THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2014 TERM

CASE NO. 2013-0885

CITY OF KEENE

v.

JAMES CLEAVELAND, GARRETT EAN, KATE AGER,
IAN BERNARD A/K/A IAN FREEMAN,
GRAHAM COLSON, AND PETE EYRE

ON APPEAL FROM FINAL ORDER OF THE
CHESHIRE COUNTY SUPERIOR COURT

BRIEF ON BEHALF OF APPELLANT

Counsel for Appellant:

Charles P. Bauer, Esq. (#208)
Robert J. Dietel, Esq. (#19540)
GALLAGHER, CALLAHAN & GARTRELL,
Professional Corporation
P.O. Box 1415
Concord, NH 03302-1415
(603) 228-1181

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1. Whether a municipality may bring claims for (a) interference with contractual employment relations with its employees, (b) civil conspiracy, and (c) negligence to protect its public employees from substantial workplace interference, harassment, and intimidation caused by private parties protesting governmental operations. Court Order at 37-43[1].

2. Whether the trial court erred in dismissing all of the City's claims without allowing a jury to decide the issues where, construing all reasonable inferences in the light most favorable to the City, the City properly alleged in its pleadings that Defendants engaged in tortious conduct that is not absolutely protected by the First Amendment. Court Order at 37-43.

3. Whether the trial court erred in denying the City's request for preliminary and permanent injunctive relief, where (1) the Defendants' conduct is not absolutely protected by the First Amendment, and (2) where the City and its employees will suffer irreparable harm and do not have an adequate remedy at law. Court Order at 37-43.

[1] Page references are to the sequential numbering of the Court's Order as appended to this brief pursuant to Supreme Court Rule 16(3)(i).

STATEMENT OF FACTS AND OF THE CASE

The City of Keene ("City"), a municipal employer, contractually employed three Parking Enforcement Officers (collectively "PEOs") - Linda A. Desruisseaux ("PEO Linda"), Alan E. Givetz ("PEO Alan") and Jane E. McDermott ("PEO Jane"). Trial Tr. vol. I, 7:10-13, 11:5-12:6, Aug. 12, 2013, 23:4-6; Trial Tr. vol. II, 233:15-22, 292:13-20, Sept. 30, 2013. The PEOs have no arrest powers, and are responsible for checking parking meters and writing parking tickets in and around the downtown area. Trial Tr. vol. I, 7:14-22, 23:8-23; Trial Tr. vol. II, 234:3-8, 292:24-293:6. The PEOs enforce motor vehicle parking laws and regulations by patrolling City streets on foot and in marked vehicles. Trial Tr. vol. I, 10:4-19.

The City filed suit alleging that the Defendants, engage in persistent and ongoing efforts to prevent the PEOs from performing their official duties in an effort to interfere with the City's contractual employment relationship with the PEOs. See Appendix, 40, 44, 57 (hereinafter "Appx., __."); Trial Tr. vol. I, 30:14-31:11, 33:11-34:25; Trial Tr. vol. II, 239:1-240:11, 242:8-250:02, 296:10-306:2, 322:16-323:7.

The City alleged that Defendants created a hostile work environment for the PEOs. See Appx., 40, 44, 57; Trial Tr. vol. I, 51:8-13; Trial Tr. vol. II, 238:10-15, 296:12-300:2. Defendants, by implied or express agreement among themselves, regularly and repeatedly taunted, interfered with, harassed, and intimidated the PEOs in the performance of their employment duties by following, surrounding, touching or nearly touching, and otherwise taunting and harassing the PEOs in groups of one, two, or more; communicating with the PEOs in taunting and intimidating manners; all in very close proximity and within the "personal space" of the PEOs as the PEOs perform their duties. Trial Tr. vol. I, 30:14-59:4; Trial Tr. vol. II, 239:1-13, 242:12-250:2, 296:10-306:2.

A three day evidentiary hearing on the City's request for injunctive relief was held in 2013. During the evidentiary hearing, each of the PEOs testified about their experiences, and explained that it is the close proximity of the Defendants' conduct that causes stress, anxiety, and harassment.

PEO Linda has been harassed, intimidated, and video recorded within her "personal space" on a regular basis since December 2012. Trial Tr. vol. I, 44:10-46:7, 47:9-23. Defendants frequently run up behind PEO Linda very quickly, startling her and making it difficult for her to concentrate on her job and her personal safety. Trial Tr. vol. I, 42:13-43:8, 44:10-16, 58:4-19, 61:6-18. Defendants have repeatedly told PEO Linda to terminate her employment relationship with the City, going as far as offering to assist her in finding alternative employment. Trial Tr. vol. I, 36:3-24. PEO Linda's experiences have caused her to experience stress and anger due to the close proximity of the Defendants. Trial Tr. vol. I, 51:1-11. She testified that she is in a near constant state of vigilance while at work, and that she tenses up and becomes very distracted. Trial Tr. vol. I, 48:12-51:18.

PEO Alan's experiences, like his colleagues, also involved being too closely followed and videotaped. Trial Tr. vol. II, 239:1-9, 244:20-245:1. PEO Alan has been crowded, bumped into, and taunted by the Defendants, including being subjected to profanities and derogatory statements relative to his post military service. Trial Tr. vol. II, 239:1-13, 255:16-21. He was subjected to demeaning and derogatory comments by the Defendants, including calling him a "racist," "bitch," and "coward." Trial Tr. vol. II, 239:11-13, 242:12-25. He has also been followed and harassed on his day off and through the internet, all in an effort to intimidate and interfere with his employment relationship with the City. Trial Tr. vol. II, 242:8-250:2.

Defendants conduct caused PEO Alan's resignation as a PEO for the City. Trial Tr. vol. I, 180:9-20; Trial Tr. vol. II, 238:7-20. He explained that he resigned in July 2013 due to the hostile work environment. Trial Tr. vol. II, 238:7-20. PEO Alan was encouraged to quit by the Defendants. Trial Tr. vol. II, 257:9-258:13. The cumulative impact of this pattern of persistent behavior caused PEO Alan to feel that he was "backed into a corner." Trial Tr. vol. II, 265:5-11, 266:13-24. As a result, he decided to quit in July 2013, before he did something "stupid." Trial Tr. vol. II, 264:12-265:15.

PEO Jane has similarly been pursued and crowded by groups of seven or eight, bumped into, grabbed by Defendant Colson, and repeatedly taunted and encouraged to find alternative employment. Trial Tr. vol. II, 296:10-306:2, 322:16-323:7. The Defendants, sometimes acting alone, and sometimes in groups, have chased her across a street, waited outside a bathroom while she was on break, followed her into buildings, and chastised her for ticketing cars parked near a funeral, among other actions. Trial Tr. vol. II, 307:9-15, 321:16-20, 322:4-13, 302:8-303:6. She has had to call the police on three occasions due to safety concerns for herself or others. Trial Tr. vol. II, 303:5-6, 313:2-5; 340:7-24. She has also been called a "liar," "thief," and asked how she could sleep at night. Trial Tr. vol. II, 322:22-25. These experiences, due to their persistent and ongoing basis, have caused PEO Jane to consider quitting her job and she has inquired about other employment options. Trial Tr. vol. II, 326:14-24.PEO Jane has also altered her work duties, to the detriment of the City. Trial Tr. vol. II, 325:11-24. PEO Jane fears for her job security, as the Defendants have stated an intention to shut down the City's parking department. Trial Tr. vol. II, 326:14-24.

