UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(West Palm Beach Division)

Case No. 9:22-cv-81857-DMM

DIANA FEDDERMAN,

Plaintiff,

vs.

PALM BEACH COUNTY SCHOOL DISTRICT, a Florida political subdivision, and MICHAEL J. BURKE, individually,

Defendants.
_____/

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF, WITH INCORPORATED MEMORANDUM OF LAW

COME NOW, the Defendants, PALM BEACH COUNTY SCHOOL DISTRICT ("SCHOOL BOARD") and MICHAEL J. BURKE, by and through the undersigned attorney, file this Response in Opposition to Plaintiff's Motion for Preliminary and Permanent Injunction ("the "Motion) pursuant to Fed. R. Civ. P. 65, Local Rule 7.1, and states as follows:

INTRODUCTION

Plaintiff asks this Court to grant her request to restore her to her former position as an Assistant Superintendent of Teaching and Learning. This injunctive relief is unnecessary as a matter of fact and is unwarranted as a matter of law. Therefore, the Motion should be denied.

1. On November 29, 2022, Plaintiff filed a complaint alleging a violation of her First Amendment rights seeking injunctive relief and damages pursuant to 42 U.S.C. § 1983.
2. On November 30, 2022, the Plaintiff filed the Motion. [D.E. 6].
3. For the reasons that follow, the Court should deny the Motion because Plaintiff's First Amendment Right to Freedom of Speech has not been restricted and she was not punished for her speech. The Court is referred to the memorandum in support of this response that follows. Furthermore, the School Board attaches certain documents to this response, including Plaintiff's Twitter history in support of this response.

FACTUAL BACKGROUND

1. On June 15, 2017, Plaintiff became the Assistant Superintendent of Teaching and Learning.

2. Plaintiff alleges that in early January 2020[1] she tweeted "Republicans are decimating public education. It's time to Act. Vote Local."[2]
3. On January 12, 2022, the School Board received a phone call from a constituent stating she "would like to speak with someone regarding the radical tweets she saw that went out from an Assistant Superintendent."[3]
4. On January 12, 2022, Mr. Sean Fahey was asked to provide legal guidance concerning the complained of tweet.
5. Mr. Fahey responded to this request to Dr. Glenda Sheffield, Chief Academic Officer, and Vicki Evans-Pare, Director of Professional Standards, on Friday, January 14, 2022 at 4:39 pm. This reply did not include Michael J. Burke.[4]
6. On January 14, 2022, at the same time that Mr. Fahey was responding to Dr. Sheffield and Ms. Evans-Pare, Mr. Burke was speaking with Plaintiff about the tweet and the impact it was having during his time at the Capital.
7. On June 15, 2022, Plaintiff was transferred to the position of Director of Supplemental Educational Services in the Department of Equity & Wellness effective July 1, 2022.
8. Plaintiff's salary has not been reduced as a result of the transfer to Director of Supplemental Education.
9. On October 12, 2022, the School Board voted on the Superintendent's restructured organization chart which eliminated all remaining Assistant Superintendent positions.[5]
10. Plaintiff's annual contract as Assistant Superintendent of Teaching and Learning expired on June 30, 2022.

PRELIMINRAY INJUNCTION STANDARD

"The purpose of the preliminary injunction is to preserve the positions of the parties as best we can until a trial on the merits may be held." *Bloedorn v. Grube*, 631 F.3d 1218, 1229 (11th Cir. 2011) (Citing *Univ. of Tex. v. Camenisch,* 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). Consequently, "[a] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establishes the 'burden of persuasion' as to the four requisites." *All Care Nursing Serv. Inc. v. Bethesda Memorial Hosp.,* 887 F.2d 1535, 1537 (11th Cir. 1989) (Citing *Jefferson County,* 720 F.2d, at 1519 (quoting *Canal Authority v. Callaway,* 489 F.2d 567, 572 (5th Cir.1974)). (*See also Benisek v. Lamone,* 138 S.Ct. 1942, 1943 (2018) ("a preliminary injunction is an 'extraordinary remedy never awarded as of right."). "The burden of persuasion in all of the four requirements is at all times upon the plaintiff." *Snook v. Trust Co. of Georgia Bank of Savannah, N.A.*, 909 F.2d 480, 483 (11th Cir.1990). The requisites

