

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' RESPONSE TO CITY OF KEENE'S REQUEST FOR
FINDINGS AND RULING**

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 states:

- A. Defendants object to all proposed findings which refer to the defendants collectively without delineating between them. Without waiving this objection defendants state:
1. Admitted.
 2. Admitted.
 3. Admitted.
 4. Admitted.
 5. The testimony at the hearing was Robin Hooding began in 2008 to 2009, and that its objectives were to express opposition to the current system of parking enforcement utilized by the City, and to spare motorists from the expense and

aggravation of receiving a ticket, and not to prevent PEOs from doing their jobs, or to create a hostile work environment. Difficult working conditions do not amount to a hostile work environment particularly where there is no claim of racial, sexual or any other type of invidious discrimination or retaliation. The job description of the PEOs recognizes that one of their duties is to "endure verbal and mental abuse when confronted with the hostile views and opinions of the public and other individuals often encountered in an antagonistic environment."

6. The substantial weight of the testimony at the hearing was that most of the communication between demonstrators and city employees was respectful and in some instances lighthearted. Those defendants that did express their sincere opinions that the PEOs should engage in more productive employment, were exercising their freedom of speech. The only substantiating video evidence about harassing and intimidating behavior was on the part of third parties attempting to intimidate defendants. The conduct and statements of each defendant were spontaneous and not dictated by any other defendant or by any organization or agreement.

7. The City cites no legal basis for this alleged duty. Any employer has an interest in supporting its employees, and the City had multiple means of doing so without initiating a lawsuit.

8. There was no testimony of any causally connected worker's compensation claim, disability claim or sick day claim made during the four years that the Robin Hood activities have been ongoing.

9. The evidence at the hearing was that all three PEOs were video recorded on a regular basis. They were neither harassed nor intimidated unless video recording is regarded per se as harassment or intimidation.
10. There was no evidence that defendants ran up behind any PEO on a regular basis. Sometimes it would be necessary for them to pass by a PEO in order to put money in an overdue meter.
11. See answer for number 6.
12. Defendants' video, Exhibit B, shows PEO Givetz himself turning around and approaching and 'taunting' one of the defendants who was videotaping him from a distance. Any bumping involving defendants was inadvertent. Plaintiff failed to provide substantial evidence of use of profanity. Derogatory speech and most profanity is constitutionally protected, particularly when addressed to government employees. Cohen v. California, 403 U.S. 15 (1971).
13. The only evidence that Givetz was "harassed" through the internet or on his days off was one reference to him in an internet posting and one casual unplanned, non-hostile encounter between him and one of the defendants.
14. Givetz made his own decision to resign, and immediately commenced working in another position.
15. There was no evidence of any group larger than three monitoring PEO activity, and only one instance of physical contact testified to by Officer McDermott which occurred when she was removing a Robin Hood card from a vehicle's windshield. She

testified that the contact was extremely brief, and not intimidating. See defendants' Exhibit A.

16. The term "chased" implies that McDermott felt threatened by defendants. She did not so testify, and there would not have been a reasonable basis for that apprehension. She chose to run across the street, and defendant chose to run after her in order to arrive at the next parking meters before she wrote tickets.

17. She testified regarding her decision to change her hours not her work duties.

18. The fact that the PEOs may be concerned with their job security if the City's Parking Enforcement Department is modified or abolished does not negate the defendants' rights to express their opinions and intentions regarding City programs and functions.

19. Although the PEOs testified that they felt stressed by the extent to which they were monitored and videotaped in the performance of their duties, the overwhelming weight of the testimony was that defendants attempted to keep a reasonable distance from the PEOs and moved back when requested.

20. None of the defendants had sought individual counseling, nor has individual counseling been recommended to them.

21. Defendants complied in almost every instance with requests that they provide more distance.

22. Defendant Colson did not testify whether he was paid, and that has no bearing on his constitutional rights.

23. If there were a genuine safety issue the City could have addressed it through its police department, and enforcement of its ordinances. Defendants have a constitutionally protected right to utilize sidewalk space for expression of their opinions.
24. The City failed to present a single instance of an accident, near accident or other safety threat involving bicycles or vehicular traffic relating to any of the defendants.
25. There were three instances testified to in which private citizens confronted defendants verbally and/or physically. On no occasion were these encounters caused by defendants. As a matter of law the reaction of hostile onlookers is not an acceptable basis for limiting freedom of speech. The appropriate action of the City would have been to protect defendants rather than trying to suppress their expression.
26. There is no evidence of any safety risk except to defendants being assaulted, and to the extent there was a safety risk the City should have utilized its Police Department to stop the assault.
27. The uncontested testimony of the defendants is that they did not target the PEOs or harbor any personal animosity against them. Their object was to place money in overdue meters in order to protect motorists from getting tickets, and to express their political and philosophical goals.
28. There was no evidence that the PEOs failed to perform their duties, much less that defendants prevented or intended to prevent them from doing so.
29. Defendants have a constitutional freedom to associate. There was no evidence presented at the hearing of any formal plan or agreement between defendants aside

from notifying each other of routes that the PEOs were taking, and working together to place cards on vehicles where parking tickets had been averted.

RULINGS

Defendants' response to the proposed rulings will be set forth in their Post-Hearing Memorandum.

Respectfully submitted,

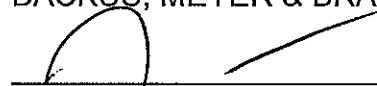
JAMES CLEAVELAND
GARRETT EAN
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GRAHAM COLSON

By Their Attorneys,

BACKUS, MEYER & BRANCH, LLP

Dated: October 8, 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 8th day of October 2013, I mailed by U.S. Postal Service First Class Mail a copy of DEFENDANTS' RESPONSE TO CITY OF KEENE'S REQUEST FOR FINDINGS AND RULING to Thomas P. Mullins, Esq., and Charles Bauer, Esq. and Peter Eyre, Pro se.



Jon Meyer, Esq.