Due to Defendants' conduct, PEOs Alan, Jane, and Linda have felt intimidated and harassed and have been significantly hindered in the performance of their job duties. Trial Tr.

vol. I, 51:8-54:15, 67:18-24; Trial Tr. vol. II, 238:10-15, 326:1-13. As a result of the Defendants' conduct, PEOs Alan, Jane, and Linda sought counseling with Mary Kimmel, a licensed clinical mental health counselor and certified employee assistance professional to deal with their stress and anxiety due to the hostile work environment. Trial Tr. vol. I, 72:2-76:19, 136:16-137:2, 137:10-15. Kimmel testified at the hearing and explained that the Defendants conduct triggers the PEOs to feel a flight or fight reaction. Trial Tr. vol. I, 147:12-18. Kimmel explained that these feelings are brought on by the persistent and constant close proximity of the Defendants. Trial Tr. vol. I, 141:23-148:16.

After repeated, unsuccessful efforts by the City and the PEOs asking the Defendants to stop their conduct of taunting, interfering, harassing and intimidating the PEOs within such close proximity of the PEOs and in their "personal space," the City sought to enforce its legal obligation and right to protect its employees from further hostile work environment conduct performed by the Defendants. The City, concerned for the PEOs' well-being and anticipating potential resignations or job alterations by the PEOs, filed a petition for injunctive relief to permit the Defendants to perform their conduct from a safe and reasonable distance away from the PEOs while the PEOs fulfilled their public duties. The City also filed a civil action against the Defendants in negligence, intentional interference with contractual employment relations with its employees, and civil conspiracy to protect its public employees from substantial workplace interference, harassment, and intimidation caused by Defendants. Trial Tr. vol. II, 363:14-368:18.

While this matter was pending before the trial court, PEO Alan resigned from his position at work, citing stress and harassment caused by the Defendants' intentional and/or negligent conduct; PEO Jane cut back her hours at work, citing stress and harassment caused by the

Defendants' conduct; and PEO Linda testified about stress and harassment she experienced by the Defendants' conduct. Trial Tr. vol. I, 51:8-54:15, 180:9-20; Trial Tr. vol. II, 238:7-20, 325:11-326:13.

Importantly, the City does not seek to prevent Defendants from exercising constitutional rights to video record the PEOs from a comfortable remove or otherwise to express their opinions about government; rather, the City seeks only to prevent Defendants from taunting, interfering with, harassing, and intimidating the PEOs by establishing a reasonable safety zone, or distance, between the PEOs and Defendants while the PEOs are performing their duties. Trial Tr. vol. I, 62:15-67:24; Trial Tr. vol. III, 545:25-548:13, Oct. 1, 2013. The City suggested a distance of approximately 15 feet, or 2 parking meters, as a reasonable separation between the PEOs and Defendants. Trial Tr. vol., III, 532:1-19.

The City also claims a legal duty to prevent ongoing hostile work environment conditions for its employees. The City claims that the City and its employees have legitimate legal interests to avoid workers' compensation claims, disability claims, unnecessary sick day claims, and resignations that can arise from a hostile work environment. Likewise, the City has a legitimate legal interest in preventing employment claims against the City arising out of its alleged failure to present a hostile work environment created by Defendants.

Defendants' actions present safety concerns to the PEOs and the general public. Trial Tr. vol. I, 61:6-18. Defendants' activities take up sidewalk space as the PEOs attempt to perform their job functions with Defendants following too closely. Trial Tr. vol. I, 36:7-12; Trial Tr. vol. II, 239:4-9, 297:3-21. Private citizens using City sidewalks have become ensnared in Defendants' activities and been prevented from traveling to their destinations. Trial Tr. vol. II, 59:5-23, 360:10-21. The motoring public is also at risk as Defendants run across streets to

intercept PEOs. Trial Tr. vol. I, 61:12-18. Defendants frequently follow the PEOs' City vehicles on foot, on bicycles, and in cars and the PEOs are forced to be hyper-vigilant of Defendants' close proximity to their vehicles while maintaining a safe distance from the general motoring public. Trial Tr. vol. I, 49:15-50:13; Trial Tr. vol. II, 304:4-305:4. The PEOs frequently find themselves at the center of confrontations between Defendants and the general public. Trial Tr. vol. I, 59:10-60:1, 78:16-79:4; Trial Tr. vol. II, 312:13-313:10. Private citizens have shouted from cars and confronted Defendants on the sidewalks within close proximity to the PEOs. Trial Tr. vol. I, 59:10-60:1, 80:15-82:6. Such confrontations interfere with the PEOs' job functions and are dangerously distracting for the PEOs, the Defendants, and the general public when they occur on active streets and sidewalks. Trial Tr. vol. I, 48:12-50:13, 61:12-18; Trial Tr. vol. II, 239:1-13, 242:8-250:02, 304:4-17, 310:24-311:4, 312:13-313:10.

The City claims that while engaging in the above conduct, Defendants knew or should have known that the City has/had an employment relationship with the PEOs, and Defendants target the PEOs for this specific reason. Defendants negligently and/or intentionally interfered with the City's relationship with the PEOs with an intent to prevent the PEOs from performing their official duties. Defendants act in concert with one another, and have jointly sought through their actions, and under an implied or express agreement among them and others, to accomplish the unlawful purpose of tortuously interfering with the contractual employment relationship among the City and its PEOs.

In December 2013, the trial court dismissed all of the City's civil claims in negligence, interference with contractual employment relations with its employees, and civil conspiracy on a motion to dismiss and denied the City's request for injunctive relief. The trial court ruled that the City cannot, as a matter of law, maintain its civil claims and protect its employees because all

of the Defendants' conduct is protected by the First Amendment. The trial court's decision is in error as a matter of law.

SUMMARY OF THE ARGUMENT

This case presents novel and "cutting edge" legal issues concerning the rights of municipalities and public employees. While it is understandable that the trial court did not want to create new law, the City, its public employees, and all municipalities and public employees in New Hampshire look to this Court to do so.

In dismissing, without jury adjudication, the City's claims of interference with contractual employment relations with its employees, civil conspiracy, and negligence, the trial court failed to construe all reasonable inferences in the light most favorable to the City. The trial court should have rigorously scrutinized the complaint to determine whether, on its face, the City asserted a cause of action sufficient to allow a jury to decide questions of fact regarding the Defendants' conduct. The trial court should have ruled that the City set forth cognizable claims which preclude dismissal on the pleadings. The trial court should have permitted the civil claims to be submitted to a jury for trial. Further, the trial court erroneously applied the law in denying the petition for injunctive relief.

The First Amendment does not provide an absolute defense to the City's claims. The trial court incorrectly ruled that because Defendants' conduct is expressive and occurs in a public forum that their conduct is absolutely protected and thereby "trumps" all civil claims brought by the City. That ruling is an error of law.

In New Hampshire, public employees have legally cognizable rights and interests in their public employment to work without substantial interference, harassment, and intimidation caused by private parties protesting governmental operations, which the trial court should have recognized. Individual public employees do not lose these rights when they accept municipal employment. As such, a municipality may bring causes of actions in (a) interference with contractual employment relations with its employees, (b) civil conspiracy, and (c) negligence to

protect its public employees from substantial workplace interference, harassment, and intimidation caused by private parties protesting governmental operations.