[1] According to the Complaint filed at D.E. 1 ¶7, the tweet occurred "in early January 2022"
[2] Ex. 1. Plaintiff's January 12, 2022 tweet.
[3] Ex. 2. Constituent Complaint
[4] Ex. 3. Mr. Fahey's email to Dr. Glenda Sheffield and Vicki Evans-Pare – redacted to protect Attorney Work Product and Attorney client privileged communications.
[5] Ex. 4. Board approved Organizational Chart effective October 12, 2022.

for obtaining a preliminary injunction are well settled. The Plaintiff must persuade the Court of: (1) a substantial likelihood of success on the merits of her claim; (2) irreparable injury ***will be*** suffered unless the injunction is issued; (3) the ***threatened injury*** to her outweighs whatever damage the proposed injunction may cause to the School Board; and (4) if issued, the injunction would not be adverse to the public interest. *See McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998) (citing *All Care Nursing Serv. Inc.*., 887 F.2d 1535, 1537 (11th Cir. 1989)) (***emphasis added)***. Accordingly, we address the matter of mootness of the request, Plaintiff's likelihood of success on the merits, irreparable injury, and threatened injury.

PLAINTIFF'S CLAIM IS MOOT

Plaintiff cannot show that she will suffer immediate harm if relief is delayed until the case is resolved on the merits. As such, her claim for preliminary injunctive relief should be denied. *Alabama v. U.S. Army Corps of Eng'rs,* 424 F.3d 1117, 1133-34 (11th Cir. 2005). ("This [c]ourt has previously explained that because the purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held, the harm considered by the district court is necessarily confined to that which *might occur in the interval between ruling on the preliminary injunction and trial on the merits.)* (*emphasis added.* quotation marks and citations omitted). *See also Reich v. Occupational Safety and Health Review Com'n,* 102 F.3d 1200 (11th Cir. 1997) ("… injunctive relief … addresses only ongoing or future violations …). The School Board carries a "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again …" *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173 (11th Cir. 2007). However, "government actors receive the benefit of a rebuttable presumption that the offending behavior will not recur." *Id.* (citing *Troiano v. Supervisor of Elections in Palm Beach County, Fla.*, 382 F.3d 1276, 1283 ("courts are more apt to trust public officials than private defendants to desist from future violations.").

Here, Plaintiff has not alleged that an injury might occur in the interval between the ruling on the preliminary injunction and the trial on the merits. Plaintiff alleged that the violation occurred in June 2022 when she was reappointed to the Director of Supplemental Education. Plaintiff filed her motion for injunctive relief on November 30, 2022. Plaintiff does not allege that a violation of her right to freedom of speech occurred after she was placed in her current position. Plaintiff has not alleged that there is a threat of future harm if she is not reinstated to her position of Assistant Superintendent of Teaching and Learning. Plaintiff has not alleged that her

freedom of speech has been stifled by the transfer to Director of Supplemental Education Services.

Further, the Eleventh Circuit has held that "[a] claim for injunctive relief may become moot if: (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Siegel v. LePore*, 234 F.3d 1163, 1172–73 (11th Cir. 2000) (quoting *Reich v. Occupational Safety & Health Review Comm'n*, 102 F.3d 1200, 1201 (11th Cir.1997). "[C]ourts are more likely to find that the challenged behavior is not reasonably likely to recur where it constituted an isolated incident, was unintentional, or was at least engaged in reluctantly." *Sheely*, 505 F.3d at 1185 (11th Cir. 2007) (citing *W.T. Grant*, 345 U.S. at 632 n. 5, 73 S.Ct. 894. *See Troiano*, 382 F.3d at 1285-86 (fact that challenged behavior 'was a good-faith effort to deal with an administrative dilemma' that was 'not likely to be present in the future' supported finding of mootness). Here, Plaintiff alleges that one tweet from January 2022 led to her transfer in June 2022; however, she has failed to allege that the School Board stifled her speech after June 2022. The challenged behavior has not occurred since June 2022, is not reasonably likely to recur and the transfer, although intentional, was not related to Plaintiff's speech on Twitter. Mr. Burke reluctantly conversed with Plaintiff about the tweet and the impact it was having on the district while he was at "Palm Beach County Days" in Tallahassee, Florida. Plaintiff has not alleged that Mr. Burke spoke with her about the tweet other than the one conversation and there is no allegation that it is subject to happen again.

