

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CATHERINE McNEILLY,

Plaintiff,

vs.

Civil Action

No. 06-1685

CITY OF PITTSBURGH, et al.,

Defendants.

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Transcript of Court's order in the preliminary injunction hearing on Wednesday, January 10, 2007, United States District Court, Pittsburgh, Pennsylvania, before the Honorable Donetta Ambrose, U.S. District Court Chief Judge.

APPEARANCES:

For the Plaintiff:

TIMOTHY P. O'BRIEN ESQ.  
WITOLD J. WALCZAK, ESQ.  
JERE KRAKOFF, ESQ.  
SARA J. ROSE, ESQ.

For the Defendants:

MICHAEL KENNEDY, Esq.

Court Reporter:

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## P R O C E E D I N G S

\* \* \* \* \*

(In open court.)

THE COURT: Sorry it took me so long.

Okay. As I said at the very beginning, this is the case of Catherine McNeilly versus the City of Pittsburgh and Nathan Harper and Luke Ravenstahl.

Why are we here? We are here because the Plaintiff, Catherine McNeilly, on October 9th, 2006, sent e-mails to City Council, the Fire and Medic Bureau chiefs, she blind copied the same to her husband and her brother; and in these e-mails and attachment she questioned the appointment of Dennis Regan as Public Safety Director and Dennis Regan's interference with her attempts to discipline a police officer under her command, who was the brother of Regan's housemate.

The Plaintiff attached to her e-mails a disciplinary action report she had filed on this police officer which contained personnel information. She was subsequently demoted for having sent the e-mail -- the attached disciplinary action report to the e-mail.

Miss McNeilly has filed this request for a preliminary injunction to enjoin the Defendants from enforcing her demotion, and I must weigh four factors when deciding whether or not to grant a preliminary injunction: Her likelihood of success on the merits, whether she will suffer

1 irreparable harm by the denial of the preliminary injunction,  
2 whether granting the preliminary injunction will result in  
3 even greater harm to the Defendants, and whether granting the  
4 injunction is in the public interest; and I'm going to begin  
5 with the likelihood of the success on the merits.

6           The Plaintiff has two claims in this case, a  
7 First Amendment claim and a claim under the Pennsylvania  
8 Whistleblower Act.

9           As to the Plaintiff's First Amendment claim, the  
10 Plaintiff is a public citizen, a public employee whose speech  
11 is protected by the First Amendment if, one, she spoke as a  
12 citizen; two, on a matter of public concern; and, three, the  
13 city did not have an adequate justification for demoting her.

14           Initially I make a finding that Plaintiff's speech  
15 at issue here was made by her as a citizen. That is because  
16 the e-mail and attached DAR were not authorized by the  
17 Defendants and were not official communications prepared and  
18 sent by Plaintiff as official Police Department  
19 communications. They were not sent pursuant to her duties as  
20 a commander in the Police Department.

21           The e-mail and attached disciplinary action report  
22 contained her personal views, opinions, concerns and evidence  
23 about the nomination of Dennis Regan to the position of Public  
24 Safety Director, and Plaintiff composed and sent the e-mail  
25 and attached DAR as a citizen.

1           Second, I find that Plaintiff's speech touched on a  
2 matter of public concern. Plaintiff's e-mail and the attached  
3 disciplinary action report were sent to inform city officials  
4 of her belief that the nominee for the position of Public  
5 Safety Director had improperly interfered with her attempt to  
6 discipline a police officer, who was the brother of the woman  
7 with whom Regan lived, and her concerns that Regan because of  
8 his improper interference was a poor candidate for the  
9 high-ranking position of Public Safety Director, which  
10 position would give him supervisory authority to control  
11 police officers and the entire Police Department, among other  
12 things. This was clearly a matter of public concern.

13           Of course I must also consider whether Plaintiff did  
14 this in good faith. Was her belief a good faith belief?  
15 Well, I just want to review what Plaintiff knew that led her  
16 to this belief.

17           She knew, for one thing, that Regan had interfered  
18 with Commander Brackney's attempt to cite Duke's Tires, and  
19 that Regan had told Commander Brackney that Duke's Tires had  
20 friends in the Mayor's office, and that Commander Brackney  
21 would be walking a beat if she did not cooperate.

22           She knew that Regan had interfered in the discipline  
23 of another police officer who, through the chain of command,  
24 received termination that was later overturned.

25           She knew that Regan had interfered in the Police

1 Department by ordering Chief Costa to promote Rende to  
2 detective even when Costa knew Rende did not have a record  
3 meriting promotion to detective; specifically, that Rende had  
4 an extensive disciplinary history and had, in fact, once been  
5 fired and then reinstated.

6 After examining Rende's file, she knew and found  
7 multiple instances where Rende had abused the Police  
8 Department's sick leave policy to an extent that far exceeded  
9 any other instance she had seen in her opinion.

