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

DEFENDANTS' POST HEARING MEMORANDUM

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 Defendants' Post Hearing Memorandum In Support Of Motion to Dismiss and in opposition to plaintiff's request for preliminary relief, stating:

Intentional Interference With Contractual Relations

The sole cause of action contained in the petition is that of tortious interference with contractual relations. Plaintiff has acknowledged that there is no precedent nationally for recognizing this tort as a cause of action for an employer, much less a public employer, against a third party for creating a hostile work environment. The "creative" application of this tort theory is an implicit acknowledgement that plaintiff has no basis for alleging the violation of any existing law or ordinance which is the standard basis for requesting injunctive relief limiting use of public space.

Even in the economic competition context in which the tort is normally applied, it does not have a legal basis on the facts alleged here. Under New Hampshire law, the

tort of intentional interference with contractual relations is not applicable to a case involving employment at will. Rand v. Town of Exeter, 11-CV-55-PB (10/2/13) fn 9; Alt. Sys. Concepts, Inc. v Synopsys, Inc., 229 F. Supp. 70-73 (DNH) (2002). Although a claim could potentially be brought for interference with prospective contractual relations, there is no bar under any tort theory against trying to persuade an employee at will to exercise his right to seek alternative employment. As set forth in the Restatement at § 768:

> *The competitor is therefore free, for his own competitive advantage, to obtain the future benefits for himself by causing the termination [of the employment at will relationship]. Thus he may offer better contract terms, as by offering an employee of the plaintiff more money to work for him or by offering a seller higher prices for goods, and he may make use of persuasion or other suitable means, all without liability. Comment i.*

If there is a right to persuade a person in an employment at will relationship to change jobs for economic reasons, it necessarily follows that there is a similar right to persuade for political reasons.

One of the three PEOs testified that he has resigned his position. The other two have chosen not to. The one who did resign immediately commenced new employment upon his resignation. The decision to leave was his, and defendants had neither the capability nor the intent to require him to do so. At the hearing he testified that his decision to leave was motivated by his stressful working conditions arising out of the defendants' Robin Hooding activities. However, many employees in both public and private employment are required to endure difficult working conditions. One of the PEOs' duties in their written job description was to "endure verbal and mental abuse

when confronted with the hostile view and opinions of the public and other individuals often encountered in an antagonistic environment." Attachment A to plaintiff's complaint. Givetz did not claim that he was either forced or persuaded by defendants to resign his position, and accordingly there can be no liability against them even if the interference tort were applicable. If an employer or employee could bring interference claim against any third party who made working conditions more stressful and unpleasant, the tort would be given virtually limitless application. Even if the work environment were rendered hostile, that does not suffice under any legal theory to create a cause of action against either the employer or a third party.

Further, the tort is only applicable against "improper" interference. "Interference" based upon political ideals is not improper. Many political movements seek reforms which would adversely affect contractual or prospective contractual relationships. To attempt to circumscribe activism based on those ideologies through a tort theory which has been almost exclusively applied to the realm of economic competition is fundamentally improper. Although defendants readily acknowledge their desire that the City parking enforcement function be reduced substantially or eliminated altogether, there was no evidence that they specifically intended that the PEOs leave their positions except in consequence of a change in the City's programs. And the testimony was equally clear that the defendants' desire to see the City change its policies was based upon their good faith political beliefs, and not in any way related to any animosity towards the PEOs individually.

Application of the seven Restatement factors (§ 767) makes clear that any interference was not improper:

a. The nature of the actor's conduct: peaceful political expression.

b. The actor's motive: political.

c. The interests of the other with which the actor's conduct interfered: employment at will.

d. The interests sought to be advanced by the actor: change in government policy.

e. The social interests in protecting the freedom of action of the actor and the contractual interests of the other: constitutional rights of political activism versus employment at will.

f. The proximity of conduct to interference: indirect through decision making of each individual PEO.

g. The relationship of parties: citizens of plaintiff municipality.

These factors overwhelming support the determination that any alleged interference was not improper.

Equity Claim

When counsel for the plaintiff was asked during oral argument whether or not the City pressed an independent equity claim, he neither responded affirmatively nor did he rule out such a claim. Given the fact that no equity claim is made as part of the complaint, and that plaintiff has not sought to amend its pleadings to add such a claim, the proper conclusion is that such a claim is not before the court.