PLAINTIFF IS NOT ENTITLED TO A MANDATORY INJUNCTION

"A preliminary injunction is typically prohibitive in nature if it seeks to maintain the status quo by prohibiting a party from taking certain action pending resolution of the case." *FHR TB, LLC v. TB Isle Resort, LP*. 865 F.Supp.2d 1172, 1192 (S.D. Fla. 2011). "But when the injunction would force a party to act, and not simply maintain the status quo, it becomes mandatory." *Id.* The Court in *FHR TB, LLC* stated that "[a]ssuming that Plaintiffs could demonstrate likelihood of success on the merits …, their requested injunction would still clash head on with the well-established rule that personal service contracts are not specifically enforceable." *Id.* The question this Court has to answer is "whether the injunctive relief of reinstatement [is] 'just and proper.'" *N.L.R.B. v. Hartman and Tyner, Inc.*, 714 F.3d 1244 (11th Cir. 2013). "Measures of this kind are to be sparingly employed, because they act to short-circuit

the Board's administrative process, and because reinstatement of unlawfully discharged employees is an extraordinary remedy 'generally left to the administrative expertise of the Board." *Id.* (citing *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1192 (5th Cir.1975).

The Court in *Casanova v. Pre Solutions, Inc.*, 228 Fed.Appx. 837 (11th Cir. 2007) held that "it would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event upon lawful grounds." (citing *McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352, 115 S.Ct. 879, 886, 130 L.Ed.2d 852 (1995). The School Board ultimately eliminated all Assistant Superintendent positions as of October 12, 2022. Therefore, the School Board is unable to reinstate Plaintiff to a position that no longer exists. "[O]rdering the [School Board] to reinstate Plaintiff would frustrate 'the lawful prerogatives of the employer in the usual course of its business." *Casanova,* 28 Fed.Appx. 837 (11th Cir. 2007). Moreover, the decision to transfer Plaintiff out of her position as Assistant Superintendent of Teaching and Learning would have happened and did happen on lawful grounds absent the tweet.

SUCCESS ON THE MERITS

Motions for preliminary injunction "are often, by necessity, litigated on an undeveloped record." *All Care Nursing Serv. Inc..,* 887 F.2d 1535, 1537 (11th Cir. 1989)) "An undeveloped record not only makes it harder for a plaintiff to meet h[er] burden of proof, it also cautions against an appellate court setting aside the district court's exercise of its discretion." *Id.* "Section 1983 and Title VII claims 'generally have the same elements of proof and use the same analytical framework' and are analyzed together." *Jones v. Gadsden County Schools,* 758 Fed. Appx. 722 (11th Cir. 2018) (quoting *Pennington v. City of Huntsville,* 261 F.3d 1262, 1265 (11th Cir. 2001). "To state a First Amendment claim for retaliation, an individual must allege that [s]he was penalized for exercising the right to free speech." *Farrow v. West,* 320 F.3d 1235, 1248 (11th Cir. 2003). "[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech." *Bell v. Sheriff of Broward County,* 6 F.4th 1374 (2021). The Court held that "a public employer retaliates [in violation of the First Amendment] when [it] takes an adverse employment action that is likely to chill the exercise of constitutionally protected speech." *Id.* (citing *Stavropoulos v. Firestone,* 361 F.3d 610, 618 (11th Cir. 2004), *abrogated as to Title VII standard by Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). The court

recognizes that "the state has an interest as an employer in regulating the speech of its employees and attempts to balance the competing interests of the public employee and the state." *Stanley v. City of Dalton, Ga.*, 219 F.3d 1280 (11th Cir. 2000). *See Rankin v. McPherson,* 483 U.S. 378, 383, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987); *Bryson v. City of Waycross,* 888 F.2d 1562, 1565 (11th Cir. 1989).

