demoted as a result of voicing her protected speech, credible and incontrovertible evidence exists that will establish that the true reason for the discipline was the violation of numerous, well-established Pittsburgh Police Bureau regulations, of which Plaintiff was intimately

¹ The city maintains, as part of its responsibilities under a consent decree with the United States department of Justice, a computer based system that tracks individual officers discipline and field complaints. This system is referred to as the "PARS" system

familiar. The decision on the demotion, conveyed in writing to Plaintiff from Chief Harper on November 28, and confirmed on December 6, 2006, explicitly detail the reasons for the decision. (These memoranda will also be introduced into evidence as exhibits by City Defendants at the TRO hearing.)

a. Plaintiff's demotion was not based on protected speech.

The City Defendants certainly recognize the well-settled legal doctrine that the "First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). However, in the instant matter, Plaintiff's demotion was not based on her personal views towards the appointment of a candidate for a particular position in City government, but rather was based on her knowing and intentional violation of specific Pittsburgh Bureau of Police rules and regulations that prohibit the release of confidential employee information.

The United States Supreme Court has identified two inquiries to guide this Honorable Court's analysis regarding a public employee's free speech protections:

The first requires determining whether the employee was speaking as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question then becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

Garcetti v. Ceballos, 126 S.Ct. 1951, 1958 (citing *Connick v. Myers*, 461 U.S. 138, 147 (1983) and *Pickering*, *supra*, 391 U.S. at 568.)

In *Ceballos*, the Supreme Court further clarified that public statements made as part of one's official duties do not constitute speech protected by the First Amendment. Specifically, where a calendar deputy prosecutor wrote a disposition memo addressing a pending criminal case pursuant to his official duties, the Supreme Court determined that he was not acting as a citizen. Rather he was acting as a government employee merely doing what he was employed to do. As such, if desired his employer was permitted to make management discipline decisions based on said employee's memo without violating the employee's First Amendment rights. *Ceballos*, 126 S.Ct. at 1960.

Similarly, Plaintiff's speech in this matter was made as a police commander rather than a private citizen. While speech made at work involving the appointment of the public safety director may not be in and of itself be dispositive on the issue of private citizen vs. public employee speech, it is important to note that the statements at issue herein were indeed made possible only because of actions taken pursuant to Plaintiff's official duties. *See id.* First, Plaintiff's duties as a police commander involved supervising rank and file officers and further included preparing and filing disciplinary action reports, including a report against Officer Rende. Plaintiff composed at least the second, October 9, 2006, e-mail while at work, on a work computer, and sent it via her work e-mail account. In both e-mails, however, she did not merely voice her personal opinion on Mr. Regan's suitability for the position of public safety director. Rather, she provided information regarding her investigation and charges filed against a particular officer, and implied that Mr. Regan's fitness for the open position was affected by his relationship with said officer. In her October 9th e-mail, she also offered her command-staff concerns as "a Police Supervisor" regarding Mr. Regan's ability to be even-handed

in holding disciplinary hearings. Plaintiff's high rank gave her access to confidential personnel information on officers that was not available to the public at large. Her status as a commander with lengthy service only magnifies her clear knowledge of rules and regulations pertaining to the inability to release confidential information absent approval from the Chief of Police. Her inclusion of this information in tandem with her investigatory and supervisory role of officers easily converted this activity from a purely private citizen complaint to one made by a public employee in performing her duties as a police supervisor.

~~However, even if this Honorable Court is inclined to find that Plaintiff's speech~~ was a made as a private citizen and touched on a matter of public concern, the inquiry is not complete because the next step is to conduct a balancing test, which weighs "the employee's interest in speaking about a matter of public concern and the value to the community of her being free to speak on such matters" against "the government's interest as an employer in promoting the efficiency of the services it performs through its employees." *Azzaro v. County of Allegheny*, 110 F.3d 968, 980 (3rd Cir. 1997). Pertinent considerations in assessing the balance include "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388 (citing *Pickering*, 391 U.S. at 571-73).

