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 MEMORANDUM OF LAW

NOW COMES the Petitioner, City of Keene (the "City"), by its counsel, Gallagher, Callahan and Gartrell, P.C., and submits this Memorandum of Law pursuant to this Court's June 11, 2013 Order and says as follows:

Introduction

The City seeks preliminary and permanent injunctive relief from the Court ordering Defendants to not interfere, harass, or intimidate the City's three Parking Enforcement Officers (PEOs), and to remain at a distance of not less than 50 feet from the PEOs during the performance of their employment duties for the City.

Argument

The PEOs suffering interference and harassment in this matter are not simply public employee automatons performing rote municipal employment functions. Officers Givitz, McDermott, and Desruisseaux are individuals with personalities, with feelings and emotions, and most importantly, with personal rights. These individuals have a right to serenity; privacy; and emotional, mental, and physical well-being.

The City has a duty to protect the rights and well-being of its employees. The City also has a protected property interest in the employment relationship between it and the PEOs based upon the PEOs' performance of parking enforcement activities for the City in exchange for consideration and benefits. Defendants' continued interference with this contractual relationship will impact the City's property interest; individual PEOs might take sick leave, file workers compensation claims, suffer temporary or permanent disability, or voluntarily resign their employment – actions which would prevent the PEOs from performing their employment obligations for the City and cause the City financial harm. Like any employer with the duty to maintain a safe and healthy work environment, the City has an obligation to prevent these Defendants from intentionally and improperly harassing and intimidating its PEOs.

A. Standing

I. The City has standing to bring an action against Defendants.

"Any person with a legal or equitable right who is not specially disqualified by the terms of a statute may bring an action in the appropriate court or agency to enforce, determine, or protect that right." 4 R. WIEBUSCH, NEW HAMPSHIRE PRACTICE, CIVIL PRACTICE AND PROCEDURE §§ 6.04 (1997). In evaluating whether a party has standing to sue, the Court focuses on whether the party has suffered a legal injury against which the law was designed to protect. *Asmussen v. Comm'r, N.H. Dep't of Safety,* 145 N.H. 578, at 587 (2000).

The City is a duly organized municipal corporation that has the specific statutory authority granted to it by the State of New Hampshire to "sue and be sued, prosecute and defend, in any court or elsewhere." *See* RSA 31:1 and RSA 47:1. In addition, the City has been granted extensive authority by the State of New Hampshire to regulate and enforce public parking 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. Acting pursuant to the authority granted to it by the State of New Hampshire, and in furtherance of creating a parking regulatory scheme, the City has adopted ordinances regulating public parking and employs three PEOs to enforce its parking laws and regulations, among other duties.

As a municipal corporate entity, the City has the right to enter into contracts with its PEOs, and to bring an action in court to protect that contractual relationship. *See* RSA 31:1, RSA 33:3, and RSA 47:1. It is evident that through their intentional actions, which include following, communicating with, taunting, intimidating, harassing, and video recording the PEOs at close proximity, Defendants are infringing on the City's right to regulate parking and maintain contractual relations with its employees. *See* Affidavits of PEOs Givetz, McDermott, and Desruisseaux attached to the City's original petition. Defendants' actions threaten the City's legal rights and constitute intentional interference with contractual relations. *See Montrone v. Maxfield*, 122 N.H. 724 (1982).

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)).

The City maintains an economic employment relationship with PEOs Givetz, McDermott, and Desruisseaux, providing salary and benefits in exchange for the PEOs' satisfactory performance of their employment duties. PEOs wear distinctive uniforms to inform the public of their status as City employees and parking enforcement personnel. Defendants are

aware of the PEOs' economic employment relationship with the City of Keene and of the employment duties the PEOs are required to perform.

With the knowledge that the PEOs are employed by the City, and most probably because of this relationship, beginning in December of 2012, and continuing through the filing of this Memorandum, Defendants have intentionally and improperly interfered with the City's economic employment relationship and with the PEOs' ability to perform their employment duties by following, communicating with, taunting, intimidating, harassing, and video recording PEOs at close proximity. Defendants frequently follow and surround individual PEOs in groups of one, two, or more, an inherently intimidating act. *See* Affidavits of PEOs Givetz, McDermott, and Desruisseaux.