The Court in *Stanley* citing to *Bryson* states that "where a public employee alleges wrongful termination because of the exercise of free speech, the employee must show by a preponderance of the evidence that:

> (1) the employee's speech is on a matter of public concern; (2) the employee's first amendment interest in engaging in the speech outweighs the employer's interest in prohibiting the speech in order to promote the efficiency of the public services it performs through its employees; and (3) the employee's speech played a "substantial part" in the employer's decision to demote or discharge the employee. If the employee succeeds in showing the preceding factors, the employer must prove by a preponderance of the evidence that (4) "it would have reached the same decision ... even in the absence of the protected conduct."
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> 219 F.3d 1280, 1288 (11th Cir. 2000). (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)).

The School Board agrees that the Plaintiff's speech was on a matter of public concern; however, that is where the agreement ends. Plaintiff cannot establish that her speech outweighed the School Board's interest in communicating to her how the speech was impacting district operations, even though she agrees that the School Board did not instruct her to remove her tweet. The United States Supreme Court stated in *Garcetti v. Ceballos,* 547 U.S. 410 (2006) that once it is determined that Plaintiff spoke (tweeted) on a matter of public concern, this Court must look to "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." (citing *Pickering,* 391 U.S., at 568, 88 S.Ct. 1731). The *Garcetti* court determined that "[t]his consideration reflects the importance of the relationship between the speaker's expressions and employment. 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." *Id.* "Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair

the proper performance of governmental functions." *Id.* at 419. Plaintiff's Twitter account stated her then position as "Assistant Superintendent of Teaching and Learning for Palm Beach County" and although it also attempted to disclaim that "Tweets are my own. Personal account.", Mr. Burke informed her that the public was conflating her personal and professional personas. [D.E. 6]. Unbeknownst to Mr. Burke, who was in Tallahassee, a constituent was complaining to the School Board about the same tweet.[6]

Further, Plaintiff cannot show that her speech was a "substantial motivating factor" in the School Board's employment decision. While the Eleventh Circuit has not fashioned a bright line test for "substantial factor" and the Plaintiff's burden in establishing this element is "not a heavy one", this Court is to "examine the record as a whole" to ascertain whether there is sufficient evidence "for a reasonable jury to conclude that h[er] protected speech was a 'substantial' motivating factor in the decision to [reappoint her to Director of Supplemental Education]." *Stanley,* 219 F.3d at 1291 (11th Cir. 2000) *Id.* at 1291. The case is too undeveloped at this stage for the Court to "examine the record as a whole." Here, Plaintiff has not provided any evidence, only argument and allegations as to the decision-making process to reappoint Plaintiff to Director of Supplemental Education. What Plaintiff has alleged is that a tweet in early January 2022 caused her reappointment on June 15, 2022 effective July 1, 2022. This change in her title was five months after the alleged conversation concerning the tweet. Additionally, there were several intervening actions that necessitated the legitimate business decision to transfer her to the position of Director of Supplemental Education.

"One cannot permanently insulate oneself from a legitimately-motivated adverse employment action by simply becoming politically active and thereafter artificially linking all one's behavior to that allegedly protected political activity." *Brochu v. City of Riviera Beach*, 304 F.3d 1144, 1161 (11th Cir. 2002). Accordingly, Plaintiff will be unable to show that the School Board would not have reached the same decision to transfer her absent the tweet. The Eleventh Circuit has "previously pointed out that government employees who have access to their employer's confidences or who act as spokespersons for their employers, as well as those employees with some policy-making role, are in a special class of employees and might seldom prevail under the First Amendment in keeping their jobs when they conflict with their employers." *Shahar v. Bowers*, 114 F.3d 1097, 1103 (11th Cir. 1997) (citing *See Bates v. Hunt,* 3

[6] Constituent complaint regarding "radical tweet".