Here, this Court must balance Plaintiff's interest in speaking out against Mr. Regan's appointment *in essentially any way she desired* with the City Police Bureau's

important interest in protecting the release of confidential information. In this instance, each of the aforementioned considerations tilts the scale in favor of the City Defendants. Plaintiff's release of confidential information without following established protocol undermines the confidence of all police officers in trusting that their confidential employee records are not subject to release at the mere whim of a high-ranking member of the chain of command staff. Nor is it dispositive that many, but not all, of the recipients of the e-mails were City employees and officials. There are thousands of City employees who have no right whatsoever to review the confidential personnel records of city police officers without following specific protocol, including high-level officials such as City Council members.

Moreover, "[c]oncern for the government's interest is especially great in the context of law enforcement." *Bradshaw v. Township of Middleton*, 296 F.Supp.2d 526, 541 (N.J. Dist. Ct. 2003). *See also, Swartzwelder v. City of Pittsburgh*, 297 F.3d 228, 239 (3rd Cir. 2002) (noting that the police bureau's interest in preventing the disclosure of confidential information is an important one); *Dennison v. Pennsylvania Department of Corrections*, 268 F.Supp. 2d 387 (M.D. Pa. 2003) (finding that a state prison's interest in efficient operations outweighed the free speech rights of an employee to release confidential records to non-authorized persons); *Williams v. Seniff*, 342 F.3d 774, 783-84 (7th Cir. 2003) (discussing deference given to police departments).

Plaintiff cites to various circuit cases for the general proposition that a police officer's disclosure of confidential information outweighs a police department's interest in maintaining such confidentiality. However, these cases may be easily distinguished from the case at issue because they either: 1) deal with corruption problems within the

police departments themselves, 2) involve a situation where an employee sought to first follow a policy and was not assisted by the chain of command; or 3) reveal information already out in the open and did not involve potential disruption of normal operations. See *Brawner v. City of Richardson*, 855 F.2d 187, 190-92 (5th Cir. 1988) (public concern was allegation of misconduct of police officers and management of the bureau); *Solomon v. Royal Oak Twp.*, 842 F.2d 862 (6th Cir. 1988) (confidential information disclosed to expose political corruption in the police department itself); *Hanneman v. Breier*, 528 F.2d 750 (7th Cir. 1976) (justification of police confidentiality rules not applicable where investigation no longer a secret due to published newspaper article already containing information); *Brockell v. Norton*, 732 F.2d 754 (chain of command policy could not take precedence over employee's speech rights where he made report to Chief and no action was taken).

Herein, the Bureau of Police promulgated these confidentiality regulations to promote, *inter alia*, efficiency, order, discipline, and trust within the force as well as between the Fraternal Order of Police union and the command staff and these needs do justify the application of the regulations in the this case. The Police Bureau's interest in protecting the disclosure of confidential personnel information far outweighs Plaintiff's right to violate such rules under the facts presented. This is particularly true considering the fact that Plaintiff could still have commented on Mr. Regan's suitability for the position of Public Safety Director to whomever she wished without adding the DAR. Moreover, the evidence introduced at the hearing will show that Plaintiff had ample time to speak with the requisite chain of command in the Police Bureau to the extent she believed the confidential materials had to be released in conjunction with her opinions

pertaining to Mr. Regan. Importantly, “it is not necessary for [an] agency to prove that morale and efficiency have actually been adversely affected by the publication; it is sufficient that such damage to morale and efficiency is reasonably to be apprehended. If the perception of potential harm or damage is present, that fact may outweigh any First Amendment rights involved.” *Jurgensen v. Fairfax County et al.*, 745 F.2d 868, 879 (4th Cir. 1984) (citing *Connick v. Myers, supra*, 461 U.S. 138 (1983)).

Because Plaintiff did not engage in protected speech, she has failed to satisfy even the first element of a First Amendment retaliation claim.²

2. *Pennsylvania Whistleblower Law Claim.*

Plaintiff’s next claim is that she is likely to prevail on the merits of her claim under the Pennsylvania Whistleblower Law, 43 P.S. §§ 1421 *et seq.*, which provides protection from adverse employment actions to employees who report suspected waste or wrongdoing in good faith.