Tortious conduct is not absolutely protected by the First Amendment, and it may not be used as means to forcibly bend another to one's will or to hold government employees captive to harassing and intimidating conduct. Where, as here, an injured party seeks injunctive relief and recovery for tort damages, which are not dependent solely on the content of Defendants' speech, but rather on the non-communicative tortious impact, relief and recovery are permitted.

In this case, the issue of whether the Defendants are for or against the PEOs is not determinative of the City's claims. Instead, the pertinent question is whether the City may recover damages in tort where the Defendants have followed, circled, harassed, bumped into, chased, recorded, talked to and intimidated three specific individuals on a daily basis, for months on end, all for the intended purpose of causing them to quit their public employment.

Defendants' conduct has had the foreseeable impact of disrupting the PEOs' relationship with the City and is improper. This conclusion would be the same even if the Defendants were motivated out of a desire to praise the parking enforcement officers, or to solicit their services for a competing endeavor.

Further, the Defendants do not have an absolute First Amendment right to force their views on the City's PEOs in close proximity and within their "personal space." The Defendants' actions give the parking officers only two choices: (1) quit their jobs or (2) face continued and persistent harassment and intimidation within close proximity. The First Amendment does not provide a defense under such circumstances.

The trial court also erred in denying the City's request for preliminary injunctive relief. The Defendants' conduct is not wholly protected by the First Amendment and a content-neutral

injunction, such as a requirement that the Defendants maintain a reasonable distance from the PEOs, is necessary to protect the City's significant governmental interests and does not unreasonably limit Defendants' right to engage in protected activity. The governmental interests at issue here include providing a safe work environment for municipal employees, preserving order on public streets and sidewalks, and protecting municipal property interests. The trial court erred in failing to balance the public employees' rights to work without substantial interference, harassment, and intimidation against the private parties' rights to protest governmental operations.

STANDARD OF REVIEW

When reviewing the trial court's grant of a motion to dismiss, this Court will assume that the plaintiff's pleadings are true and construe all reasonable inferences in the light most favorable to the non-moving party. Plaisted v. LaBrie, 165 N.H. 194, 195 (2013). The Court must analyze the facts contained on the face of the writ and pleadings to determine whether a cause of action has been asserted. Williams v. O'Brien, 140 N.H. 595, 597 (1995). Where the plaintiff's allegations constitute a basis for legal relief, the Court "must hold that it was improper to grant the motion to dismiss." Id. The Court "must rigorously scrutinize the complaint to determine whether, on its face, it asserts a cause of action." Id. (emphasis supplied).

When a petition for injunctive relief has been denied, the Court will reverse the trial court's decision if there is "an error of law, an unsustainable exercise of discretion, or clearly erroneous findings of fact." New Hampshire Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007). Further, "[a] denial of a preliminary injunction based on the failure to show a likelihood of success should not constitute a judgment that the underlying claim is frivolous, foreclosing a trial." Kukene v. Genualdo, 145 N.H. 1, 4 (2000).

ARGUMENT

INTRODUCTION

The trial court committed errors of law by dismissing the City's civil complaints as a matter of law on a motion to dismiss, including:

- "The Court finds that the Petitioner's tortious interference with contractual relations and civil conspiracy claims against the Respondents unreasonably prevent the Respondents' from exercising their right to free speech. As explained above, whether a tortious interference claim exists depends on whether a jury finds the Respondents' conduct 'improper.' Such a subjective standard creates an unreasonable risk that the jury will find liability 'on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression.' Accordingly, the Respondents' motion to dismiss is granted." See Court Order at 41 (emphasis added) (internal citations omitted).

- "The Court agrees with the Respondents that their free speech rights under the First Amendment of the Federal Constitution will be violated by permitting the City to move forward on any of the claims in this action or the more recent action or by granting the requested preliminary and permanent injunctive relief. Thus the Respondents' motion to dismiss is granted." See Court Order at 36.

- "The Court is skeptical that a claim for tortious interference with contractual relations exists in circumstances such as those presented here. Notably, the Court and parties cannot find any applicable case law where the tort has been applied to private citizens protesting governmental employees. Nevertheless, the Court need not reach this issue as the enforcement of such a tort is an infringement on the Respondents' right to free speech and expression under the First Amendment of the Federal Constitution." See Court Order at 37.

The trial court should have permitted the City's civil complaint to go to a jury for determination.

Public employees in New Hampshire have legally cognizable rights and interests in their employment to work without substantial interference, harassment, and intimidation caused by private parties protesting governmental operations, which the trial court should have recognized. See, e.g., Lacasse v. Spaulding Youth Ctr., 154 N.H. 246, 249 (2006) (citing Porter v. City of Manchester, 151 N.H. 30, 42 (2004) (constructive discharge occurs when employer renders

employee's working conditions so difficult and intolerable that reasonable person would feel forced to resign); see also Greenberg v. Union Camp Corp., 48 F.3d 22, 27 (1st Cir. 1995) (constructive discharge occurs when employee's resignation resulted from conditions that were particularly humiliating or demeaning); Muniz v. Nat'l Can Corp., 737 F.2d 145, 148 (1st Cir. 1984) (employer has a non-delegable duty to provide safety of employees in work environment).

The PEOs, as municipal employees, do not shed their individual rights, such as the right to be left alone and the right to peace and tranquility, while acting as government officials. As the Supreme Court has recognized:

> The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader "right to be let alone" that one of our wisest Justices characterized as "the most comprehensive of rights and the right most valued by civilized men." Olmstead v. U.S., 277 U.S. 438, 478 (1928). The right to avoid unwelcome speech . . . can also be protected in confrontational settings.

Hill v. Colorado, 530 U.S. 703, 717 (2000). While it has been recognized, that the right "to persuade" is protected by the First Amendment, it is equally recognized in the law that "no one has a right to press even 'good' ideas on an unwilling recipient." Id. (quoting Rowan v. United States Post Office Dept., 397 U.S. 728, 738 (1970)). Courts have "repeatedly recognized the interests of unwilling listeners in situations where 'the degree of captivity' makes it impractical for the unwilling viewer or auditor to avoid exposure." Id. at 718.

While it is recognized that the First Amendment affords protection to symbolic or expressive conduct as well as to actual speech, Virginia v. Black, 538 U.S. 343, 358 (2003), employees and their employers also have legitimate, protected rights. Defendants' activities of taunting, harassing, and intimidating the PEOs causing emotional, physical, and mental distress, and interference with employment relationships are not protected free speech activities.

The protections afforded by the First Amendment are not absolute, and courts have long recognized that some limited regulation to protect individuals and the public is consistent with the Constitution. Virginia, 538 U.S. at 358; see also U.S. v. Alvarez, 132 S. Ct. 2537 (2012) (collecting cases); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Miller v. California, 413 U.S. 15 (1973); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

I. A Municipality May Bring Claims For (a) Interference With Contractual Employment Relations With Its Employees, (b) Civil Conspiracy, and (c) Negligence To Protect Its Public Employees From Substantial Workplace Interference, Harassment, And Intimidation Caused By Private Parties Protesting Governmental Operations.

The City's Complaint and Amended Verified Petition set forth sufficient facts and elements of law to preclude dismissal.

To state a cognizable claim for intentional interference with contractual relations, a plaintiff must allege, with sufficient factual support, that: "(1) the plaintiff had an economic relationship with a third party; (2) the defendant knew of this relationship; (3) the defendant intentionally and improperly interfered with this relationship; and (4) the plaintiff was damaged by such interference." Demetracopoulos v. Wilson, 138 N.H. 371, 373-74 (1994). To persuade a jury that conduct is improper, a plaintiff must "show that the interference with his contractual relations was either desired by the [defendant] or known by him to be a substantially certain result of his conduct." Id.