Even if the claim were before the court, it would not be a sufficient basis for injunctive relief. The purpose of equity is to provide a more flexible, less technical means to vindicate legal rights. It is not intended to fill the gap where there is no viable legal claim, and is certainly not intended to justify the violation of constitutional rights. It

would undermine the appearance of judicial impartiality for injunctive relief to be ordered without any legal basis on behalf of a municipal plaintiff against individuals expressing their opposition to the policies of that municipality.

Constitutional Rights

If plaintiff's interference theory were applicable, then the defendants would be barred from any political activity or expression which sought to persuade the PEOs to leave their position or which adversely affected their working conditions. This potential consequence would do such serious violence to defendants' constitutional rights as to demonstrate the nonsensical nature of applying plaintiff's theory in this context.

The testimony at the preliminary hearing established that "Robin Hooding" consisted of four principal activities, all of which are constitutionally protected:

1. Filling expired meters before cars were ticketed to protest against the City's parking enforcement function as well as 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.

These activities are protected by at least three constitutional rights:

1. Freedom of expression provided for in the First Amendment of the United States Constitution.
2. Part 1, Article 22 of the New Hampshire Constitution stating that "free speech . . . [is] essential to the security of freedom in this State; [it] ought, therefore, to be invariably preserved."
3. Part 1, Article 8 of the New Hampshire Constitution stating the right of government accountability.

In addition to these individual rights, defendants, to the extent they act in common, are protected by the First Amendment right to associate.

Expressive activity is protected as well as pure speech. In Doyle v Commissioner of New Hampshire Department of Resources and Economic Development, 163 N.H. 215 (2012), the New Hampshire Supreme Court recognized that the plaintiff's Big Foot impersonation on Mount Monadnock was constitutionally protected:

> *The speech at issue here is unquestionably protected under our State Constitution. Even though Doyle's activities may have been nothing more than a playful hoax, '[w]holly neutral futilities come under protection of free speech as fully as the Keats poems or Donne sermons.' United States v Stevens, 559 U.S. 460, (2010).*

The speech and expressive conduct in this case has heightened constitutional protection because it is on a matter of public concern which is "at the heart of the First Amendment protection". Snyder v Phelps, 562 U.S. 220 (2011). As the Court observed, "[s]peech concerning public affairs is more than self expression; it is the essence of self government." Id. Under the First Amendment, protecting speech on

public issues is of "central importance". Boos v Barry, 485 U.S. 312, 318 (1981). Id. Further the speech and expressive conduct took place on the streets and sidewalks of downtown Keene which is a public forum where the highest standards of constitutional protection applies. As the court noted in Doyle, "traditional public forums are fundamental to the continued 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." 163 N.H. 215 (2012) (citations omitted). In public forums, "the government's ability to restrict expressive activity 'is very limited'." Boos v Barry, 485 U.S. at 318.

Plaintiff's legal theory rests on the fundamental fallacy that otherwise constitutionally protected speech can be rendered illegal and penalized if it has the purpose and effect of persuading someone to violate prospective contractual relations. As the following review of some of the leading precedents will demonstrate, it has been clear for at least the last thirty years that this proposition is false.

This conclusion is manifest in Supreme Court decisions considering boycotts, blockades and other forms of protest arising out of the civil rights movement and the controversy over abortion. In the civil rights context, when demonstrators sought to advance racial justice by boycotting white businesses, those businesses attempted to responded by suing the demonstrators for attempting to persuade black customers to stop patronizing the boycotted establishments. The leading case is NAACP v Claiborne Hardware, Co., 458 U.S. 886 (1982). The white merchant plaintiffs in Claiborne attempted to utilize a common law theory, the tort of malicious interference with the plaintiffs' business, directly analogous to the interference claim in this case. In relative

terms, they had a stronger case than plaintiff here because they were asserting private business interests of the sort traditionally protected by tort law, and because the facts demonstrated a very strong pattern of what the Mississippi Supreme Court referred to as "intimidation, threats, social ostracism, vilification and traduction" of potential black customers as well as scattered acts of violence. Id. at 894. Nonetheless, the Court decisively found in the defendants' favor on the basis of the fundamental legal principle that: "speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action." Id. at 910. It held that "use of speeches, marches and threats of social ostracism cannot provide a basis for a damages award. But violent conduct is beyond the pale of constitutional protection." Id. at 933. Given the lack of any evidence of violence in the case before this Court, the holding in Claiborne should have been more than sufficient to prevent this action from being brought.