In order to state a prima facie case under the Pennsylvania Whistleblower Law, a plaintiff must first show, by a preponderance of evidence, that she reported an instance of wrongdoing or waste, as defined by the law, to her employer or an appropriate authority prior to an alleged reprisal. 43 P.S. § 1424(b). If a plaintiff is able to satisfy this requirement, the burden then shifts to the employer to establish, also by a preponderance of the evidence, that the action taken by the employee occurred “for separate and

² A public employee’s retaliation claim for having engaged in free speech is a three-part test: “First, plaintiff must establish the activity in question was protected. For this purpose, the speech must involve a matter of public concern. Once this threshold is met, plaintiff must demonstrate his interest in the speech outweighs the state’s countervailing interest as an employer in promoting the efficiency of the public services it provides through its employees. These determinations are questions of law for the court. If these criteria are established, plaintiff must then show the protected activity was a substantial or motivating factor in the alleged retaliatory action. Lastly, the public employer can rebut the claim by demonstrating “it would have reached the same decision...even in the absence of the protected conduct.” *Baldassare v. The State of New Jersey et al.*, 250 F.3d 188, 195 (3rd Cir. 2001) (internal citations omitted.)

legitimate reasons, which are not merely pretextual.” 43 P.S. § 1424(c). If the employer offers evidence of a legitimate reason for the adverse action, the burden shifts back to the plaintiff to demonstrate the reason was pretextual. *Watson v. City of Philadelphia*, 638 A.2d 489, 492 (Pa. Commw. 1994).

1. Plaintiff cannot establish her burden under the Pennsylvania Whistleblower Act.

Although Defendants expect that evidence will be presented at the evidentiary hearing to challenge that Plaintiff’s report was made in “good faith”, even assuming it was, it should not be not automatically presumed that Plaintiff can meet her initial burden because she does not put forth allegations of either “wrongdoing” or “waste” as defined under the Pennsylvania Whistleblower Law. The Law carefully defines these words as follows:

“Wrongdoing.” A violation which is not of a merely technical or minimal nature of a Federal or State statute or regulation, of a political subdivision ordinance or regulation or of a code of conduct or ethics designed to protect the interest of the public or the employer.

“Waste.” An employer’s conduct or omissions which result in substantial abuse, misuse, destruction or loss of funds or resources belonging to or derived from Commonwealth or political subdivision sources.

43 P.S. § 1422.

In her Verified Complaint, Plaintiff carefully mentions the words “wrongdoing,” “misconduct” and “wrongful conduct” relating to Mr. Regan and Officer Rende (*See, e.g.,* Plaintiff’s Verified Complaint, at ¶¶ 17, 26, 28 34, 36) but does not cite to a specific Federal or state statute, or to a local ordinance or regulation she contends has been violated. In her Legal Memorandum in Support of her Motion for a TRO or Preliminary Injunction, she contends that Mr. Regan “violated his ethical obligation as a City

employee not to engage in self-dealing.” (See Plaintiff’s Legal Memorandum in Support of TRO or Preliminary Injunction at pp. 13-14). She further alleges that if her allegations are true, Mr. Regan would have committed conduct that “would constitute a grave dereliction of that official’s ethical obligations and possibly....a pattern of corruption.” (See Plaintiff’s Legal Memorandum in Support of TRO or Preliminary Injunction, at p. 14. However, she again does not identify a particular provision of the City’s Code of Conduct, City Code Chapter 197 or even the State Ethics Act, 65 Pa.C.S. §§1102 *et seq.*, which, incidentally, the State Ethics Commission is charged to enforce.³

Most likely, Plaintiff fails to identify a particular ordinance or regulation in her Verified Complaint because she did not identify conduct in her e-mails that would actually constitute a violation of the City’s Code of Conduct or other City ordinance or regulation. Most of the provisions in the City Code deal with private financial gain for one’s self or one’s “direct family” or improperly exerting influence with respect to property or a business with which the employee or a direct family member is associated. *See, e.g.* Sections 197.03, 197.04, 197.05. Notably, Officer Rende is not part of Mr. Regan’s direct family. There is a general provision, Section 197.04)(d), that prohibits a city employee from using any facilities, property, staff or information obtained in the course of employment *for personal use* other than would be generally available to the public at large. Plaintiff’s Verified Complaint, however, does not allege with any specificity that Mr. Regan improperly used City information for his alleged improper activities. In fact, a reference to an unwritten code of conduct does not satisfy Plaintiff’s burden under the Pennsylvania Whistleblower Act. *See Surmacz v. Department of Public*

³ The statute or regulation must also be one that the employer is charged with enforcing for the public good. *See Gray v. Hafer*, 651 A.2d 221, 224 (Pa. Commw. 1994), *aff’d per curiam*, 669 A.2d 335 (Pa. 1995).

