

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 1:23-CV-12685-DJC

MEREDITH O'NEIL, JESSICA
SVEDINE, DEANNA CORBY, NICK
ROCCO, JENNA ROCCO, AND ROBERTO
SILVA,

Plaintiffs.

v.

CANTON POLICE DEPARTMENT, THE
TOWN OF CANTON, MASSACHUSETTS,
HELENA RAFFERTY, as Chief of the Canton
Police Department and in her personal capacity,
and OFFICER ROBERT ZEPF, OFFICER MICHAEL
CHIN, OFFICER ANTHONY PASCARELLI, and
SARGEANT JOSEPH SILVASY, in their official
Capacities,

Defendants

**OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY
RESTRAINING ORDER AND FOR A PRELIMINARY INJUNCTION**

On November 8, 2023 Plaintiffs filed an emergency motion for a temporary restraining order and preliminary injunction to enjoin Defendants, particularly the 'Canton Police Department', the Canton Police Chief and four named individual Canton police officers from interfering with Plaintiffs' planned protest on Sunday, November 12, 2023. Plaintiffs have moved for oral argument and evidentiary hearing prior to serving summons on the Defendants. Defendants hereby oppose. The Court has ordered the defendants to submit a response by Friday November 10th.

LEGAL STANDARD

The standard used to consider a request for a temporary restraining order is the same as that used for a preliminary injunction. *Associated Subcontractors of Mass., Inc. v. University of Mass. Bldg. Authority*, 13 Mass. L. Rep. 622 (2001).

To prevail on their motion for a temporary restraining order (TRO), Plaintiffs must demonstrate they have a reasonable likelihood of success on the merits and will suffer irreparable harm if the TRO is not granted. Fed. R. Civ. P. 65; *Westinghouse Broadcasting Co., Inc. v. Dukakis*, 409 F. Supp. 895, 896 (D. Mass 1976). The Plaintiffs shoulder the significant burden of establishing that:

(1) [they have] suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

The Shell Co. (P.R.) Ltd. v. Los Frailes Serv. Station, Inc., 605 F.3d 10, 19 (1st Cir. 2010).

Fed Rules Civ Proc R. 65 states:

(b) Temporary Restraining Order.

(1) Issuing Without Notice. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) Contents; Expiration. Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was

issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

(3) Expediting the Preliminary-Injunction Hearing. If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(4) Motion to Dissolve. On 2 days' notice to the party who obtained the order without notice—or on shorter notice set by the court—the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

RELEVANT STATUTES

Mass. Gen. Laws, ch. 268, §§ 13A states:

Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the commonwealth, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, shall be punished by a fine of not more than five thousand dollars or by imprisonment for not more than one year, or both. Nothing in this section shall interfere with or prevent the exercise by any court of the commonwealth of its power to punish for contempt.

Mass. Gen. Laws, ch. 268, §§ 13B in relevant part states:

...Whoever willfully, either directly or indirectly: (i) threatens, attempts or causes physical, emotional or economic injury or property damage to; (ii) conveys a gift, offer or promise of anything of value to; or (iii) misleads, intimidates or harasses another person who is a: (A) witness or potential witness; ... or (E) family member of a person described in this section, with the intent to or with reckless disregard for the fact that it may; (1) impede, obstruct, delay, prevent or otherwise interfere with: a criminal investigation at any stage, a grand jury proceeding, a dangerousness

hearing, a motion hearing, a trial or other criminal proceeding of any type or a parole hearing, parole violation proceeding or probation violation proceeding; or an administrative hearing or a probate or family court proceeding, juvenile proceeding, housing proceeding, land proceeding, clerk's hearing, court-ordered mediation or any other civil proceeding of any type; or (2) punish, harm or otherwise retaliate against any such person described in this section for such person or such person's family member's participation in any of the proceedings described in this section, shall be punished by imprisonment in the state prison for not more than 10 years or by imprisonment in the house of correction for not more than 2½ years or by a fine of not less than \$1,000 or more than \$5,000 or by both such fine and imprisonment. If the proceeding in which the misconduct is directed at is the investigation or prosecution of a crime punishable by life imprisonment or the parole of a person convicted of a crime punishable by life imprisonment, such person shall be punished by imprisonment in the state prison for not more than 20 years or by imprisonment in the house of corrections for not more than 2½ years or by a fine of not more than \$10,000 or by both such fine and imprisonment.

Massachusetts General Laws, chapter 268, section 13B(a) defines harassment in the context of the statute:

- (a) "Harass", to engage in an act directed at a specific person or group of persons that seriously alarms or annoys such person or group of persons and would cause a reasonable person or group of persons to suffer substantial emotional distress including, but not limited to, an act conducted by mail or by use of a telephonic or telecommunication device or electronic communication device including, but not limited to, a device that transfers signs, signals, writing, images, sounds, data or intelligence of any nature, transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photo-optical system including, but not limited to, electronic mail, internet communications, instant messages and facsimile communications.

