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' RESPONSE TO CITY OF KEENE'S MEMORANDUM OF LAW

NOW COME the Respondents, James Cleaveland, Garrett Ean, Kate Ager, Ian Freeman and Graham Colson, by and through their counsel, Backus, Meyer & Branch, LLP, and submits the following Response to City of Keene's Memorandum of Law stating as follows:

INTRODUCTION

This action appears to be without precedent insofar as the City of Keene seeks to utilize this court's authority to protect public employees from hostile speech on its public sidewalks and other public areas. The City has not cited any decided case which has granted such relief in favor of public employees against private citizen demonstrators. The City's asserted tort of intentional interference does not fit the facts, and cannot justify the violation of individual rights that it asks this court to authorize.

ARGUMENT

There is no dispute that Respondents' Robin Hood activities are a form of political expression at the core of the First Amendment, and Part 1, Articles 8 and 22 of

the New Hampshire Constitution. Further, these activities take place on public sidewalks and streets which are "fundamental to the continuing 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." Doyle v. Commissioner, New Hampshire Department of Resources and Economic Development, 163 N.H. 215, 223 (quoting from Boos v Berry, 45 U.S. 312, 318). "As such, 'government entities are strictly limited in their ability to regulate private speech in [traditional public forums].'" Id. (quoting from Pleasant Grove City v Summum, 555 U.S. 460, 469.)

In its Memorandum, Petitioner asserts that the Parking Enforcement Officers (PEOs) "have a right to serenity; privacy; and emotional, mental, and physical well-being." Memo 1. It makes no sense to claim that public employees working in public places have a right to serenity or privacy while on the job. In regard to the claim to emotional, mental and physical well being, the job description for Parking Enforcement Officer, Attachment A to the City's Petition, specifically requires that the person employed in that position be able 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."

The tort asserted by the City of intentional interference with contractual relations, which is the only legal basis for its complaint, does not apply to these facts. The tort requires intentional and improper interference in a contractual relationship. Hughes v New Hampshire Div. of Aeronautics, 152 N.H. 30, 39-41 (2005). Respondents have not taken any action to induce the City to terminate its contract with the PEOs, nor have

they taken any action to induce the PEOs to terminate their contracts with the City. The claim that respondents have allegedly contributed to the PEOs difficult working condition does not amount to intentional interference with contractual relations as a matter of law.

The City attempts to reconcile its tort claim with respondents' constitutional rights by asserting the captive audience doctrine. However, the New Hampshire Supreme Court has questioned whether protecting people from an offensive speaker can constitute a significant governmental interest. Doyle, 163 N.H. at 223. There is no principled distinction between protecting a listener from an unwelcome message versus suppressing the speech of the speaker. Even if protecting persons from offensive speech could amount to a significant government interest, that cannot be applicable when the persons to be protected are government employees. It would turn the First Amendment and Part 1, Articles 8 and 22 on their head to deny private citizens the right to communicate their message to government employees on the ground that that message may disturb the serenity and mental well being of those employees.

The City seeks three types of relief all of which are clearly unconstitutional. First it asks for a 50 foot floating zone from any PEO while that PEO is on duty. The City ignores the governing law in the case of Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357 (1997), where the U.S. Supreme Court held unconstitutional a 15 foot floating buffer zone in regard to any person or vehicle accessing or leaving abortion clinic facilities. It made this ruling even though the trial court made factual finding of violence and disruption outside of the clinics in question far in excess of anything claimed in this case, and even though persons to be protected - - medical

patients immediately before and after treatment - - have a far stronger claim to protection than the public employees here. Further, reinforcing the disfavored status of buffer zone protection against free speech, the U.S. Supreme Court has recently granted certiorari in the case of McCullen, et al v Coakley, et al (1/9/2013) in which the First Circuit upheld a fixed 35 foot buffer zone around the entrances, access and driveways of abortion clinics.

Even a superficial consideration of the practical issues that would be raised by adopting floating buffer zones around the PEOs, makes clear that it would have the effect of banning respondents from all Keene streets and sidewalks in which parking meters are located at least during the hours that the PEOs are on duty. Since the PEOs are in constant motion from one parking meter to another, a floating zone around them would also be in constant motion, and therefore respondents would always be at risk of violation. At the least, such a zone would render it impossible for respondents to act as Robin Hoods by preventing cars from being ticketed.

The second remedy the City seeks is to prevent respondents from video recording any PEO from within a 50 foot radius even though there is no allegation in the affidavit that the respondents have engaged in videotaping in a way that physically interferes with the PEOs carrying out their duties. The City does not attempt to reconcile this item of relief with its own acknowledgement that the First Circuit has recognized a First Amendment constitutionally protected right to engage in video and audio recording of public employees. Glik v Cunniffe, 655 F.3d 78, 84 (1st Cir. 2011). There is even more direct constitutional protection under Part 1, Article 8 of the New Hampshire Constitution providing that "(a)ll power residing originally in, and being

derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive." That does not equate to a constitutional right to videotape from a six inch distance, but the petitioner's proposed 50 foot buffer zone would vitiate video recording as a means of government accountability. Establishing any fixed distance would be improper since an appropriate distance would necessarily depend upon the many individual circumstances of each videotaping situation.

Finally the petition seeks to ban the respondents from communicating with the PEOs in a manner "which seeks to taunt, harass or intimidate . . . .". Despite the City's use of the word "manner" this proposed restriction is a content based prior restraint on political speech. Rather being based upon volume or some other neutral characteristic, it singles out the substance of the communication with terms which could encompass any negative message. Notably, it does not seek to limit complimentary or other positive communication. In addition to being facially unconstitutional, the proposed restriction by utilizing undefined and nonspecific terms - - "taunt, harass or intimidate" - - would have a severely chilling effect on respondents' political speech.

CONCLUSION

Respondents dispute many of the factual assertions contained in the City's petition. But even if the facts were accurately stated, they do not provide a legal basis for relief, much less the multiple violations of constitutional rights that the City has requested this court authorize.

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: 7/10/2013 By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July, 2013, I mailed by U.S. Postal Service First Class Mail a copy of RESPONDENTS' RESPONSE TO CITY OF KEENE'S MEMORANDUM OF LAW to Thomas P. Mullins, Esq., counsel for the City of Keene, Charles Bauer, Esq. and Erik Moskovitz, Esq..

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Jon Meyer, Esq.