Welfare, 612 A.2d 566 (Pa. Commw. 1992) (dismissing complaint under the Pennsylvania Whistleblower Act for failure to allege a “wrongdoing” as defined by the law.)

Nor does Plaintiff specifically allege “waste” as defined by the Act. Although Plaintiff attempts to expand the scope of her allegations against Mr. Regan in her Verified Complaint to accusations of threatening a fellow commander with adverse personnel actions if a criminal statute was enforced against a political supporter of the administration (*See* Plaintiff’s Verified Complaint, p.4, ¶14), it is quite clear from reading the e-mails at issue that they were limited to concerns regarding Mr. Regan’s qualifications vis a vis his connection to Officer Rende. Plaintiff cannot now “add information” to her original good faith report to bolster her allegations.

At any rate, Plaintiff was demoted for releasing confidential information in connection with her e-mails. The focus of her allegations against Dennis Regan in those e-mails is limited to allegations of a potential abuse of power, perhaps, but there is no allegation of abuse or misuse of City funds or resources on the part of Mr. Regan. Nor does she allege such “waste” in her Verified Complaint. Rather, she alleges concerns over Mr. Regan’s “final decision-making authority over police officer discipline...” (*See* Plaintiff’s Legal Memorandum in Support of TRO or Preliminary Injunction, at p.4, ¶¶ 11, 14.)

- 2. Plaintiff’s demotion was made because she released confidential information outside the permitted scope of Police Bureau regulations—not because she opposed the appointment of Dennis Regan.*

Additionally, even if this Honorable Court is inclined to find that Plaintiff has met her initial burden, it is respectfully submitted that the evidence to be proffered at the

evidentiary hearing will cement the fact that Plaintiff was solely demoted for violating important rules and regulations of the Police Bureau dealing with the dissemination of confidential documents. In Chief Harper's initial notification of her demotion on November 28, 2006, Chief Harper cites to no less than eight separate rules and regulations that Plaintiff violated by releasing confidential information. In fact, Chief Harper's final demotion memorandum, written on December 6, 2006, specifically reiterates that Plaintiff did not deny releasing the confidential employee information in contravention of numerous Bureau rules and regulations, some of which Plaintiff herself authored. Chief Harper further states that Plaintiff had ample opportunity to discuss the potential release of confidential information with the then Acting Chief of Police before doing so. Plaintiff had every right to criticize Dennis Regan's pending appointment to whomever she wanted. She just did not have the right to include the confidential personnel information from PARS and OMS systems when doing so.

Interestingly, Plaintiff alleges in her Verified Complaint that no other commander or police officer has been suspended for "allegedly disclosing confidential information." (See Plaintiff's Verified Complaint, at p. 7, ¶ 26). As evidence in the hearing will show, the reason no other commanders have been suspended pending an investigation into such circumstances surrounding a release of confidential information, let alone have been demoted, is because *no other commanders* or similarly-ranked superior officers have ever intentionally breached departmental confidentiality and security in such a fashion.

Plaintiff directs this Court's attention to the case of *Dennison v. Pennsylvania Department of Corrections, supra*, for the proposition that "the Whistleblower Law protects employees who release confidential information as part of their reports of