LEGAL ARGUMENT

A. The Canton Police Department is Not a Legal Entity Capable of Suit

As an initial matter, Plaintiffs' filing against the 'Canton Police Department' is not cognizable because the Police Department is not a legal entity that is subject to suit. Here, the Department is an agency of the Town of Canton; it is a non-person and consequently is not subject to suit. *Darsch v. Lynch*, 2016 U.S. Dist. LEXIS 4830 (D. Mass. Jan. 13, 2016). *See*

Johnson v. Rodriguez, 943 F. 2d 104 (1st. Cir 1994) (state agency may not be sued for alleged civil rights violations).

Douglas v. Boston Police Dep't, No. 10-11049-WGY, at *1 (D. Mass. 2010) (dismissing suit against a municipal police department because department “has no legal existence or liability to suit separate from the [municipality]”). Therefore, any and all allegations or claims against the named “Canton Police Department” will be unsuccessful as it is not a legal entity that can be sued.

B. A Temporary Restraining Order is Not Appropriate Relief Given The Alleged Police Response

Preliminary injunctive relief is an extraordinary remedy not to be granted absent showing of probable success on merits and possibility of irreparable injury should it not be granted. Injunctive relief is "an act of equitable discretion by the district court." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, (2006). This is "an extraordinary remedy never awarded as of right." *Sindi v. El-Moslimany*, 896 F.3d 1, 29 (1st Cir. 2018) (internal quotation marks omitted).

Plaintiffs by their own admission in their verified complaint “gathered on Sunday, November 5, 2023, across the street from Chris Albert’s business, D&E Pizza.” (Docket #1, ¶29). They did so carrying signs referencing a pending Superior court criminal trial. (Docket #1, ¶30). Plaintiffs note they have selected to protest outside Chris Albert’s business, knowing he is a witness in the case and protesting what they perceived as “Chris Albert’s expected testimony”. (Docket #5, pg. 11). Plaintiffs indicate they “want Chris Albert to testify truthfully”. (Docket #5, pg. 7). Plaintiffs note they do this based off their impression of Chris Albert’s expected

testimony. Plaintiffs presume to know what his testimony will be and that it will be untruthful, they use this to justify harassment of this witness outside his place of business.

For all of the Plaintiffs' deep concern about the expected testimony of Chris Albert, or that of his son's, it is illegal for members of the public to harass or otherwise influence their testimony. See M.G.L. 268, §13A & M.G.L. 268, §13B. It is for impartial jurors to decide what is true in the matter of Karen Reed. Plaintiffs' constitutional rights to free speech are not unlimited, they are limited particularly where they can be used to influence a criminal proceeding. See *Lavienna-Torres v. Colon-Alsina*, No. 12-1277 (JAF), 2013 U.S. Dist. LEXIS 69210, at *40 (D.P.R. May 13, 2013) ("the state's ability to protect witnesses and their families—is a topic of clear public interest"). Moreover, it is in the interests of the police to protect witnesses, in order to secure convictions." *Rivera v. Rhode Island*, 402 F.3d 27, 38 (1st Cir. 2005). Chris Albert has every right, as any other witness, to be free from harassment as to what his expected testimony will be and a determination of whether or not it is truthful, unimpacted from Plaintiffs' influence.

Plaintiffs' rights have not been violated to date nor have they presented any evidence other than the conjecture that the Canton police will or intend to violate their rights in the future. Plaintiffs motion for a temporary restraining order is predicated on their fear of potential arrest by the police for future conduct that has not yet occurred. On November 5th as stated in their complaint plaintiffs were merely advised of the law by police officers handing out copies of M.G.L. ch. 268 §13A. the Complaint is devoid of any allegation that the Plaintiffs' First Amendment rights were impacted or violated on that day. Plaintiffs have not been prohibited or enjoined from lawful protest in any way by the Canton police personnel: they have merely been

instructed as to what conduct the law prescribes for the protection of witnesses and others involved in the judicial process.

B. The Plaintiffs Lack Standing for a Temporary Restraining Order

The Plaintiffs do not have standing, as their requested relief is for merely theoretical future harms based on conjecture. “To have standing in any capacity, a litigant must show that the challenged action has caused the litigant injury.” *Sullivan v. Chief Justice for Admin. & Mgt. of the Trial Court*, 448 Mass. 15, 21 (2006), citing *Slama v. Attorney Gen.*, 384 Mass. 620, 624 (1981). “However, alleging ‘injury alone is not enough; a plaintiff must allege a breach of duty owed to [her] by the public defendant.’” *Sullivan*, 448 Mass. at 21, citing *Northbridge v. Natick*, 394 Mass. 70, 75 (1985). “Injuries that are speculative, remote, and indirect are insufficient to confer standing.” *Sullivan*, 448 Mass. at 21. Here, any alleged injury is entirely speculative, and the Plaintiffs therefore does not have standing. Any possible police action that may be taken in the future will be predicated upon and in response to is yet unknown conduct taken by the Plaintiffs.

