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STATE OF NEW HAMPSHIRE

CHESHIRE, SS.

SUPERIOR COURT

CITY OF KEENE

vs.

JAMES CLEAVELAND, ET AL.

Docket No. 213-2013-CV-00098

CITY OF KEENE'S
REQUEST FOR FINDINGS AND RULINGS

Petitioner, City of Keene, submits the following Request for Findings of Fact and Rulings of Law:

FINDINGS OF FACT (1-29)

1. The City of Keene ("City"), is a New Hampshire municipal corporation with a principal place of business located at 3 Washington Street, Keene, New Hampshire. The City has been granted extensive authority by the State of New Hampshire to regulate and enforce public parking in the City under RSA 47:17, XVIII, including but not limited to the installation of parking meters under RSA 231:130, and the adoption of parking enforcement ordinances under RSA 231:132-a.
2. The City contractually employs three (3) Parking Enforcement Officers (collectively PEOs), who are also members of the Keene City Employees Union, AFT-NH Local #6288, and who are tasked with enforcing motor vehicle parking laws and regulations by patrolling City streets. The PEOs have no arrest powers. The PEOs are primarily responsible for checking parking meters and writing parking tickets in and around the downtown area.
3. The PEOs are Linda A. Desruisseaux ("Desruisseaux"), Alan E. Givetz ("Givetz") and Jane E. McDermott ("McDermott").

4. Defendant, James Cleaveland, is an individual who resides at 173 Washington Street, Apt. 9, Keene, New Hampshire. Defendant, Garrett Ean, is an individual who resides at 75 Leverett Street, Keene, New Hampshire. Defendant, Kate Ager, is an individual who resides at 6 Mystic Place, Keene, New Hampshire. Defendant, Ian Bernard, is an individual who resides at 73 Leverett Street, Keene, New Hampshire. Defendant, Graham Colson, is an individual who resides at 34 Walnut Street, Keene, New Hampshire. Defendant, Pete Eyre, is an individual who resides at 29 North Lincoln Street, Keene, New Hampshire.

5. Beginning in or around December 2012, and continuing to the present, Defendants have, acting in concert and individually, engaged in persistent and ongoing efforts to prevent the PEOs from performing their official duties in an attempt to interfere with the City's employment contractual relationship with the PEOs, creating a hostile work environment for the PEOs.

6. Defendants have, by implied or express agreement among themselves, regularly, repeatedly, and intentionally 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; and video recording the PEOs at very close proximity as they perform their duties.

7. Given the employment contractual relationship between the City and the PEOs, the City has an obligation to protect its employees from a hostile work environment. The City has a legal duty to prevent ongoing hostile work environment conditions for its employees.

8. The City and its employees have a legitimate interest to avoid workers' compensation claims, disability claims, and unnecessary sick day claims that can arise from a hostile work environment.

9. PEO Linda has been harassed, intimidated, and video recorded on a regular basis since December 2012.
10. 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.
11. 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.
12. PEO Alan has been crowded, bumped into, and taunted by the Defendants, including being subjected to profanities and derogatory statements relative to his military service.
13. PEO Alan 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.
14. Defendants conduct played a significant role in PEO Alan's recent resignation as a PEO for the City.
15. PEO Jane has 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.
16. Defendants have chased PEO Jane across a street.
17. As a result of the Defendants' harassing behavior, PEO Jane has had to alter her work duties, to the detriment of the City.
18. PEO Jane fears for her job security, as the Defendants have stated an intention to shut down the City's parking department.
19. 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.

20. As a result of the Defendants' conduct, PEOs Alan, Jane, and Linda have 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.

21. PEOs have expressly requested, on multiple occasions, that Defendants stop their interference and intimidation.

22. Defendant Colson has stated that both he and other participants are being paid to conduct the complained of activity, with the purpose and intention of preventing the PEOs from doing their jobs.

23. Defendants' actions present a safety concern to the PEOs and the general public. Defendants activities take up sidewalk space as the PEOs attempt to perform their job functions with Defendants following too closely. Private citizens using City sidewalks have become ensnared in Defendants' activities and been prevented from traveling to their destinations.

24. The motoring public is also at risk as Defendants run across streets to intercept PEOs. Defendants frequently follow the PEOs' City vehicles on foot and by bicycles and 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.

25. The PEOs frequently find themselves at the center of confrontations between Defendants and the general public. Private citizens have shouted from cars and confronted Defendants on the sidewalks within close proximity to the PEOs.

26. 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.

27. While in engaging in the above conduct, Defendants knew that the City has/had an employment relationship with the PEOs, and Defendants target the PEOs for this specific reason.

28. Defendants intentionally interfere with the the City's relationship with the PEOs with an intent to prevent the PEOs from performing their official duties.

29. Defendants have and are acting in concert with one another, and have jointly sought through their actions, and under and implied or express agreement among them and others, to accomplish the unlawful purpose of tortious interference with the contractual employment relationship among the City and its PEOs.

RULINGS OF LAW (A-W)

A. "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." *Id.*, at 47 (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 (2003)(D.N.H.).

B. Intentional interference with contractual relations may be shown, where: "(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." *Hughes v. New Hampshire Div. of Aeronautics*, 152 N.H. 30, 39 – 41 (2005) quoting *Demetracopoulos v. Wilson*, 138 N.H. 371, 373 – 74 (1994).

C. Defendants have no legal authority to taunt, interfere with, harass, and intimidate the PEOs in the performance of their employment duties, or legal authority to intentionally interfere with the employment relationship among the City and the PEOs.

D. While the PEOs are municipal employees, they do not shed all of 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.