"A civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means. Its essential elements are: (1) two or more persons (including corporations); (2) an object to be accomplished (i.e. an unlawful object to be achieved by lawful or unlawful means

or a lawful object to be achieved by unlawful means); (3) an agreement on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof." Jay Edwards, Inc. v. Baker, 130 N.H. 41, 47 (1987) (interior quotation and citations omitted). "For a civil conspiracy to exist, there must be an underlying tort which the alleged conspirators agreed to commit." Sheeler v. Select Energy and NEChoice, LLC, 2003 WL 21735496 (D.N.H. July 28, 2003).

A negligence claim is stated where a defendant owed a duty to the plaintiff, breached that duty, and that the breach proximately caused the claimed injury. Carignan v. N.H. Int'l Speedway, Inc., 151 N.H. 409, 412 (2004). Absent a duty, there is no negligence. Walls v. Oxford Magmt Co., Inc., 137 N.H. 653, 656 (1993). A duty may arise through a party's actions, through assumption of the risk, through a special relationship, or by reasonable foreseeability that a party's conduct could result in an injury to another. Id. In determining whether a duty exists, the Court addresses the question of "whether the plaintiff's interests are entitled to legal protection against the defendant's conduct." Id. (quoting Libbey v. Hampton Water Works Co., 118 N.H. 500, 502 (1978)); see generally W. Page Keeton et al., Prosser and Keeton on the Law of Torts, § 54, at 358 (5th ed. 1984) (duty not sacrosanct in itself, but only expression of sum total of policy considerations).

Construing all reasonable inferences in the Complaint and pleadings in the City's favor, the elements of the three tort actions have been satisfied. The City set forth cognizable claims for interference with contractual employment relations with its employees, civil conspiracy, and negligence. See Appx., 40, 44, 46, 57, 58.

The trial court erred when it dismissed all claims in the City's complaints based on the incorrect ruling that the Defendants' conduct is absolutely protected by the First Amendment[2].

II. The Trial Court Erred In Dismissing All Of The City's Claims Without Allowing A Jury To Decide The Issues, Construing All Reasonable Inferences In The Light Most Favorable To The City, Because The City Properly Alleged that the Defendants Engaged In Tortious Conduct That Is Not Absolutely Protected By The First Amendment.

A. The trial court's obligation to construe all reasonable inferences in the City's favor does not provide for dismissal based on the potential of jury bias.

The trial court based its decision to dismiss the City's claims on its ruling that the "improper" element of an intentional interference with contractual relations claim creates an unreasonable risk of jury bias. That speculative risk of bias does not provide grounds for dismissal.

The proper remedy to address potential juror bias is through jury instructions addressing the law against jury prejudice, elements of the torts pleaded, and First Amendment defenses. The City's complaint does not call on jurors to assess whether the Defendants' political message is proper or improper. Accordingly, a potential for juror bias does not provide grounds to dismiss the City's claims. Cf. Snyder v. Phelps, 131 S.Ct. 1207, 1219 (2010) (explaining that instruction to jury that it could hold defendant liable based on a finding that the picketing was "outrageous" created an unacceptable danger of suppressing speech because it called on the jury to assess the content of the speech at issue).

B. Defendants' tortious conduct is not protected by the First Amendment.

In its Order, the trial court relied on the holdings in NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), and Snyder v. Phelps, for the proposition that enforcement of the City's claim for intentional interference would unreasonably prevent the Defendants from exercising

[2] In fact, the trial court failed entirely to analyze the negligence and civil conspiracy claims in its Order.

their right to free speech. That ruling is based on an overly broad interpretation of NAACP and Snyder, both of which are distinguishable on the facts in this case.

In NAACP, the National Association for the Advancement of Colored People (NAACP) organized a boycott of white merchants in Claiborne County, Mississippi for the purpose of securing compliance with demands for equality and racial justice. 458 U.S. at 887-89. The boycott spanned a seven-year period, and involved various forms of speech and expressive conduct, including meetings, speeches, nonviolent picketing, but also acts of threats and violence. Id. at 898-907. Specifically, evidence was introduced that some of the one-hundred forty-eight (148) defendants had engaged in acts of physical violence against customers and prospective customers. Id. at 905. "Store watchers" were also placed outside of boycotted stores and identified customers who patronized those businesses. Id. at 903-904. The names of those individuals were then read at meetings of the Claiborne County NAACP in order to socially ostracize them. Id.

The affected businesses ultimately brought suit in Mississippi state court, seeking damages for economic losses caused by the boycott. NAACP, 458 U.S. at 891. The defendants responded, as here, by asserting that their conduct was protected by the First Amendment. Id. at 892.

The Mississippi trial court rejected the defendants' First Amendment claims, and awarded the businesses a final judgment in excess of $1,200,000. Liability was imposed on the NAACP, based on the actions of its field secretary, Charles Evers, and on all but eighteen (18) of the original defendants. NAACP, 458 U.S. at 893. On appeal, the Mississippi Supreme Court reversed portions of the trial court's decision, but upheld common-law tort liability. Id. at 894-896. The Mississippi Supreme Court determined that "certain defendants, acting for all others"

engaged in physical force and violence. Id. at 894. And, that "[i]ntimidation, threats, social, ostracism, vilification, and traduction were some of the devices used by the defendants to achieve the desired results." Id. at 921. On this basis, the court again rejected the defendants' First Amendment defense, and held that "[i]f any of these factors – force, violence, or threats – is present, then the boycott is illegal regardless of whether its primary, secondary, economical, political, social or other." Id. at 895.

On appeal, the United States Supreme Court reversed and remanded. The Supreme Court's holding turned on a proximate cause analysis. In summary, the Supreme Court reasoned that the facts and circumstances at issue involved both protected and non-protected speech and conduct. The Supreme Court, therefore, rejected the state court's holding, reasoning that the Mississippi Supreme Court failed to delineate which acts – protected or non-protected – caused the business injuries at issue. NAACP, 458 U.S. at 921. The Supreme Court stated "[t]he ambiguous findings of the Mississippi Supreme Court are inadequate to assure the 'precision of regulation' demanded by [the First Amendment]." Id.

The Supreme Court explained that while "precision of regulation" is demanded in the context of First Amendment rights, "[n]o federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence." NAACP, 458 U.S. at 916. Applying this standard to the acts of Charles Evers, the Supreme Court held that "a finding that he authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity." Id. at 927 (emphasis supplied). "A judgment tailored to the consequences of [the] unlawful conduct may be sustained." Id. at 926.

The Supreme Court's holding recognized that determining whether speech or conduct may be subject to tort liability requires an analysis of the "means employed by the participants to

achieve those goals." Id. Accordingly, tortious conduct is not automatically protected by the First Amendment.

Applying the Supreme Court's holdings in NAACP to this case makes clear that the trial court here did not construe all reasonable inferences in the City's favor. The trial court, in ruling that the City's claims would prevent the Defendants from exercising First Amendment rights, engaged in an overly broad application of Supreme Court precedent. A reasonable jury, properly instructed and operating under the standards set forth in NAACP, could examine the Defendants' conduct, and find that the Defendants authorized, directed, and engaged in specific tortious activity against specific individuals, intended to cause intimidation and harassment; i.e., the type of improper conduct necessary to sustain a claim for intentional interference. Further, unlike in NAACP, there is no proximate causation problem here. The City seeks to recover damages against specific individuals for specific tortious conduct.