wrongdoing so long as they disclose the information to appropriate governmental authorities.” (See Plaintiff’s Legal Memorandum in Support of TRO or Preliminary Injunction , at p. 14, n.54). In *Dennison*, a state corrections employee released confidential inmate psychological reports to a prison reform advocate, a local NAACP official, and the news media to reveal his concerns about racial discrimination in parole violations at the prison. He was then fired for releasing the confidential information. In undertaking a first amendment analysis regarding the employee’s free speech rights, the *Dennison Court* found against the employee. Although agreeing that the issue of racial discrimination in parole hearings was a matter of public concern, the district court found that the prison’s interest in efficient operation of the organization outweighed the employee’s right to distribute confidential psychological records to non-authorized persons. *Id.* at 398. While the *Dennison Court* does note that the employee had an approved avenue to report wrongdoing to “appropriate authorities” pursuant to the Pennsylvania Whistleblower Law, the court also specifically noted that the defendants in that case did not challenge the employee’s *prima facie* case or make any showing that retaliation for the report was not a motive for the firing and, as such, the employee’s Pennsylvania Whistleblower claims survived a summary judgment motion.⁴ *Id.* at 406-07. Moreover, there is no holding that confidential information of every kind is automatically appropriate to be included in a whistleblower’s report even to “appropriate authorities.”⁵ Instantly, City Defendants challenge both the Plaintiff’s *prima facie* case

⁴ The court dismissed the employee’s whistleblower claims insofar as they related to the release of the records to private individuals. *Dennison*, 267 F.Supp. 2d 387, at 407.

⁵ For example, within the City’s Police Bureau, even the Deputy Chief of Police would have to get permission from the Chief of Police to review a police officer’s confidential personal information within, for example, the PARS system. Pittsburgh Police General Order 22-2.

and will be able to demonstrate with a preponderance of the evidence that the motive for demotion was purely based on the violation of an important departmental policy regarding the release of confidential information.

B. PLAINTIFF HAS NOT DEMONSTRATED IRREPARABLE INJURY OCCASIONED BY THE DENIAL OF RELIEF.

The City recognizes that there is a presumption of irreparable harm where there is a governmental deprivation of First Amendment rights. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citations omitted) ("the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). This presumption, though, necessarily relies on the premise that there has been such a deprivation of First Amendment rights.

That simply is not the case here, as Plaintiff has neither established that her speech was protected under the First Amendment or that she will be successful with her whistleblower claim.

Moreover, Plaintiff is already scheduled to have a hearing before the Civil Service Commission next week during which time she will have the opportunity to administratively appeal her demotion.

Finally, neither Plaintiff's nor any other City police officers' speech is chilled with respect to public discourse via the Plaintiff's demotion or via the prohibition on the release of confidential personnel information. These members of the force may speak on matters of public concern. They just cannot release protected confidential information when doing so.

C. THE GRANTING OF PRELIMINARY RELIEF WILL RESULT IN EVEN GREATER HARM TO THE CITY AND WILL NOT BE IN THE PUBLIC'S INTEREST.

Combining the last two prongs of the test, it is respectfully argued that the City will indeed potentially suffer harm from being required to reinstate Plaintiff as a commander at this juncture. The nature of her violation of Bureau policies and procedures is serious and repositioning her as a commander will diminish confidence in the Bureau's right to enforce its rules and regulations as well as Civil Service Commission's ability to handle these matters.

III. CONCLUSION

For the foregoing reasons, the City Defendants respectfully request that the Plaintiff's Motion for a TRO/Preliminary Injunction be denied.

Respectfully submitted,

/s/ George R. Specter
Acting City Solicitor
City of Pittsburgh
Pa. I.D. No. 01017

/s/ Michael Kennedy
Assistant City Solicitor
City of Pittsburgh
Pa. I.D. No. 52780

/s/ Yvonne S. Schlosberg
Assistant City Solicitor
City of Pittsburgh
Pa. I.D. No. 74582

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION was served by electronic and hand delivery at the Evidentiary Hearing for the Preliminary Injunction this 4th day of January, 2007 upon the following:

The Honorable Donetta W. Ambrose
United States District Court, Western District
U.S. Post Office and Courthouse
Seventh and Grant Streets, Room 649
Pittsburgh, PA 15230

COUNSEL FOR PLAINTIFF:

Timothy O'Brien, Esquire
1705 Allegheny Building
Pittsburgh, PA 15219

Jere Krakoff, Esquire
Stember Feinstein
1705 Allegheny Building
Pittsburgh, PA 15219

Witold Walczak
Sara J. Rose
American Civil Liberties Union
313 Atwood Street
Pittsburgh, PA 15213

Yvonne Schlosberg
Assistant City Solicitor