As a result of Defendants' tortious interference, PEOs have expressed anxiety and distress. In addition, PEOs have expressly requested, on multiple occasions, that Defendants stop their interference and intimidation. *See* Affidavits of PEOs Givetz, McDermott, and Desruisseaux.

The City has suffered and will continue to suffer harm due to the PEOs inability to perform their job duties effectively because of Defendants' tortious interference. *See* Restatement (Second) of Torts, § 766 (1977); *see also Donovan v. Digital Equip. Corp.*, 883 F. Supp. 775 (1994); *Montrone,* 122 N.H. at 726. Without injunctive relief, the PEOs will continue to suffer anxiety and distress caused by Defendants' behavior. 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, and may suffer further damage by way of voluntary resignations by one or more PEOs for intolerable working conditions caused by Defendants' intentionally harassing behavior.

The City has a legal right granted to it by the State of New Hampshire to regulate parking, including entering into employment contracts with the PEOs. Further, the City is specifically authorized under State statute to protect, through the bringing of court actions, its legal and equitable interests. It is plainly evident that the City has suffered and will suffer legal injury of the sort that the common law tort of intentional interference with contractual relations was specifically intended to prevent should the Court fail to grant the requested equitable relief. The City has a right to claim relief before this Court and thus has standing as a matter of law. *See Ossipee Auto Parts, Inc. v. Ossipee Planning Bd.*, 134 N.H. 401 (1991).

B. Tortious Interference and the First Amendment

I. Defendants' intentional and improper interference with the PEOs is not constitutionally protected conduct.

The City has not filed its petition seeking a restriction of Defendants' First Amendment rights. The City seeks only to protect its employees from regular, repeated, and intentional taunting, interference, harassment, and intimidation in the performance of their employment duties. Intimidation, interference, and harassment are not activities protected by the First Amendment.

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"). Expressed in *Glik* and *Iacobucci* is the fact that 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.

The City does not seek to limit Defendants' ability to videotape City employees from a "comfortable remove." Nor, to the extent that Defendants' activity of feeding meters can be considered a First Amendment activity, does the City seek to prevent Defendants' from engaging in that activity. The City seeks only to prevent intimidation and harassment of its employees; prevent Defendants from intentionally interfering with the City's contractual relationship with the PEOs; prevent Defendants from intentionally interfering with the PEOs' ability to perform their employment functions; and prevent the PEOs from suffering undue and unwarranted stress, anxiety, and emotional, mental, and physical distress. No First Amendment right is impinged by the City's injunction request and this Court need not analyze the First Amendment before granting injunctive relief to prevent Defendants' tortious interference.

The content of the speech at issue in this matter can be confusing and should be clarified: the content of Defendants' speech and conduct (i.e., Defendants' attempts to force PEOs to resign and Defendants' stated motive to shut down the parking enforcement office) is relevant only to show that the Defendants are intentionally and improperly interfering with the City's contractual relationship with its PEOs, thereby constituting tortious interference. The content of Defendants' speech is *not* relevant to a First Amendment analysis. Through its injunction request, the City seeks a content-neutral, easily measured 50-foot safety zone. The only First Amendment analysis necessary requires that the time, place, and manner restrictions requested be justified.

II. This Court has the authority to implement time, place, and manner restrictions upon Defendants' activities.

There is substantial legal support providing this Court the authority to enjoin Defendants' conduct and enact a 50-foot safety zone.

a. Freedom of speech is not absolute.

While it is well 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.

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).

The First Amendment permits restrictions upon speech and conduct which are of "such slight social value...that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. *Virginia*, 538 U.S. at 358-59 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992)).

The City here seeks just such a narrow restriction – an injunction preventing Defendants' from harassing and intimidating the PEOs and from intentionally and improperly interfering with the City's employment relationship with its PEOs. Defendants' activities include, but are not limited to, closely following the PEOs on foot in groups of one, two, or more; taunting, bumping into, and quickly running up to the PEOs from behind; and videotaping the PEOs from a very

close proximity from the rear, front, and sides. *See* affidavits of PEOs. While Defendants might suggest that their conduct is protected by the First Amendment, this harassing and intimidating conduct is of such slight social value that any benefit derived therefrom is clearly outweighed by the public interest in order and morality. *See R.A.V.*, 505 U.S. at 382-83.