Similarly, the trial court's reliance on Snyder was also in error. In Snyder, the plaintiff sought to hold members of the Westboro Baptist Church liable in tort for picketing near his son's funeral service based on a claim of intentional infliction of emotional distress. 131 S.Ct. at 1213-14. The Church Members picketed on public land along the route of the funeral procession and displayed signs, containing homophobic slurs and other offensive content. Id. at 1213. The Church had provided notice in advance to local authorities. Id. And, unlike the Defendants here, the Church members did not "yell or use profanity." Id. "None of the picketers entered church property or went to the cemetery" and there was no violence involved. Id. In summary, the Church members' only substantive act was to display extremely offensive signs during a solemn funeral procession. "The protest was not unruly; there was no shouting, profanity, or violence." Id. at 1218-19.

Based on those specific circumstances, the Supreme Court held that, "any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself." Snyder, 131 S.Ct. at 1219. "A group of parishioners. . . holding signs that said 'God Bless America' and 'God Loves You,' would not have been subjected to liability." Id.

The Snyder holding reaffirms the Supreme Court's judgment in NAACP, that a court must look to the specific facts and means employed by individuals invoking the First Amendment. Where speech is tortious, not because of the message conveyed, but rather due to the means employed, liability may attach. See Erznoznik v. Jacksonville, 422 U.S. 205, 210–211, n. 6 (1975) ("It may not be the content of the speech, as much as the deliberate 'verbal or visual assault,' that justifies proscription.") (citation and brackets omitted). Therefore, the trial court, construing all reasonable inferences in the City's favor, should have determined that the Defendants' conduct here, which involved acts such as following, chasing and running after PEOs (even lurking outside a bathroom), forms a basis upon which a jury might find liability.

Unlike in Snyder, the message conveyed by the Defendants' conduct is not solely at issue, and the City's claims do not rise and fall based on the message alone. Instead, the City has been consistent from the outset: its core objectives are (1) to provide a safe working environment for its employees, (2) preserve order and safety on public streets and sidewalks, and (3) to avoid economic injury through the intentional disruption of its contractual relationship with its employees. These are permissible goals, and the City may recover for intentional and improper tortious conduct in this case without intruding upon the political message that the Defendants are seeking to advance.

identified in our cases. It is an aspect of the broader 'right to be let alone' that one of our wisest Justices characterized as 'the most comprehensive of rights and the right most valued by civilized men.'" Id. at 716-17 (2000) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). The Supreme Court explained that this right exists not just in the privacy of the home, but also in public confrontational settings. Id. at 717 ("The right to avoid unwelcome speech has special force in the privacy of the home, and its immediate surroundings, but can also be protected in confrontational settings.").

Admittedly, the burden to avoid unwanted communications and conduct, normally falls upon the viewer. See Erznoznik, 422 U.S. at 209. The Defendants' conduct here, however, is not of the type or nature from which the PEOs can simply "avert their eyes." Id. at 209 (finding restrictions on speech are justified when "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure."). The workplace harassment faced by the PEOs is not readily avoidable, and "[u]nlike a person on the street, an employee at work cannot simply walk away from speech she would rather not hear." Caroline Mala Corbin, The First Amendment Right Against Compelled Listening, 89 B.U. L. Rev. 939, 959 (2009).

In light of these factors, the trial court should have accounted for the PEOs' right to be free from harassment when determining whether the First Amendment provides a defense. In doing so, the trial court should have concluded that the First Amendment is not an absolute defense to the City's claims, and the trial court should have denied Defendants' motion to dismiss. See Hill, 530 U.S. at 718 ("None of our decisions has minimized the enduring importance of 'a right to be free' from persistent 'importunity, following and dogging' after an offer to communicate has been declined. While the freedom to communicate is substantial, 'the

right of every person 'to be let alone' must be placed in the scales with the right of others to communicate.'").

III. The Trial Court Erred In Denying The City's Petition For Preliminary And Permanent Injunctive Relief.

In its order, the trial court failed to address whether the City had presented sufficient evidence at the evidentiary hearing to warrant issuance of a preliminary injunction. Instead, the trial court incorrectly reasoned that the City could not prevail on an intentional interference with contractual relations claim, and therefore, denied the City's request for injunctive relief without further examination.

For the reasons set forth above, the trial court's decision was in error as a matter of law. The City's request for injunctive relief should be remanded for a determination of whether an injunction should issue based on the evidence presented. See Mottolo, 155 N.H. at 63 (When a petition for injunctive relief has been denied, the Court will reverse the trial court's decision if there is "an error of law, an unsustainable exercise of discretion, or clearly erroneous findings of fact").

Here, the evidence presented at the evidentiary hearing warrants an order. See Mottolo, 155 N.H. at 63 (Requiring evidence of immediate danger of irreparable harm to party seeking injunctive relief, and no adequate remedy at law). During the evidentiary hearing, the City presented evidence showing that PEO Givetz quit due to the stress caused by Defendants' conduct, and that the City will incur additional injury if its remaining PEOs are subjected to continuing harassment. Trail Tr. Vol. II, 364:10-368:18. If the remaining PEOs also quit, the City may be unable able to find qualified individuals willing to accept employment given the conditions created by the Defendants. Trial Tr. Vol. II, 326:21-24; 363:14-365:4. These factors

are sufficient evidence of an irreparable injury that warrant the issuance of a preliminary injunction.

Additionally, the City's authority to enact an ordinance would not provide the City with the immediate relief it needs to protects is employees and to avoid irreparable injury. That course would also run a greater risk of chilling First Amendment rights than a narrowly tailored injunction targeting specific misconduct by specific individuals.[3] See Madsen, 512 U.S. 753, 764-65 (1994) ("Injunctions, of course, have some advantages over generally applicable statutes in that they can be tailored by a trial judge to afford more precise relief than a statute where a violation of the law has already occurred.").

In pursuing injunctive relief, the City does not seek to regulate the content of the Defendants' speech, but rather, to preserve several significant governmental interests, including providing a safe workplace for its employees, preserving public safety and order, and protecting the City's economic interest in its employees. These interests provide permissible grounds to grant an injunction. See Madsen, 512 U.S. at 768 (upholding injunction, in part, due to states "strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting the property rights of all its citizens.")

Under these circumstances, the trial court should exercise its equitable powers and enter a content-neutral injunction that lawfully enjoins the Defendants from engaging in continued harassment of the PEOs and which protects the City's contractual relations with the PEOs. See DVD Copy Control Ass'n, Inc. v. Bunner, 31 Cal. 4th 864, 881 (2003) ("The First Amendment does not prohibit courts from incidentally enjoining speech in order to protect a legitimate property right.").

[3] The trial court's suggestion that the City can enact an ordinance presumes that such efforts would be successful and that such an ordinance could be enacted in a timely manner to prevent further injury. Those presumptions are not certain in a democratic system.

The City has specifically requested that such relief be tailored to require the Defendants to maintain a reasonable distance from the PEOs. The scope of the injunction, however, must ultimately be tailored by the trial court and is subject to court discretion. Madsen, 512 U.S. at 762 ("The parties seeking the injunction assert a violation of their rights; the court hearing the action is charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public.").

The proposed injunction is the appropriate remedy in these circumstances because it burdens only those individuals who are engaged in tortious conduct. See Madsen, 512 U.S. at 762 ("An injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group. It does so, however, because of the group's past actions in the context of a specific dispute between real parties."). A properly imposed injunction would serve to protect the City's legitimate governmental interests without unreasonably chilling Defendants' First Amendment activities.