The principle of Claiborne that speech or expressive activity, even when intended to persuade or intimidate a person not to pursue a contractual relationship is constitutionally protected unless characterized by violence, has been followed in subsequent cases in which the Court has addressed the rights of abortion protesters. The government bodies in those cases had a much stronger claim than the plaintiff here because they were acting to protect vulnerable medical patients going to or from places of medical treatment rather than public employees on the job, and because they were acting against a record of numerous acts of violence, trespass and other violations of the law, none of which have been claimed in this case Nonetheless, the Court only granted limited injunctive relief for the areas right around the clinics, and specifically

ruled out the type of floating buffer zone sought here. No case has recognized interference in contractual or prospective contractual relations between patients and clinics as a justification for injunctive relief.

In the first case, Madsen v Women's Health Center, Inc. 512 U.S. 753 (1994), the Court upheld a 36 foot buffer zone around the clinic entrance and exit based on the conclusion of the state court that such an injunction was the only way to maintain access to the clinic. The other restrictions including prohibiting abortion "counselors" from approaching patients were struck down. The Court specifically noted that even in the instance of a content neutral injunction, "standard time, place, and manner of analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burdened speech more than necessary to serve a significant interest." Id. at 765.

The statement of facts in the second case, Schenck v Pro-Choice Network of Western New York, 519 U.S. 357 (1997), contains an extraordinary record of violence including numerous large scale blockades, trespassing, grabbing, pushing, shoving, yelling and spitting at patients entering the clinic. Notwithstanding this history, the Court struck down the floating 15 foot buffer zone established by the lower court around any person or vehicle seeking access to the clinic. In ruling out a floating buffer zone, the Court noted:

> *It would be quite difficult for a protester who wishes to engage in peaceful expressive activities to know how to remain in compliance with the injunction. This lack of certainty leads to a substantial risk that much more speech will be burdened than the injunction by it term prohibits. That is, attempts to stand 15 feet from someone entering or leaving a clinic and to communicate a message - - certainly*

protected on the face of the injunction - - will be hazardous if one wishes to remain in compliance with the injunction. Id.

In the third case, Hill v Colorado, 530 U.S. 703 (2000), the Court reviewed a Colorado statute which prohibited a person from "knowingly approaching" within 8 feet of another person, without that person's consent, within 100 feet of the entrance of any health care facility.

There was a history in that case of "counselors" using strong and abusive language against patients. In upholding the statute, the Court noted the particular importance of protecting pregnant woman from physical harassment, a concern of no application here. And the law was narrowly limited to areas adjacent to health care facilities.

It is ironic that at the oral argument plaintiff's counsel chose to rely upon the First Circuit opinion in the case of McCullen v Coakley, _____ F.2d _____(1st Cir.) (2013), upholding a 35 foot buffer zone around the entrance, exits and driveway of a abortion clinic even though the U.S. Supreme Court has granted Certiorari to review the merits of that decision. The fact that the Court granted cert. notwithstanding the apparent similarity between McCullen and Madson, demonstrates that if there is a trend in this area of the law, it is towards greater protection of the rights of demonstrators.

Plaintiff argues that the constitutional rights of the defendants must be balanced against the interests of the PEOs in not being subject to videotaping and unwanted verbal expression. However, the Supreme Court has never upheld the balancing of interests as being the appropriate test in terms of determining whether free speech and expression shall be restricted. Instead the heavy burden is on the government to

establish a substantial or compelling interest, and that that interest can only be achieved through narrowly tailored restrictions premised upon a neutral ordinance or a pattern of pre-existing violations of the law.

This Court needs not address remedy since plaintiff has failed to assert, much less establish, a viable cause of action. But the position plaintiff has taken on remedy is illustrative of the extraordinary chasm between its position and the Supreme Court precedent. At the outset of this case, plaintiff proposed a fifty foot floating buffer zone in the entirety of downtown Keene which is unconstitutional on its face. At the beginning of the temporary hearing, it asked for a thirty foot floating zone in which certain activities, described with conspicuously vague terms, would be prohibited. As set forth supra, this is also unconstitutional on its face because the ambiguity of its language would have an impermissible chilling effect on protected speech. At oral argument, plaintiff proposed that this Court fashion its own remedy. That would be completely inappropriate. It is the responsibility of the plaintiff to demonstrate that its proposal meets the stringent standards set forth by the courts. For this Court to establish its own standard would place itself in an untenable position of merging the legislative and judicial functions, and deprive defendants of the opportunity to assert their position regarding its constitutionality.