Defendants legitimately retain the right to express their First Amendment rights regarding their disagreement with parking enforcement in the City of Keene. They similarly retain the right to video record the PEOs in their public activities. Defendants do not, however, retain the right to interfere with the PEOs' job functions or the City's contractual relationship with its PEOs while claiming First Amendment protection. There is a balancing that must occur in order to protect the PEOs' rights, the City's rights, and the Defendants rights. The City does not seek to limit Defendants' message, but rather to restrict intentionally harassing conduct. On balance, the City's request for an easily measureable, narrowly-restrictive safety zone preserves all parties' interests.

b. Time, Place, and Manner Restriction

The City's request for injunctive relief is reasonable as to time, place, and manner[1]. According to *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), time, place, or manner restrictions must satisfy the following conditions: (1) be content neutral; (2) be narrowly tailored; (3) serve a significant governmental interest; and, (4) leave open ample alternative channels for communication.

[1] Because Article 22 of New Hampshire Constitution permits incidental regulation of the time, place and manner of expression to the same degree as the First Amendment of the Federal Constitution, the Court's analysis need not distinguish between the two. *See, e.g., State v. Comley*, 130 N.H. 688, 692 (1988).

i. The City's injunctive relief request is content neutral

A restriction that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. *Ward*, 491 U.S. at 791; *see also Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986). Government regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

The Court in *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011), recognized that so long as protestors were peaceful, non-intrusive, and situated away from the subject of their protest so as not to interfere, the exercise of their First Amendment rights was neither actionable nor necessary of restriction.[2]

Were Defendants here to perform the same conduct they do now (following the PEOs in groups of two or more, running up quickly from behind the PEOs, bumping into the PEOs, and videotaping the PEOs from close proximity), but were delivering a different message, their actions would be just as disruptive and would similarly interfere with the City's contractual relationship and with the PEOs' ability to perform their job functions. The City's injunction merely places Defendants, regardless of their message, at a non-intrusive comfortable remove where they may exercise their First Amendment rights without interfering with the PEOs.

ii. The City's injunctive relief request is narrowly tailored

The City does not seek to place any restriction on Defendants' messages, ideas, or content. Rather, the City seeks to have Defendants refrain from expressing their message in a

[2] *Snyder* involved Westboro Baptist Church congregants protesting at a military funeral with subjectively insensitive signs, but the protestors did not yell or use profanity, there was no violence associated with the picketing, and the protesting was conducted in a supervised area away from the funeral grounds.

manner intended to harass and intimidate. The City's request for a 50-foot safety zone comports with its goal and is narrowly tailored. The injunction's limited scope only prohibits these Defendants and their agents from interfering with the City's contractual relationship and the PEOs' employment duties in a small, easily measured radius[3]. *Cf. Doyle v. Comm'r, N.H. Dep't of Res. & Econ. Dev.*, 163 N.H. 215, 225 (2012) (collecting cases of overbroad, unconstitutional restrictions). It does not place any undue burden on the Defendants specifically or on the public as a whole.

iii. The City's injunctive relief request serves a significant governmental interest

The requested safety zone serves "significant government interest[s] that would be achieved less effectively absent the [restriction]." *Doyle v. Comm'r, New Hampshire Dep't of Res. & Econ. Dev.*, 163 N.H. 215, 224 (2012). The safety zone prevents interference with the City's protected property interest in its contractual relationship with the PEOs; it creates and maintains a safe and healthy working environment for the PEOs by protecting the PEOs emotional, mental, and physical well-being; and it upholds the City's statutorily-authorized parking regulation and control. *See generally Community for Creative Non-Violence*, 468 U.S. at 293.

iv. The City's injunctive relief request leaves open ample alternative channels for communication

The narrowly-tailored safety zone will not unduly proscribe Defendants' expressive activity and has no effect on the quantity or content of that expression beyond regulating the extent to which Defendants' conduct interferes with the PEOs' employment functions and the City's contractual relationship. Defendants may continue to perform all protected First

[3] The 50-foot safety zone is easily measured and enforceable as it constitutes either the width of five, ten-foot angled parking spaces or just under the length of three eighteen-foot parallel parking spaces.