10 She consulted the Assistant City Solicitor for  
11 assistance in preparing a disciplinary action report. He told  
12 her about the 120-day rule and subsequently told her that what  
13 she described to him as her approach sounded like a good  
14 approach to him.

15 She filed the DAR in June of 2006 and heard nothing  
16 for several weeks. The solicitor that she spoke with never  
17 told her he was recommending withdrawal of the disciplinary  
18 action report.

19 On August 2<sup>nd</sup>, 2006, when Plaintiff inquired of  
20 the Assistant City Solicitor of the status of the disciplinary  
21 action report, he never responded to her.

22 On August 6<sup>th</sup>, 2006, when Plaintiff inquired about  
23 the status of the disciplinary action report, her supervisor  
24 said it had been forwarded through the chain of command.

25 On August 8th, 2006, she sent the e-mail she had

1 received from her supervisor to the Assistant Chief.

2           On August 9th, 2006, while Plaintiff was at a  
3 command staff meeting, Regan came to her zone office looking  
4 for her.

5           On August 10<sup>th</sup>, 2006, the Plaintiff,  
6 Miss McNeilly, found that the DAR had been withdrawn.

7           Then on September 9<sup>th</sup>, 2006, when Plaintiff made  
8 it abundantly clear to the command staff that she thought  
9 Regan had something to do with pulling the disciplinary action  
10 report, Plaintiff was told by the Chief that she just didn't  
11 understand everything that was at play.

12           No one told Plaintiff at that time that Regan had  
13 nothing to do with Rende's disciplinary action report.  
14 Rather, she was told by the Chief that she just didn't  
15 understand; and, because of that, she left with the inference  
16 that her PowerPoint -- that what her PowerPoint had suggested  
17 was correct.

18           Then on October 3<sup>rd</sup>, 2006, Plaintiff read the  
19 newspaper and read that the Mayor had nominated Regan to be  
20 the Public Safety Director.

21           Knowing all of the above, I find that Plaintiff had  
22 a good faith belief that Regan had improperly interfered in  
23 Police Department matters; and that because of his nomination  
24 to be Public Safety Director, Plaintiff's concerns were also a  
25 matter of public concern. This is especially so when combined

1 with the fact that in the 1990s allegations of interference in  
2 the Police Department discipline led to a consent decree  
3 between the United States Department of Justice and the city.

4           So knowing all of this, Miss McNeilly sent an e-mail  
5 to the Mayor on October 6<sup>th</sup>, 2006, expressing her concern  
6 about Regan's nomination as Public Safety Director. Hearing  
7 nothing for three days and with Regan's appointment imminent,  
8 she sent an e-mail on October 9<sup>th</sup>, 2006, to City Council,  
9 Fire and Medic Bureau chiefs, her chain of command, and blank  
10 copied the same to her brother and husband.

11           Because her objection to Regan's appointment was  
12 largely concerned with his interference in matters involving  
13 Police Officer Rende, and because Plaintiff felt it was  
14 imperative to grab Council's attention, especially in light of  
15 the lack of response from the Mayor, Plaintiff attached the  
16 disciplinary action report she had filed on Rende.

17           All of the above supports a good faith belief on  
18 Plaintiff's part that Regan was improperly interfering in  
19 Police Department matters.

20           Thirdly, having found that Plaintiff's speech was  
21 that of a citizen on a matter of public concern, her demotion  
22 was unconstitutional unless the city had adequate  
23 justification for the demotion.

24           This is a balancing test. On one side of the scale  
25 I put the city's interests. Clearly, the city has an interest

1 in maintaining the chain of command in the Police Department.  
2 It also has an interest in maintaining the confidentiality of  
3 its employees' records. The city also has an interest in  
4 insuring that police officers follow rules and regulations so  
5 that there is order within the Police Department, and that the  
6 integrity and efficiency of the police function be preserved  
7 without disruption.

8           However, in weighing these interests, and because  
9 the defense has been very adamant about Plaintiff's demotion  
10 being imposed for disclosing the disciplinary action report,  
11 and not for the e-mails, I examine what was in both.

12           In the e-mails plaintiff summarizes the very  
13 information contained in the disciplinary action report and,  
14 in fact, includes highly sensitive information about Rende's  
15 record which was not included in the disciplinary action  
16 report.

17           The disciplinary action report also contains  
18 specific dates of Rende calling off sick and working secondary  
19 details before and after the sick leave, the dates and places  
20 of his secondary employment and the statistic of his, Rende's,  
21 arrests and traffic stops, all of which, according to  
22 Donaldson, are not inherently confidential and, according to  
23 Plaintiff's expert Rothlein, are public records in other  
24 jurisdictions, specifically Florida.