F.3d 374, 378 (11th Cir.1993); *Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1237–38 (11th Cir.1992). *See also Kinsey v. Salado Independent School Dist.*, 950 F.2d 988 (5th Cir.1992) (*en banc*). *See generally Pickering v. Board of Ed.*, 391 U.S. 563, 570 n. 3, 88 S.Ct. 1731, 1735 n. 3, 20 L.Ed.2d 811 (1968). "Put differently, the government employer's interest in staffing its offices with persons the employer fully trusts are given great weight when the pertinent employee helps make policy, handles confidential information or must speak or act – for others to see – on the employer's behalf." *Id.* (citing *Bates*, 3 F.3d at 378; *Sims*, 972 F.2d at 1237-38.

"When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, [the Eleventh Circuit] do[es] not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Shahar, ,* 114 F.3d at 1108 (11th Cir. 1997) (citing *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). The Court in *Shahar* held that employment in a governmental entity in a position involving the employer's confidences is the kind of employment in which "the employer's interest has been given especially great weight in the past. Furthermore, the employment … with responsibilities directly impacting on the enforcement of a [governmental entity's]: a kind of employment in which appearances and public perceptions and public confidence count a lot." 114 F.3d 1097, 1110 (11th Cir. 1997).

Therefore, based on the intervening events between the tweet and the June 15, 2022 transfer, the School Board was well within its right to make changes to its administrative personnel team. Consequently, Plaintiff will not succeed on the merits of her claim.

IRREPARABLE HARM

Plaintiff cannot establish that she is or will suffer "imminent irreparable harm". *See Siegel*, 234 F.3d at 1176. Even if the Court were to find that Plaintiff established a substantial likelihood of success on the merits, her failure to establish irreparable injury "would, standing alone, make preliminary relief improper." *All Care Nursing Serv. Inc..*, 887 F.2d 1535, 1537 (11th Cir. 1989). "[T]he asserted irreparable injury must be neither remote nor speculative, but actual and imminent." *Id.* (quotation omitted). *C.B. v. Bd. of Sch. Com'rs of Mobile Co., AL*, 261 Fed. Appx. 192, 193–94 (11th Cir. 2008). *See also Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118, 137–38, 59 S.Ct. 366, 369, 83 L.Ed. 543 (1939) ("[C]laims of injury

that are purely abstract ... do not provide the kind of particular, direct, and concrete injury that is necessary to confer standing to sue in the federal courts."). A plaintiff must point to some type of cognizable harm, whether such harm is physical, economic, reputational, contractual, or even aesthetic. The Eleventh Circuit has not gone so far as to say that "a violation of constitutional rights always constitutes irreparable harm." *Siegel,* 234 F.3d at 1177 (11th Cir. 2000). "An injury is 'irreparable if it cannot be undone through monetary remedies.'" *Scott v. Roberts,* 672 F.3d 1279, 1295 (11th Cir. 2010).

Plaintiff has not alleged that she was restricted from tweeting or denied the opportunity to exercise her First Amendment rights. Instead, Plaintiff alleged that Mr. Burke informed her that "he could not order her to take [her tweet] down, and was not asking her to do so." [D.E. 6]. This allegation shows that her speech was not restricted. Plaintiff is unable to show this as she has continued to tweet and retweet political comments on twitter.[7] "The assertion of First Amendment rights does not automatically require a finding of irreparable injury, thus entitling a plaintiff to preliminary injunction if [s]he shows a likelihood of success on the merits. Rather, … it is the 'direct penalization, as opposed to incidental inhibition, of First Amendment rights [which] constitutes irreparable injury." *Siegel,* 234 F.3d at 1178 (11th Cir. 2000) (citing *Hohe v. Casey,* 868 F.2d 69, 73 (3d Cir.1989) (quoting *Cate v. Oldham,* 707 F.2d 1176, 1189 (11th Cir. 1983). Plaintiff attempts to claim that her transfer to Director of Supplemental Education was punishment for the tweet in January. She is unable to show an injury at all, let alone one that cannot be undone through monetary remedies.