Amendment speech and conduct outside the safety zone, including videotaping, feeding meters, and expressing their disagreement with the City's parking enforcement. That the safety zone may reduce to some degree the potential audience for Defendants' speech is of no consequence because there remain more than adequate alternative avenues of communication. *See generally Ward*, 491 U.S. at 802.

Restrictions on the time, place, or manner of protected speech are not invalid "simply because there is some imaginable alternative that might be less burdensome on speech." *United States v. Albertini*, 472 U.S. 675, 689 (1985). The injunctive relief sought by the City is narrowly tailored to protect the specific City concerns at issue. This Court has authority to impose a 50-foot safety zone and Defendants' constitutional rights will not be infringed.

III. This Court has the authority to enjoin Defendants' activity under the "captive audience" doctrine.

This Court also retains authority to impose the City's requested safety zone under the "captive audience" doctrine. The Supreme Court has in a number of cases recognized that when an audience has no reasonable way to escape hearing an unwelcome message, greater restrictions on a speaker's freedom of expression may be tolerated. Stated differently, even if the speaker enjoys the right to free speech, he or she has no corollary right to force people to listen. *Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P. 2d 846, 21 Cal. 4th 121, 159 (1999).

The relevance of a captive audience to determining the scope of First Amendment protection of speech is exemplified by *Frisby v. Schultz*, 487 U.S. 474 (1988). In that case, the Supreme Court upheld an ordinance that prohibited focused picketing in front of an individual's home. Although picketing is generally characterized as core political speech (*Carey v. Brown* 447 U.S. 455, 460 (1980)); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152 (1969)) and was so

in *Frisby* (the resident was targeted because he was a physician who performed abortions), the Supreme Court explained that "[t]he First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." *Frisby* 487 U.S. at 487.

In addition to *Frisby*, numerous other cases have cited an audience's "captivity" as a factor justifying limitations on free speech: ***Erznoznik v. City of Jacksonville***, 422 U.S. 205, 209 (1975) (finding restrictions on speech are justified when "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure"); *Lehman v. City of Shaker Heights* 418 U.S. 298, 302 (1974) (recognizing riders of public transit are a captive audience to advertising placed inside the cars); and *Cohen v. California*, 403 U.S. 15, 21–22 (1971) (noting those objecting to the defendant's objectionable message, exhibited on his jacket, could simply avert their eyes.).

Admittedly, "the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes." *Erznoznik*, 422 U.S. at 210-11 (internal quotations omitted). But where "substantial privacy interests are being invaded in an essentially intolerable manner," government may restrict discourse to protect others from hearing it. *Cohen*, 403 U.S. at 21.

Defendants' conduct here is similar to that found in the 'captive audience' cases cited above; it is not of the type or nature from which the PEOs can simply "avert their eyes." Defendants' harassing activities substantially interfere with the PEOs' ability to perform their employment functions in an "essentially intolerable manner." This Court retains the authority to implement a 50-foot safety zone.

Conclusion

The sole purpose of the requested preliminary and permanent injunctive relief is to preserve the City's right to maintain its economic relationship and contract with its PEO workforce; prevent Defendants' interference with the PEOs' employment functions; and protect the PEOs' emotional, mental, and physical well-being. Defendants' intentional interference and harassment constitutes tortious interference and this Court retains the authority to enjoin Defendants' conduct within a 50-foot safety zone.

Respectfully submitted,

CITY OF KEENE

By Its Attorneys,

GALLAGHER, CALLAHAN & GARTRELL, P.C.
214 N. Main St., P.O. Box 1415
Concord, NH 03302-1415
(603) 228-1181

Dated: July 1, 2013

By: Erik G. Moskowitz
Erik G. Moskowitz, Esq. (#18961)
Charles P. Bauer, Esquire (#208)

CERTIFICATE OF SERVICE

I hereby certify that I have this date forwarded a copy of the foregoing to Thomas Mullins, Esquire, Ian Bernard f/k/a Ian Freeman, Garrett Ean, James Cleaveland, Kate Ager, Graham Colson, and Peter Eyre.

Dated: July 1, 2013

By: Erik G. Moskowitz
Erik G. Moskowitz, Esq.