25           The Defendants have not identified any statutory or

1 constitutional basis for keeping this information  
2 confidential, and it appears that it is deemed confidential  
3 solely because of the working agreement with the Fraternal  
4 Order of Police. This is a contractual agreement which has  
5 less significance than if it were grounded in a statute or in  
6 the Constitution for weighing purposes.

7 In addition, Donaldson testified that there was no  
8 disruption in the integrity and efficiency of the Police  
9 Department as a result of the Plaintiff's actions.

10 As to the confidentiality matters, Plaintiff made  
11 every effort to keep the e-mail and attached DAR confidential.  
12 Indeed, she marked the e-mail confidential and disclosed the  
13 information only to those individuals who themselves had a  
14 duty to keep it confidential. It was someone to whom  
15 Plaintiff disclosed the information, not the Plaintiff  
16 herself, who revealed the information to the public.

17 Now, on the other side of the scale I put  
18 Plaintiff's interests; and they are her concerns that Regan, a  
19 man whom she believed in good faith had been improperly  
20 interfering in police matters, was going to be appointed  
21 Public Safety Director.

22 Plaintiff wanted City Council to know this because  
23 they were going to vote on the appointment. Plaintiff had  
24 attempted to express her concerns through her chain of  
25 command, but the chain of command had been ineffective in

1 addressing her concerns. Plaintiff was concerned that the  
2 improper influence from the Mayor's office violated the  
3 consent decree; and, finally, she was concerned about the  
4 public safety and what effect Regan's appointment would have  
5 on the public safety.

6           As I said earlier, this is a balancing test.  
7 Plaintiff's allegations and evidence of wrongdoing and  
8 governmental misconduct and concerns that wrongdoers would be  
9 placed in high government positions outweigh the city's  
10 concerns the Plaintiff's actions would disrupt the Police  
11 Department, which they apparently did not; and that the  
12 confidentiality of a disciplinary report was compromised,  
13 especially in light of the fact that the e-mail which the  
14 Defendants are not complaining about contained the same  
15 information as the disciplinary action report, which the  
16 Defendants are complaining about. Therefore, the Plaintiff is  
17 likely to succeed on the merits of her First Amendment claim.

18           She also has a claim under the Pennsylvania  
19 Whistleblower Law which prohibits public employers from  
20 retaliating against an employee who makes a good faith report  
21 of wrongdoing to appropriate authorities. For the reasons  
22 already stated, I find that the Plaintiff made a good faith  
23 report of wrongdoing.

24           I also find that Exhibit 24 clearly establishes a  
25 causal connection between her good faith report and her

1 demotion. Therefore, the Plaintiff is likely to succeed on  
2 the merits per the Pennsylvania Whistleblower Law claim.

3           The second consideration for a determination of  
4 whether or not to issue a preliminary injunction is whether or  
5 not Plaintiff will suffer irreparable harm if the injunction  
6 is not issued. The law is clear. The loss of First Amendment  
7 freedoms even for the smallest amount of time constitutes  
8 irreparable harm.

9           But I must also consider whether or not the  
10 Defendants will suffer irreparable harm. There has been no  
11 evidence that the Defendants will suffer such harm if the  
12 Plaintiff's demotion is postponed until this lawsuit is  
13 revealed. Donaldson tells us that everything in the Police  
14 Department is proceeding swimmingly.

15           Furthermore, let me make something very clear.  
16 Contrary to how some may perceive this case, this case is not  
17 about corruption in the Police Department. It is about  
18 allegations of wrongdoing and improper and undue influence by  
19 officials within the Mayor's office in Police Department  
20 matters.

21           Finally, I must consider whether the public interest  
22 will be served by granting the injunction. The public  
23 interest is always served by disclosure of wrongdoing and  
24 undue and/or inappropriate influence by public officials in  
25 Police Department matters. The chilling effect of discipline

1 and demotion to a police officer who makes a good faith report  
2 of what she believes in good faith to be wrongdoing and  
3 inappropriate influence in Government never serves the public  
4 interest.

5           Therefore, a preliminary injunction is issued  
6 enjoining Defendants, their officers, employees and agents  
7 from enforcing the disciplinary action imposed on the  
8 Plaintiff, Catherine McNeilly, on November 28<sup>th</sup>, 2006, and  
9 December 6<sup>th</sup>, 2006.

10           That's it.

11           MR. O'BRIEN: Thank you, Your Honor.

12           (Whereupon, at four o'clock p.m., court was  
13 adjourned.)

14                           C E R T I F I C A T E

15           I, Shirley Ann Hall, certify that the foregoing  
16 is a correct transcript from the record of proceedings in the  
17 above-titled matter.

18   s/Shirley Ann Hall  
19   Shirley Ann Hall, RDR, CRR  
  Official Reporter

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