The Plaintiff relies on *Ashcroft v. American Civil Liberties Union,* 542 U.S. 656, 660 (2004) stating that the court affirmed "a district court preliminary injunction against the enforcement of the Child Online Protection Act 'because the statute likely violates the First Amendment'). This case is distinguishable from the one at hand. In *Ashcroft,* the case involved content-based speech restriction and this case does not involve a restriction of speech at all. Plaintiff also relies on *Mahanoy Area School District v. B.L. by and through Levy,* 141 S.Ct. 2038 (2021) where the court granted a preliminary injunction and Plaintiff's motion for summary judgment where the school suspended a cheerleader for her speech on social media. This case is distinguishable from the one at hand as Plaintiff was not punished for her speech and the School Board eliminated all Assistant Superintendent positions and therefore is unable to reinstate her to

[7] Composite Ex. 5 – Plaintiff's tweet history.

a position that no longer exists whereas the cheer team was still intact at the time the injunction was requested and granted.

The Plaintiff also relies on *Elrod v. Burns*, 427 U.S. 347 (1976) which is also distinguishable from the case at hand because in *Elrod* "at the time a preliminary injunction was sought in the District Court, one of the respondents were seeking to have certified prior to the dismissal of their complaint were threatened with discharge or had agreed to provide support for the Democratic Party in order to avoid discharge." Here, at the time Plaintiff sought a preliminary injunction on November 30, 2022, she was not being threatened with any employment action or threatened with a potential future violation of her First Amendment rights and the action she alleges was adverse occurred on June 15, 2022.

Because Plaintiff "must meet all four prerequisites to obtain a preliminary injunction, failure to meet even one dooms its appeal. "A delay in seeking a preliminary injunction of even a few months – though not necessarily fatal – militates against a finding of irreparable harm" *Wreal, LLC v. Amazon.com, Inc.* 840 F.3d 1244 (11th Cir. 2016). "[T]he very idea of a preliminary injunction is premised on the need for speedy and urgent action to protect a plaintiff's rights before a case can be resolved on its merits." *Id.* (citing *Univ. of Tex. V. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 1834, 68 L.Ed.2d 175 (1981); *All care Nursing Serv., Inc. v. Bethesda Mem'l Hosp., Inc.,* 887 F.2d 1535, 1539 (11th Cir. 1989). "[F]ailure to act with speed or urgency in moving for a preliminary injunction necessarily undermines a finding of irreparable harm." *Wreal, LLC*, 840 F.3d at 1248 (11th Cir. 2016) (citing *e.g.*, *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985); *Taylor v. Biglari*, 971 F.Supp.2d 847, 853 (S.D. Ind. 2013) (citing *Shaffer v. Globe Protection, Inc.*, 721 F.2d 1121, 1123 (7th Cir. 1983)); *Silber v. Barbara's Bakery, Inc.*, 950 F.Supp.2d 432, 439–40 (E.D.N.Y. 2013); *Hi–Tech Pharm., Inc. v. Herbal Health Prods., Inc.*, 311 F.Supp.2d 1353, 1357–58 (N.D. Ga. 2004); *Seiko Kabushiki Kaisha v. Swiss Watch Int'l, Inc.*, 188 F.Supp.2d 1350, 1355–56 (S.D. Fla. 2002).