E. 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) (string cite omitted), employees and their employers also have legitimate, protected rights.

F. Defendants' intentional activities of taunting, harassing, and intimidating the PEOs with the intent to cause emotional, physical, and mental distress, and interference with employment relationships are not protected free speech activities.

G. 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. *Id.*; 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).

H. The right to videotape public officials is not unfettered. See generally *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011) (recognizing that plaintiff's activities of filming from ten feet away "were peaceful, not performed in derogation of any law," and did not "interfere with the [public officials'] performance of their job duties" and was, therefore, not reasonably subject to limitation.); *Iacobucci v. Boutler*, 193 F.3d 14, 25 (1st Cir. 1999) (finding that plaintiff "filmed the group from a comfortable remove; and he neither spoke to nor molested them in any way").

I. Defendants harassing behaviour and non-peaceful, disruptive recording is not constitutionally protected conduct. See *Gericke v. Begin*, 2012 WL 4893218, at *7 (Docket No. 11-CV-231-SM, Dist. Ct. N.H.). Here, where Defendants consistently videotape the PEOs in very close proximity while engaging in other non-peaceful, disruptive behavior, Defendants' actions are not constitutionally protected. See *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011) (recognizing right to record public officials under limited circumstances where plaintiff "filmed [the officers] from a comfortable remove" and "neither spoke to nor molested them in any way").

J. The actions of Defendants, acting individually and jointly, and concertedly, constitute a civil conspiracy to accomplish the unlawful act of tortious interference with the City's employment contractual relationship with its PEOs. See *Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 47 (1987).

K. Defendants, acting in concert with one another have jointly sought through their actions, and under and implied or express agreement among them and others, to accomplish the unlawful

purpose of the tortious interference with the contractual employment relationship among the City and its PEO's, causing damage to the City by causing stress, anxiety, and physical and emotional distress to the PEOs, which can lead to claims of workers' compensation, emotional distress, disability, or resignation from employment.

L. Defendants have and are acting in concert pursuant to a civil conspiracy, and each is jointly and severally liable for the tortious damage to the City either based on their own individual actions and for the actions of their concerted effort, even if a Defendant's own actions did not cause the damage. *See* N.H. Civil Jury Instructions, sec. 14.16.

M. Defendants, in conducting the above-described activity, place the PEOs and the public in danger, both by their distracting behavior and also as a result of their disregard for rules of the road.

N. The City has suffered and will continue to suffer harm to its employment relationship with the PEOs due to Defendants efforts to prevent the PEOs from performing their job duties. *See* Restatement (Second) of Torts, § 766 (1977); *see also* *Donovan v. Digital Equip. Corp.*, 883 F. Supp. 775 (1994); *Montrone v. Maxfield*, 122 N.H. 724, 726 (1982).

O. Without injunctive relief, the PEOs will continue to suffer a hostile work environment, anxiety and distress caused by Defendants' behavior.

P. Without injunctive relief, the City will continue to suffer damages by way of the inability of the PEOs to properly perform their assigned job duties.

Q. Further, without injunctive relief, the City will likely suffer damage by way of additional voluntary resignations, workers' compensation claims, disability claims, and unnecessary sick days, by one or more PEOs for intolerable working conditions caused by Defendants' intentional harassing behavior.

R. The loss of the City's employment contractual relationship with the PEOs would cause considerable damage to the City of Keene, forcing it to hire and train new PEOs – a time-consuming and money-intensive prospect. Such damage is irreparable and cannot be adequately compensated by money damages. In addition, it is possible, and likely probable, that the City may not be able to replace the PEOs if Defendants' actions are allowed to continue, and the City would not be able to fulfill its statutory authority with respect to public parking.

S. The City's injunction request is designed specifically to protect the PEOs from tortious interference with their employment contractual relationship with the City and will not prevent Defendants from engaging in otherwise-protected free speech activities.

T. In pursuing injunctive relief, the City seeks to preserve several significant governmental interests:

- Protection of City employees from a hostile workplace;
- Promotion of City employees' job functions;
- Retention of City employees;
- Protection of the motoring and walking public;
- Promotion of the free flow of traffic on streets and sidewalks;
- Prevention of public citizen confrontation with Respondents in close proximity to PEOs;
- Promotion of public safety and order; and
- Promotion of freedom of expression in reasonable time, place, and manner.

U. The requested injunctive relief burdens no more speech than is necessary to serve these interests.

V. Safety concerns for the PEOs and the general public mandate the injunction of Defendants' behavior. A 30 foot safety zone that keeps Respondents safely back from the PEOs is narrowly tailored so as to serve only the significant governmental interests at stake and burdens no more speech than is necessary for such protections. *See Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765 (1994). The injunction will put in place reasonable time-place-

manner restrictions, but will not prohibit Defendants from engaging in constitutionally protected speech.

W. An injunction will prevent further interference with and intimidation of the PEOs, preserve the parties' employment relationship, and preserve the City's statutory authority to regulate public parking.


Respectfully submitted,

CITY OF KEENE

By Its Attorneys,

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Dated: August 12, 2013

By: 
Charles P. Bauer (#208)
Robert J. Dietel (#19540)

CERTIFICATE OF SERVICE

I hereby certify that I have this date forwarded a copy of the foregoing to Thomas Mullins, Esquire; Jon Meyer, Esquire counsel for Ian Bernard a/k/a Ian Freeman, Garrett Ean, James Cleaveland, Kate Ager, and Graham Colson; and Peter Eyre, *pro se*.

Dated: August 12, 2013

By: 
Charles P. Bauer (#208)