

STATE OF NEW HAMPSHIRE

CHESHIRE, SS.

SUPERIOR COURT

CITY OF KEENE

v.

JAMES CLEAVELAND
GARRETT EAN
KATE AGER
IAN BERNARD A/K/A IAN FREEMAN
GRAHAM COLSON

Docket No. 213-2013-CV-00098

**RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS**

NOW COME the Respondents, James Cleaveland, Garrett Ean, Kate Ager, Ian Freeman and Graham Colson, by and through their attorneys, Backus, Meyer & Branch, LLP, and submits the following Memorandum of Law in support of Motion To Dismiss:

The only cause of action alleged by Petitioner is tortious interference with contractual relations. There is no precedent that counsel has been able to locate for this type of claim being made against a group of protesters for allegedly encouraging public employees to resign their employment. The claim fails to meet the requirements of the tort, and its application would violate Respondents' free speech rights.

The Petitioner must show that the Respondents' alleged interference is "improper." Hughes v. New Hampshire Div. of Aeronautics, 152 N.H. 30, 40-41 (2005). "Only improper interference is deemed tortious in New Hampshire." Roberts v. General Motors, 138 N.H. 532, 540 (1994) (emphasis on original). Petitioner has not asserted that Respondents are acting with improper motive, and any such allegation would require this court to engage in an improper inquiry into their politics and ideology. Instead, Petitioner challenges their means. However, the Petition does not claim that they violated any of the criminal statutes or ordinances governing conduct in public places.

The City acknowledges that the Respondents have a free speech right under the First Amendment, and Part I, Article 22 of the New Hampshire Constitution to engage in "Robin Hooding" although it has chosen to define that activity in ways that are inaccurate and pejorative. What is at least equally clear as a matter of free expression rights, is that the Respondents have a right to express their opinions about parking enforcement to the PEO's even if those opinions cause them distress. See Snyder v.

Phelps, 562 U.S. ___ 131 S. Ct. 1207 (2011). Petitioners use of the term “taunt” does not affect Respondent’s legal rights absent a showing that they were utilizing “fighting words”.

The PEO’s are public employees working in public places. The claim that they should be shielded from public comment pertaining to the nature of their work is directly contrary to freedom of speech as well as Part I, Article 8 of the New Hampshire Constitution stating the importance of government accountability. If Petitioner’s tactic were successful, government employees at all levels would be able to turn to the courts to suppress public criticism.

The Petitioner’s claim also fails to meet the requirements of the tort because there is no allegation that the complained of conduct has caused any of the PEO’s to resign their employment. As the New Hampshire Supreme Court has stated, “where contractual obligations are performed, there can be no claim for tortious interference with contractual relations.” Tessier v. Rockefeller, 162 N.H. 324, 337 (2011). Even if a PEO were to testify that she left her position because of the Respondents, that would

not change the fact that the decision to resign was within the full control of the employee, not of Respondents.

This case has been initiated and prosecuted without proper legal authority. Petitioner has attempted to compensate for its lack of an established legal basis by general reference to this court's equity powers as well as the PEO's alleged right to work in a non-hostile work environment. As a matter of employment law, there is no legal right to work in a non-hostile work environment unless the hostility is motivated by illegal discrimination or by retaliation for the exercise of a legally protected right.

For this court to accept the invitation to act on the basis of equity without a sustainable legal basis would exceed the role of the judiciary, and subject Respondents and all other citizens to potentially arbitrary decision-making governed only by considerations which are flexible and subjective. Because of the fundamental constitutional rights at issue in this case, it is particularly important that this action be decided upon well defined and established legal principles and precedents.

Respectfully submitted,


JAMES CLEAVELAND
GARRETT EAN
KATE AGER
IAN BERNARD a/k/a IAN FREEMAN
GRAHAM COLSON

By Their Attorneys,

BACKUS, MEYER & BRANCH, LLP

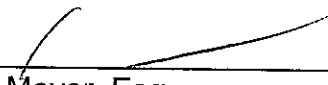
Dated: 9, 4, 2011

By: _____


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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 2013, I mailed by U.S. Postal Service First Class Mail a copy of Respondents' Memorandum Of Law to Thomas P. Mullins, Esq., counsel for the City of Keene, Charles Bauer, Esq. and Erik Moskovitz, Esq..



Jon Meyer, Esq.