Here, Plaintiff alleged that she "tweeted in January 2020 that 'Republicans are decimating public education. It's time to Act. Vote local." [D.E. 6]. She further alleges that "as soon as the academic year ended, Superintendent Burke summoned [her] to his office, told her – without any explanation – that he was abolishing her position as assistant Superintendent in the Division of Teaching and Learning …" *Id.* Additionally, she alleged that "she was listed three days later at a School Board meeting on a list of promotions (and a sole demotion – hers) for the

board to approve as being appointed Director of Supplemental Educational Services in the Department of Wellness and Equity…" *Id.* Because Plaintiff waited months after the alleged adverse employment action that violated her First Amendment Rights to request a preliminary and permanent injunction, her request should be denied. Like the court in *Wrael, LLC,* this Court should deny the injunction because Plaintiff "…pursued [her] preliminary-injunction motion with the urgency of someone out on a meandering evening stroll rather than someone in a race against time." 840 F.3d 1244, 1246 (11th Cir. 2016). Plaintiff has not offered an explanation for the delay and it cannot be discerned from the record.

THREATENED INJURY

"An injunction cannot be fashioned when the prospect of future injury is only speculative… there must be a 'likelihood of substantial and immediate irreparable harm.'" *Gagliardi v. TJCV Land Trust,* 889 F.3d 72 (11th Cir. 2018). "[A] plaintiff seeking only injunctive or declaratory relief must prove not only an injury, but also a 'real and immediate threat' of future injury in order to satisfy the injury in fact' requirement.'" *Koziara v. City of Casselberry,* 392 F.3d 1302, 1305 (11th Cir. 2004). *See Lyons,* 461 U.S. at 111, 103 S.Ct. at 1670 (explaining "[a]bsent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles"). Plaintiff has not alleged future harm. Plaintiff has alleged that the harm was the reappointment to Director of Supplemental Education. This alleged harm has already happened and is not subject to change in the future. Additionally, Plaintiff has not alleged that she has been prohibited from exercising her freedom of speech on Twitter. In fact, Plaintiff has continued to tweet since the January 2020 tweet alleged in her motion.

Like the *Koziara* court, this Court should find that even if Plaintiff had suffered an injury by virtue of being transferred to the position of Director of Supplemental Education, "she has not claimed, much less proven, another [transfer or adverse employment action] is imminent." 392 F.3d 1302 at 1306 (11th Cir. 2004). "Lacking such a showing of real and immediate threat of future injury, Plaintiff fails to satisfy the injury in fact requirement." *Id.*

PERMANENT INJUNCTION STANDARD

"When seeking a permanent injunction, the moving party must meet the same four factor test required on a motion for a [preliminary injunction] except that in seeking a permanent injunction a plaintiff must prove actual success on the merits rather than a likelihood of success

on the merits." *A Choice for Women v. Butterworth*, 54 F. Supp. 2d 1148, 1154 (S.D. Fla. 1998) (citing *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 546 n. 12, 107 S.Ct. 1396, 1404 n. 12, 94 L.Ed.2d 542 (1987); *Ingram v. Ault*, 50 F.3d 898, 900 (11th Cir. 1995); *United States v. Metropolitan Dade Cty. Fla*., 815 F.Supp. 1475, 1477 (S.D.Fla.1993). Additionally, Plaintiff has the burden to show "by a preponderance of the evidence that [the requested] form of equitable relief is necessary." *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1182 n. 10 (11th Cir. 2007).

Stated above, Plaintiff cannot establish a likelihood of success on the merits and therefore cannot establish an actual success on the merits of her claim. Therefore, the request for a permanent injunction should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 14, 2022, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day to all persons on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in another authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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THE SCHOOL BOARD OF PALM BEACH COUNTY, FLORIDA
Shawntoyia Bernard, Esq. - General Counsel
3300 Forest Hill Blvd., Suite C-331
West Palm Beach, FL 33406
Tel: 561-434-8750
Fax: 561-434-8105

By: */s/ V. Danielle Williams*
V. DANIELLE WILLIAMS, ESQ.
Florida Bar No.: 72229
danielle.williams@palmbeachschools.org
veronica.velez@palmbeachschools.org
mary.quesada@palmbeachschools.org

SERVICE LIST

The AMLONG FIRM
William R. Amlong
500 Northeast Fourth Street
Suite 101
Fort Lauderdale, Florida 33301-1154
(954) 462-1983
WRAmlong@TheAMlongFirm.com
KAmlong@TheAmlongFirm.com
Attorneys for Plaintiff