CONCLUSION

The trial court's dismissal of the City's civil claims should be reversed and remanded with instructions to allow a jury to hear evidence and make determinations on the civil claims. The trial court's denial of the petition for injunctive relief should be reversed and remanded with instructions on the law.

REQUEST FOR ORAL ARGUMENT

The City requests oral argument before the full court to be presented by Attorney Bauer.

RULE 16(3)(i) CERTIFICATION

Pursuant to Supreme Court Rule 16(3)(i), I hereby certify that a copy of the Court's Order, dated December 3, 2013, is appended hereto.

Respectfully submitted,

CITY OF KEENE

By its attorneys,
GALLAGHER, CALLAHAN & GARTRELL, P.C.

June 11, 2014

Charles P. Bauer, Esquire (#208)
Robert J. Dietel, Esquire (#19540)
214 N. Main Street, P.O. Box 1415
Concord, NH 03302-1415
(603) 228-1181

CERTIFICATE OF SERVICE

I hereby certify that I have this date forwarded two copies of the foregoing via U.S. Mail, postage prepaid to Peter Eyre, *pro* se, John Meyer, Esq., counsel for James Cleaveland, Garrett Ean, Kate Ager, Ian Bernard a/k/a Ian Freeman, and Graham Colson, and Stephen C. Buckley, Esq.

June 11, 2014

Charles P. Bauer, Esquire (#208)

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

CHESHIRE, SS.

No. 213-2013-CV-00098;
213-2013-CV-0241

The City of Keene

v.

James Cleaveland,
Garrett Ean,
Kate Ager,
Ian Bernard a/k/a Ian Freeman,
Graham Colson, and
Pete Eyre

DEC 4 2013

ORDER

The Petitioner, the City of Keene (the "City"), brings these actions claiming tortious interference with contractual relations, negligence, civil conspiracy, and seeking preliminary and permanent injunctive relief ordering the Respondents, James Cleaveland, Garret Ean, Kate Ager, Ian Bernard a/k/a Ian Freeman, Graham Colson, and Pete Eyre to not interfere, harass, or intimidate members of the Parking Enforcement Office ("PEO"). Five of the defendants, through counsel, have filed a motion to dismiss, which the sixth Respondent, Pete Eyre, joins. An evidentiary hearing was held on the preliminary injunction request on August 12, September 30, and October 1, 2013, and the Court heard extensive legal argument from counsel on both the motion to dismiss and the motion for preliminary injunctive relief. After consideration of the arguments presented, as well as the evidence at the hearing, the Respondents' motion to dismiss is **GRANTED**. Further, in light of this decision, the more recently filed action, 2013-CV-0241, is also **DISMISSED.**

I. Factual Background

The Petitioner employed three at-will Parking Enforcement Officers (collectively the "PEOs"), Linda Desruisseaux ("Desruisseaux"), Alan Givetz ("Givetz"), and Jane McDermott ("McDermott"), whose duties included enforcing motor vehicle parking laws by monitoring parking meters and writing parking tickets. The PEOs patrol on foot and move throughout downtown Keene. Beginning in December 2012, the Respondents began following, videotaping, and talking with the PEOs on almost a daily basis.

A. Allegations Made by PEOs

PEO McDermott testified that she has been a PEO since September 2012 and beginning in December 2012, Cleaveland, Ean, Colson, Freeman, and Ager have all followed her on foot. McDermott testified that this causes her stress because she has to constantly monitor where the Respondents are and feels like she cannot get away. Even on her breaks, the Respondents sit and wait outside her car or follow her into the library or city hall.

McDermott testified that she carries a radio that allows her to contact the dispatcher at the Keene Police Department. On three occasions she has needed to contact the police: (1) when there was an altercation between Graham and Colson and persons against the Respondents' activities at Wells Garage; (2) when Cleaveland would not let her pass, and (3) when Ean's friend was carrying a gun on his side. McDermott further testified that on April 27, 2013, Cleaveland objected to her giving tickets in an area where a funeral was being held. Cleaveland raised his voice and said, "Don't you know these people are at a funeral." Cleaveland then referred to her as a "fucking thief." McDermott went to the Keene Police Department thereafter. In regard to

the April 27, 2013 exchange, Cleaveland testified that McDermott told him she was giving the funeral patrons tickets because the Respondents had been preventing her from ticketing cars downtown. In addition, Cleaveland testified that McDermott called him a "terrorist" and "anarchist."

At one point, Keene Police radioed McDermott to check on her when the group surrounding her was so large that they could not see her. On another occasion, McDermott was taking the Respondents' cards off a windshield and Colson grabbed her wrist. McDermott testified that initially she felt threatened until she realized what was happening. McDermott was not hurt and the situation resolved peacefully.

McDermott testified that Freeman and Cleaveland told her they would help her find a new job. Moreover, the Respondents have called her a "liar," "thief," and asked her how she could sleep at night. McDermott originally tried to thwart the Respondents by running away and crossing streets; however, the Respondents continued to follow.

McDermott testified that regardless of what the Respondents are saying the close proximity makes it hard to focus on her job. She refuses to work Saturdays because she does not feel safe with Cleaveland's and Colson's presence, and she has contemplated quitting and inquired about other employment.

On cross examination, McDermott testified that part of her job involves dealing with public confrontation and the City has never provided her with such training. With respect to the distance of the Respondents, five feet would be appropriate but two feet is too close.

PEO Givetz testified that he started in September 2012 and resigned in July 2013 due to the hostile work environment caused by the Respondents. Specifically,

Colson made it hard for Givetz to do his job by standing in front of him and asking what Givetz was going to do. Colson also referred to Givetz's military service, suggesting he would "drone brown babies," as well as calling him a "racist," "bitch," and "coward," and following him on his day off.

Givetz testified that Colson would follow him closely so that if he turned around they would bump into each other. Moreover, Ean would walk with Colson while videotaping. Eyre worked behind the scenes, radioing the Respondents after passing him and on one occasion asked Givetz whether the Respondents' actions were boosting morale.

Givetz testified that Colson, Ean, and Cleaveland would tell him that they could help him find a real job, one that does not hurt people, and that he should quit. Givetz experienced an anger he had never experienced before due to the constant nature of the Respondents' activities. Givetz testified that he felt like he was "backed into a corner" and had to quit before he did something "stupid."

PEO Desruisseaux testified that while on patrol Cleaveland and Colson attempt to stop her from doing her job by engaging her in conversation. On one occasion Colson told her that she was vandalizing cars by chalking the tires. Moreover, Ean, Eyre, and Cleaveland made comments to Desruisseaux that she should not be doing her job because she was stealing from the citizens of Keene. Desruisseaux testified that Cleaveland has come within close proximity of her, about a foot away. Desruisseaux asked Cleaveland to stay away and stop talking to her, but he continued. Desruisseaux testified that the constant videotaping is intimidating no matter what distance it is done

because there is no peace. However, she has never observed any of the Respondents being violent.

Desruisseaux explained that she can hear the footsteps of the Respondents following. She tenses up and becomes very distracted, which impacts her job performance. She becomes angry and frustrated by the Respondents' actions and has contemplated filing a grievance with her union, filing a workers compensation suit for stress, or taking a mental health day.