C. The Plaintiffs Cannot Show a Likelihood of Success on the Merits.

To succeed in an action for a preliminary injunction, a plaintiff must show 1) likelihood of success on the merits; 2) that irreparable harm will result from denial of the injunction; and 3) that, in light of the plaintiff’s likelihood of success on the merits, the risk of irreparable harm to the plaintiff outweighs the potential harm to the defendant in granting the injunction. *Tri-Nel Mgt., Inc. v. Board of Health of Barnstable*, 433 Mass. 217, 219 (2001), citing *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 617 (1980). A court must also “examine whether the

public interest would support entering an injunction or, in the alternative, whether an injunction would adversely affect the public.” *Le Clair v. Norwell*, 430 Mass. 328, 337 (1999); *see United States v. D’Annolfo*, 474 F. Supp. 220, 222 (D. Mass. 1979) (“When the government acts to enforce a statute or make effective a declared policy of Congress, the standard of public interest and not the requirements of private litigation measure the propriety and need for injunctive relief.”); *Edwards v. Boston*, 408 Mass. 643, 647 (1990) (“before issuing the preliminary injunction, a judge is required to determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public”).

i. Likelihood on the Merits

The Plaintiffs are unable to show a likelihood of success of any civil rights violation by the Canton Police Department. Nor will plaintiffs likely show that the possible enforcement of M. G. L ch. 268 §§13A & 13B is unlawful or that said statute is unconstitutionally vague. No Court has ever made such a determination and it is wildly premature to ask this Court to enjoin the police from the possible future enforcement of a lawful statute based upon a generalized and as yet unestablished claim that the statute is unconstitutional.

M. G. L ch. 268 §§13A & 13B are sufficiently clear. *See Commonwealth v. McGhee*, 472 Mass. 405, 414 (the language in a statute “will be constitutionally adequate if it ‘conveys [a] sufficiently definite warning as to the prescribed conduct when measured by common understanding and practice.’”). Moreover, similar restrictions under law have been long recognized. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 n.18 (1984) (“Although litigants do not surrender their First Amendment rights at the courthouse door, ... those rights may be subordinated to other interests that arise in this setting. For instance, on several occasions, this Court has approved restrictions on the communications of trial participants where necessary to

ensure a fair trial for a criminal defendant In the conduct of a case. A court often finds it necessary to restrict the free expression of participants including counsel, witnesses, and jurors.) (internal quotations and citations omitted). The First Amendment does not supersede the proper administration of justice and the court's obligation to ensure a fair trial, including protecting witnesses from intimidation. *See Commonwealth v. McCreary*, 45 Mass. App. Ct. 797, 799 (1998) (purpose of witness intimidation statute "is to protect witnesses from being bullied or harried so that they do not become reluctant to testify or, to give truthful evidence in investigatory or judicial proceedings ... [and] to prevent interference I with the administration of justice"). The right to a fair trial is just as important' to the functioning of democracy as the First Amendment.¹

The Plaintiffs further fail to show irreparable harm will result from denial of the injunction; Simply stated, it is unreasonable and unrealistic to have a restraining order against a police department on an untested or established claim that an existing state penal statute is unconstitutional.

The Plaintiffs have not shown irreparable injury that would entitle them to interim relief because the Plaintiffs had not presented any evidence or testimony from which this Court can concluded that their speech was actually chilled by Defendants' actions or will be in the future. Plaintiffs picketing is no less effective if it is held somewhere not to consciously and actively intimidate a witness to the pending criminal trial at matter.

ii. Public Interest

¹ Taken from Memorandum and order on Defendant's Bail Petitions in *Commonwealth vs. Aidan Kearney*, Docket Nos. 23BP116, 23BP117, 23BP118, 23BP119, 23BP120, 23BP123, 23BP124, 23BP125, 23BP126, in the Norfolk Superior Court.

The public interest would not support entering such an order. Police officers serve and protect their community; by entering the proffered TRO this Court would inherently prevent members of the Canton Police Department from effectively doing that which they are empowered and expected to do. If theoretical police action is taken on November 12, 2023 which involves the enforcement of the referenced statute, those impacted by arrest or by criminal complaint may test the existence of probable cause for the police action and or test the constitutionality of said statute in that state forum.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully requests that this Honorable Court deny Plaintiff's request for a temporary restraining order.

The Defendants further request a hearing on said motion.

Respectfully submitted,

DEFENDANTS,

Canton Police Department, The Town of
Canton, Massachusetts, Helena Rafferty,
Officer Robert Zepf, Officer Michael Chin,
Officer Anthony Pascarelli, and Sargeant
Joseph Silvasy

By their Attorney,

/s/ Douglas I. Louison

Douglas I. Louison (BBO# 545191)
Joseph A. Mongiardo (BBO# 710670)
Louison, Costello, Condon & Pfaff, LLP
Ten Post Office Square, Suite 1330
Boston, MA 02109
(617) 439-0305
jmongiardo@lccplaw.com
dlouison@lccplaw.com

CERTIFICATE OF SERVICE

I hereby certify that the Notice of Appearance, filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on the 9th day of November, 2023

/s/ Douglas I. Louison

Douglas I. Louison