Almost any type of permissible restriction upon constitutionally protected speech must be content neutral. Rather than relying on a neutral ordinance, plaintiff in this action is asking the Court to solely restrict six named individuals all of who express a particular point of view. Instead of being a comprehensive prohibition of certain types of actions, the proposed injunction would only apply if those actions were committed within

thirty feet of PEOs. And the proposed prohibition against "taunting" makes clear an intent to prohibit negative speech even when positive speech is permissible. The fact that this entire case is content based is demonstrated by plaintiff's sole cause of action for interference with contractual relations which is predicated on the content of defendants' expression. By its very nature, it is limited to and antithetical to expression which advocates reducing the size of government, and has no application to ideology, which would favor government expansion.

In their supplemental pleadings, plaintiff appeared to be suggesting a conspiracy claim which would raise constitutional difficulties under the right to associate. However, apparently based on the lack of evidence at the hearing of any underlying organization, plaintiff acknowledged at oral argument that it was just seeking an injunction against the six named defendants. This underlines the ineffective and arbitrary nature of the proposed remedy since other Robin Hooders would be free to carry on the same activities.

The balancing of interests advocated by plaintiff would not be the appropriate standard even were a valid tort claim alleged because constitutional rights trump claims in tort. In Snyder v Phelps 562 U.S. _____, 131 S.Ct. 1207, (2011), in the Supreme Court held that the tort of intentional infliction of emotional distress, cannot be brought against demonstrators exercising their free speech rights. Although there was no denying the grievous injury that the speech caused to the plaintiff, that injury was not weighed against the exercise of constitutional rights. As Justice Roberts wrote:

> *Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and - as it did here – inflict great pain. On the facts before us, we cannot react to that*

> *pain by punishing the speaker. As a Nation we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate. 131 S.Ct. 1220.*

Plaintiff repeatedly invokes its interest in protecting safety, notwithstanding the fact that there was no evidence of any significant safety problems aside from three assaults against defendants committed by third parties nor any police officer testimony. If there were safety issues, the City had an obligation to provide protection to the demonstrators. As the New Hampshire Supreme Court has noted:

> *When peaceful, orderly public comments are involved, the police have a duty to take reasonable affirmative steps to ensure the maintenance of the protestor's rights to freedom of speech and expression. State v Nickerson 120 N.H. 221, 226 (emphasis in original).*

Nickerson involved protestors on a traffic island where the safety issues were far more significant than any alleged here. There should be no doubt that restrictions on free speech cannot and should not be based upon the actions of those who attempt to assault or otherwise violate the rights of the speakers.

Plaintiff also complains that some of the language used by the defendants was derogatory and profane. However, derogatory and even profane speech is in most instances constitutionally protected. Cohen v California, 403 U.S. 15 (1971); Boos v Barry, 485 U.S. 312, 322 (1988), [i]n public debate our own citizens must tolerate insulting, and even outrageous speech in order to provide 'adequate breathing space' to the freedoms protected by the First Amendment.") (citations omitted); State v Oliveira, 115 N.H. 559 (1975), (defendant's use of the phrase "f***kin' pigs was constitutionally protected").

The plaintiff's case ultimately reduces to an appeal for sympathy for the PEOs. They are entitled to recognition for the nature of the job they perform for the PEOs. But their testimony did not support the overstated claims made on their behalf, and significant parts of what they did assert was contradicted by the video exhibits and the defendants' testimony. The PEOs status as public employees, as well as their job descriptions require them to tolerate criticism and demands for accountability which might be considered unpleasant and uncomfortable. (Glik v Cunniffe, 665 F.3d 78, 84 (1st Cir) (2011). They do not have a right to be protected from distraction. Even if they had experienced a hostile work environment, there is no intrinsic right against a hostile work environment.

The City has a legitimate interest in their working conditions which it can address in many constitutionally permissible ways including more training and other support. The City also has the right to enforce the criminal and civil, state and local, statutes and ordinances that govern the conduct of persons in public spaces. It can even, subject to constitutional review, adopt new ordinances. What it cannot do, is exactly what it has done in this case, which is to utilize an inapplicable legal theory in an attempt to persuade this Court to impose clearly unconstitutional restrictions on protected speech and conduct without any evidence that defendants have violated any laws.