Desruisseaux, along with the other PEOs, meet with Therapist Mary Kimmel. Dr. Kimmel testified that Desruisseaux is suffering from stress and the inability to trigger flight or fright reactions due to the Respondents' activties. Dr. Kimmel testified that she has never seen this type of persistence and the constant close proximity and stress does not allow Desruisseaux, Givetz, or McDermott the ability to flee the Respondents. Dr. Kimmel testified that a 30 foot buffer zone would be helpful because it would relieve the PEOs from the Respondents' actions.

Elizabeth Fox, the City's director of finance testified that the loss of Givetz has resulted in staffing hours of the PEOs being reduced from 108 to 74. This reduction has resulted in a loss of PEO ticket revenue. Furthermore, the counseling sessions and costs to replace Givetz have or will cost the City additional revenue. In addition, the City hired a private investigator, Peter Thomas, to follow the Respondents and the PEOs.

B. <u>Respondents' Activities</u>

Freeman testified that he is a minister with the Shire Free Church, as well as a talk show host with Free Talk Live, and Program Director of LRN.FM. He testified that he has participated in "Robin Hooding" since 2009 to prevent people from receiving

parking tickets. Freeman testified that Robin Hooding is done by identifying and filling expired parking meters before a PEO locates an expired meter and issues a ticket. When this is done it is referred to as a "save." Freeman testified that Robin Hooding is more effective if two people participate together; one staying ahead of the PEO and filling meters and another placing cards on saved car's windshields.

Freeman testified that he views parking tickets as a threat against people and the ultimate goal of Robin Hooding is to shut down the City's parking enforcement. Freeman testified further that his political philosophy is that people should interact consensually, without threats and violence. He believes the government parking policy is in contravention of his political philosophy because it is based on stealing cars or a ransom. Freeman believes parking should be handled in the marketplace where each owner determines his or her own policy.

Cleaveland is a participant in Free Keene, which he stated was a movement without an organized head. Cleaveland testified that Robin Hooding is based on the idea that parking is not a criminal act and the City should not be charging citizens to park. In his view, Robin Hooding is done to protest this injustice and the goal is to phase out the PEO over three years. Cleaveland testified that after a car has been saved, the Robin Hooders place cards on windshields informing the driver that they have been saved from a ticket and referring them to FreeKeene.org for donations.

Cleaveland testified that he videotapes while Robin Hooding, typically ten feet away from the PEOs. He claims videotaping is important for three reasons: (1) in case something interesting happens downtown; (2) to get the word out; and (3) accountability in case there is an incident between a PEO, the Respondents, or the public. Cleaveland

testified that a distance limitation or safety zone around the PEOs would frustrate the goal of Robin Hooding because Robin Hooders would not necessarily be saving meters that the PEOs are issuing tickets.

Cleaveland testified that he communicates with other Robin Hooders through radios and cellphones, alerting the location of the PEOs. Generally, verbal interactions with PEOs is limited, however Cleaveland testified that PEO McDermott will engage in conversation asking the Respondents' views on religion and politics.

Ean testified that he has been involved in Robin Hooding and the goal is to shut down the PEO by filling meters and bringing everyone in compliance with the parking laws. Ean said he finds it rewarding to protect people from the government and believes that the municipal corporation of Keene is a legal fiction. He believes in self-ownership and anarchism—people should be their own masters to the extent that they do not infringe on others and should voluntarily pay for government services. Ean testified that he has been involved in three altercations with the public objecting to the Robin Hooding, but citizens have also approached him and approved of the movement.

Ean testified that videotaping from 30 feet away is possible but would make it harder to converse with the PEOs, result in poorer audio, and greater risk of interfering with private citizens. Ean testified that beginning in May he has published episodes on YouTube, FreeKeene.com, FreeConcord.org, and Facebook detailing the Robin Hooding efforts and PEO Givetz is the top commenter. A video filmed on February 26, 2013, depicts Givetz being followed, turning around, and saying, "is that close enough coward."

Ager testified that she has participated in Robin Hooding from December 2012 to March 2013 for approximately eight hours a week. She joined the movement because she thought it would be a good way to help the community and converse with people she would not normally speak. Since March 2013, Ager has focused on charity work and has not been Robin Hooding.

Eyre testified that he is not a part of the Robin Hooding movement. Nevertheless, Eyre testified that on one occasion he called the Robin Hooders to alert them that Givetz was driving around the rotary. Eyre testified that he set up KeeneCopBlock.org a year ago as a police accountability movement and does not believe that the City of Keene as a municipal corporation is legitimate.

II. Procedural Posture

On May 1, 2013, the Petitioners brought this action alleging that the Respondents, acting individually and in concert, tortiously interfered with contractual relations in that the Respondents created a hostile work environment for the PEOs and forced Givetz to resign. See (Pet.'s Clarified/Amended Verified Pet. Preliminary Permanent Inj. Relief 1.) The City seeks preliminary and permanent injunctive relief "against the six Respondents, enjoining them from interfering with the PEOs' employment relationship with the City, either through the City's proposed 30 foot injunction, or through any other reasonable injunction that the Court deems appropriate." (Pet.'s Supp. Mem. Law 4.) The Respondents object and move to dismiss, contending that the Petitioner's tortious interference claim fails to state a claim and violates the Respondents' free speech rights under the First Amendment of the Federal Constitution and Part I, Article 22 of the New Hampshire Constitution, as well as the

right to government accountability under Part I, Article 8 of the New Hampshire Constitution. On September 23, 2013, the Petitioner filed an additional complaint against the Respondents alleging intentional interference with employment contractual relations and negligence. The Court agrees with the Respondents that their free speech rights under the First Amendment of the Federal Constitution will be violated by permitting the City to move forward on any of the claims in this action or the more recent action or by granting the requested preliminary and permanent injunctive relief. Thus, the Respondents' motion to dismiss is **GRANTED**.

III. Standard of Review

In ruling on a motion to dismiss, the Court must determine "whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." Harrington v. Brooks Drugs, 148 N.H. 101, 104 (2002) (quotations and citation omitted). The Court must analyze the facts contained on the face of the writ to determine whether a cause of action has been asserted. Williams v. O'Brien, 140 N.H. 595, 597 (1995). In rendering such a determination, the Court must "assume the truth of the facts alleged in the plaintiff's pleadings and construe all reasonable inferences in the light most favorable to him." Harrington, 148 N.H. at 104 (quotations omitted). The Court need not accept as true, however, statements in the writ "which are merely conclusions of law." Karch v. BayBank FSB, 147 N.H. 525, 529 (2002) (quotation and citation omitted).

IV. Analysis

A. Tortious Interference with Contractual Relations

To establish a claim for tortious interference with contractual relations, otherwise known as intentional interference with contractual relations, a plaintiff must show: (1) he

"had an economic relationship with a third party"; (2) "the defendant knew of this relationship"; (3) "the defendant intentionally and **improperly** interfered with this relationship"; and (4) he "was damaged by such interference." Hughes v. N.H. Div. of Aeronautics, 152 N.H. 30, 40–41 (2005) (citation omitted) (emphasis added). The Respondents contend that "there is no bar under any tort theory against trying to persuade an employee at will to exercise his right to seek alternative employment." (Resp'ts' Post Hearing Mem 2.) The Court is skeptical that a claim for tortious interference with contractual relations exists in circumstances such as those presented here. Notably, the Court and parties cannot find any applicable case law where the tort has been applied to private citizens protesting governmental employees. Nevertheless, the Court need not reach this issue as the enforcement of such a tort is an infringement on the Respondents' right to free speech and expression under the First Amendment of the Federal Constitution.

B. First Amendment Right to Free Speech

The Respondents contend that the Petitioner's tort claim infringes upon activities that are constitutionally protected:

1. Filling expired meters before cars were ticketed to protest against the City's parking enforcement function as well was a means to protect motorists from getting tickets.
2. Verbal communication with PEOs on various subjects, including defendants' political theories and their connection to parking enforcement.
3. Videotaping Parking Enforcement Officers as they perform their duties as a means of assuring government accountability.
4. Placing a Robin Hood card on the windshield of cars which had been spared from parking tickets in order to communicate a political message and secondarily to raise funds.

(Def.s' Post Hearing Mem. 5) "The Free Speech Clause of the First Amendment—Congress shall make no law . . . abridging the freedom of speech—can serve as a defense in state tort suits. . . ." Snyder v. Phelps, 131 S.Ct. 1207, 1215 (2011) (citation and quotation omitted).

1. **Public or Private Speech**

Whether the Respondents' speech is protected under the First Amendment requires an analysis of whether it is of a public or private concern.

> Speech on matters of public concern is at the heart of the First Amendment's protection. The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. That is because speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.

Snyder, 131 S.Ct. at 1215 (quotations, citations, brackets and ellipses omitted).

> Speech is of public concern:
>
> when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public. The arguably inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.

Id. at 1216 (quotations and citations omitted). On the other hand, matters of "purely private significance" are given "less rigorous" First Amendment protections. Id.

"Whether . . . speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Connick v. Myers, 461 U.S.138, 147–48 (1983). "[N]o factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said,

where it was said, and how it was said." Snyder, 131. S.Ct. at 1216. Here, the Respondents' speech and expressive protest of the City's parking regulation through filling meters, placing cards on windshields, telling the PEOs they should quit, calling the PEOs "thieves" "fucking thieves," and "liars," and attacking PEO Givetz for his military service are clearly matters of public concern. "While these messages may fall short of refined social or political commentary," the issues involve the political authority of the City as a sovereign and its regulation of the citizens, as well as the United States' military actions abroad. Snyder, 131 S.Ct. at 1217.

The Respondents' activities occur on streets and sidewalks throughout downtown Keene. Such public area "used for public assembly and debate, [constitute] the hallmarks of a traditional public forum." Frisby v. Schultz, 487 U.S. 474, 480 (1988). "Traditional public forums are fundamental to the continuing vitality of our democracy, for 'time out of mind, [they] have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" Doyle v. Commissioner, New Hampshire Dept. Resources and Economic Development, 163 N.H. 215, 223 (2012) (quoting Boos v. Barry, 485 U.S. 312, 318, (1988). "Such space occupies a special position in terms of First Amendment protection." Snyder, 131 S.Ct. at 1218 (citation and quotation omitted).

Moreover, "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907 (1982) (quotation and citation omitted). "[T]he activity of peaceful pamphleteering is a form of communication protected by the First Amendment," id. at 910, and "the videotaping of public officials is an exercise of

First Amendment liberties." Glik v. Cunniffe, 655 F.3d 78, 83 (1st Cir.2011). With these principles in mind, it is clear that the Respondents' activities are protected under the First Amendment.

The Petitioner, citing Glik, contends that the Respondents' speech is not protected because it harasses and interferes with the PEOs' duties and aims to shut down the PEO. As explained above, the Respondents' speech is given special protection because it is at a public place on a matter of public concern. Merely because many people disagree with the Respondents as to the role of parking enforcement in Keene does not subject their speech and expressive conduct to lesser protections. See Snyder, 131 S.Ct. at 1215 ("The arguably inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.") (quotation omitted); Texas v. Johnson, 491 U.S. 397, 414, (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

Furthermore, the Court finds Glik unsupportive of the Petitioner's position. In Glik, Boston police officers arrested the plaintiff under the Massachusetts' wiretap statute and two other state-law offenses for videotaping an arrest in Boston Commons. The issue before the First Circuit Court of Appeals, *inter alia*, was whether the plaintiff's 42 U.S.C. §1983 claim, alleging a violation of his First Amendment rights, was barred by qualified immunity. The Court found that the plaintiff's First Amendment rights had been clearly violated as he had a right to videotape the officers in a public place on a matter of public concern. The Court opined that because videotaping occurred from a peaceful remove

and did not impair the officers' duties, the plaintiff's videotaping could not be restricted. Glik, 655 F.3d at 84 ("Such peaceful recording of an arrest in a public place that does not interfere with the police officers' performance of their duties is not reasonably subject to limitation.") The Court in Glik did not hold that interference with public employees' duties removes speech of public concern from its First Amendment protections. Instead, the holding only reaffirmed its prior position that videotaping in a public place on a matter of public concern was clearly protected by the First Amendment. See id. at 83 ("[W]e have previously recognized that the videotaping of public officials is an exercise of First Amendment liberties.").

2. Reasonable Time, Place or Manner Restrictions

The next issue is to what extent the government may regulate this speech and activity. The Respondents' choice of where and when to engage in this activity "is not beyond the Government's regulatory reach—it is subject to reasonable time, place, or manner restrictions." Snyder 131 S.Ct. at 1218. The Court finds that the Petitioner's tortious interference with contractual relations and civil conspiracy claims against the Respondents unreasonably prevent the Respondents' from exercising their right to free speech. As explained above, whether a tortious interference claim exists depends on whether a jury finds the Respondents' conduct "improper." Hughes v. N.H. Div. of Aeronautics, 152 N.H. at 40–41. Such a subjective standard creates an unreasonable risk that the jury will find liability "on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." Snyder, 131 S.Ct. 1218 (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988)). Accordingly, the Respondents' motion to dismiss is **GRANTED**. See Snyder, 131 S.Ct. at 1219

(overturning state tort of intentional infliction of emotional distress based on the defendant's First Amendment right to free speech); see NAACP, 458 U.S. at 934 (reversing malicious interference with business verdict based on the defendant's First Amendment right to free speech).[1]

Throughout its pleadings and at the preliminary injunction hearing the Petitioner contends that even if the tortious interference with contractual relations claim was dismissed, it would seek the Court's equitable powers in limiting the Respondents' activities through an injunction. Specifically, the Petitioner contends that a 30 foot floating buffer zone around the PEOs is a reasonable time, place, and manner restriction. Given the dismissal of the tortious interference claim, the Court **DENIES** the Petitioner's request for a preliminary and permanent injunction and **DISMISSES** its second complaint against the Respondents for intentional interference with employment contractual relations and negligence.

By this decision, the Court does not mean to suggest that the targeting of hard-working PEOs in the manner described above is appropriate or laudable. Each of the PEOs is to be commended for the composure and civility they have shown. The Court notes that the PEOs are not without remedy to the extent that the Respondents violate applicable criminal laws. Nothing in this decision is meant to suggest that conduct that rises to the level of an assault, criminal threatening, or otherwise violates other provisions of the criminal code constitutes protected speech. Further, the City may, provided it does not run afoul of constitutional protections, enact an ordinance addressing some of its concerns.

[1] As the Court finds under the Federal Constitution, it need not address the Respondents' remaining defenses under the New Hampshire Constitution.

For the foregoing reasons, the Court **GRANTS** the Respondents' motion to dismiss. Both of the pending cases are **DISMISSED**.

SO ORDERED.

12/3/13
Date

John C. Kissinger, Jr.
Presiding Justice