In regard to the most recent draft injunction submitted by the City at the outset of the preliminary hearing, if it were enforced narrowly it would have no effect on the defendants or the PEOs. If it were interpreted broadly, if phrases such as "taunting" and "intimidating" and "harassing" were given the broad interpretation advocated by some of the City witnesses in this proceeding, then it would virtually eliminate defendants'

protected speech and actions. Plaintiff's proposed injunction is the very epitome of overbreadth in that any serious attempt to comply would chill any expression within the proposed thirty foot floating buffer zone.

Preliminary Injunction

Likelihood of Prevailing

Even if plaintiff stated a viable cause of action against the defendants, the testimony presented at the preliminary hearing overwhelmingly favored the proposition that defendants were engaging in peaceful, constitutionally protected political activism which did not violate the rights of the plaintiff. Given the Court's careful attention to the evidence presented over the course of three days, there is no need to restate it. However, certain propositions are clear:

1. Notwithstanding the fact that the focus was supposed to be on the alleged liability of each defendant individually, plaintiff repeatedly attempted to treat them collectively. This tactic, however, did not disguise the fact that there was virtually no evidence relating to two defendants: Ager (who was consistently characterized by the PEOs as being "quiet"), and Eyre (whose only apparent offense was to communicate with other defendants by radio, and accuse one PEO of utilizing "ransom".) In regard to two other defendants, Ean and Freeman, there was no testimony of any alleged infringing speech or conduct aside from defendant Freeman exercising his freedom of speech to express his opinion that PEOs should resign, and possibly that he would help them find other jobs, and defendant Ean exercising his constitutionally protected right to monitor the PEOs through video. Almost all of the complaints by the PEOs, inasmuch as

they were individualized, were directed at defendants Colson and Cleaveland. Even with respect to those individuals, the testimony was overwhelming that the PEOs' complaints against them, which were unsubstantiated by any of the exhibits, were at most incidental to the exercise of their rights of political expression.

2. Through three days of testimony, there was no claim that any of the defendants violated any statute or ordinances governing behavior in public places aside from the claim that one or more of the defendants, as well as the PEOs, did not always use crosswalks when crossing the street.

3. There was no claims of violence by any defendant. The only claims involving any physical contact were accidental bumping and one instance in which defendant Colson touched the arm of one of the PEOs, and then immediately removed his hand.

4. The testimony of defendants that they did not hold any personal animosity against the PEOs was uncontradicted by any of the testimony or evidence, and substantiated the fact that there were virtually no contacts with the PEOs outside of their work duties.

The degree of consideration and respect shown by the defendants to the PEOs, and by the PEOs to the defendants, was disputed during the course of the testimony. However, in the context of political activism and free expression, lack of consideration or respect does not amount to a legitimate basis for government intervention. The primary complaint of the PEOs that the monitoring and other Robin Hood activities occurred on a daily basis may be significant in terms of how they were affected, but it has no bearing

on the defendants' constitutional rights. If what they did on day 1 was constitutionally protected, it was equally protected on day 20.

Irreparable Harm

Although irreparable harm is a requirement for the granting of preliminary relief, the City presented its Finance Director to testify to the financial measure of each injury allegedly incurred by it. Further, the City has filed a subsequent action for damages arising out of these same allegations. Given the fact that these alleged injuries can be compensated for in financial terms, if there were a legal and factual basis for doing so, plaintiff cannot meet the irreparable law requirement.

The Public Interest

Without restating what has been stated before, it should be clear that the public interest in permitting political activism and expression of all varieties so long as it does not violate the law, is paramount, and of far more public interest than the injuries alleged by Plaintiff which could be addressed in other ways.

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: October 10, 2013 By: _____

Jon Meyer, Esq.
NH Bar # 1744
116 Lowell Street, P.O. Box 516
Manchester, NH 03105-0516
603-668-7272
jmeyer@backusmeyer.com

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October, 2013, I mailed by U.S. Postal Service First Class Mail a copy of DEFENDANTS' POST HEARING MEMORANDUM to Thomas P. Mullins, Esq., Charles Bauer, Esq., and Peter Eyre, Pro se.

_____
Jon Meyer, Esq.