

NO. 08-2264

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

KEVIN M. THOMPSON

Plaintiff - Appellant

v.

CITY OF METHUEN, MASSACHUSETTS; DR. JEANNE C. WHITTEN,
individually and in her capacity as Superintendent of Schools in Methuen;
DR. CHARLES P. LITTLEFIELD, individually and in his capacity as
former Superintendent of Schools in Methuen;
MASSACHUSETTS TEACHERS ASSOCIATION,
Local affiliate Methuen Education Association

Defendants - Appellees

BRIEF OF APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS
NO. 07-12196-DPW, USDC JUSTICE DOUGLAS P. WOODLOCK

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A. STATEMENT OF JURISDICTION

The District Court had jurisdiction under 28 U.S.C. § 1343. Final judgment was entered on September 26, 2008. A timely notice of appeal was filed on September 27, 2008, and withdrawn on September 30, 2008, to first attempt a motion for reconsideration, which was filed on October 6, 2008 and denied on October 7, 2008. A timely notice of appeal was re-filed on October 14, 2008. This Court has jurisdiction under 28 U.S.C. § 1291.

B. STATEMENT OF ISSUES

1. Did U.S. District Court Justice Douglas P. Woodlock ("Woodlock") defy the law and creatively interpret the facts in the least favorable light to the appellant, Kevin Thompson ("Thompson"), to dismiss this case?
2. Does the Constitution of the United States supersede all other law and case law?
3. Does the free speech clause of the First Amendment contain *any* restrictive "conditions" that limit its application to speech that is "a matter of public concern"?
4. If free speech *were* conditional, wouldn't workplace harassment in a public school setting and corruption in a labor union's election process qualify as "matters of public concern"?

5. Does a public school employer have the authority to issue "prior restraints" on any topic it so chooses?
6. Can a public school employer dismiss a tenured-teacher for alleged misconduct without allowing that teacher his due process right to be heard and confront the employer's witnesses against him?
7. Does the law prohibit a judge from granting a motion to dismiss a *pro se* litigant's case unless the complaint cannot succeed on any of its claims for relief?
8. Does Thompson have a right to a jury trial on his claim that the City of Methuen/Methuen Public Schools ("Employer") harassed him for three years with baseless disciplinary actions and failed to respond to Thompson's complaints of workplace harassment committed by other teachers in the school?
9. Does Thompson have a right to a jury trial on his claim that he was fired for reporting an act of workplace harassment, which the Employer called a violation of a "prior restraint" put on his speech?
10. Does Thompson have a right to a jury trial based on the documented FACT that three separate administrative agencies concluded that the specific reason cited by the Employer to dismiss Thompson was without merit?

11. Does Thompson have a right to a jury trial as it pertains to his dismissal on the grounds that it was affirmed in defiance of the FACT that the Employer, with the burden of proof to overcome, did not prove a thing relevant to the arbitrator's decision and showed up to three separate evidentiary hearings on the matter without a single first-hand witness who Thompson could confront under oath as a witness against him?
12. Does Thompson have a right to a jury trial on his claims of negligence, retaliation, and breach of contract against the Massachusetts Teachers Association?
13. Did the attorney for the Massachusetts Teachers Association, Joseph G. Sandulli, illegally influence the arbitrator, Gary D. Altman, to defy the law and the facts of the arbitration case to rule against Thompson?
14. Was Woodlock legally required to recuse himself from this case when he became aware of Thompson's misconduct complaint against him?

C. STATEMENT OF THE CASE

On November 27, 2007, Thompson filed a lawsuit in U.S. District Court against the City of Methuen/Methuen Public Schools, Dr. Jeanne C. Whitten ("Whitten"), and Dr. Charles P. Littlefield ("Littlefield") pursuant to 42 U.S.C. § 1983 for deprivation of rights under color of law.

Specifically, Superintendent Littlefield put a "prior restraint" on Thompson's speech for self-serving reasons and then repeatedly alleged that his "prior restraint" had been violated to generate a paper trail of baseless warnings, reprimands, and suspensions against Thompson. Ultimately, it was Littlefield's replacement, Whitten, who wrongfully dismissed Thompson from his tenured teaching position in Methuen.

Other claims contained in the lawsuit include provable claims of employer retaliation, defamation of character, concealment of material facts, intentional infliction of emotional distress, and negligence (as it pertains to the employer's failure to respond to reported complaints of workplace harassment).

Thompson brought a supplemental claim against the Massachusetts Teachers' Association ("MTA") and its local affiliate, the Methuen Education Association ("MEA"), pursuant to 28 U.S.C. § 1367, for aiding and abetting the employers' efforts to wrongfully terminate Thompson and for negligently and maliciously failing to provide Thompson with legal services and costs, to which he was entitled as a paying union member.

The breach of the MTA/MEA's duty of fair representation was motivated solely by retaliation. The MTA/MEA chose to not represent Thompson because of his whistleblower efforts against his local union

president, whose loyal following was on the executive board that three times in three years voted to deny Thompson's requests for legal assistance and arbitration costs.

Compensatory and punitive relief were sought against the Defendants for their willful and knowing crimes against Thompson in the amount of \$11,000,000.

Thompson's lawsuit against the "City of Methuen et al" was the second of two lawsuits filed by Thompson and assigned to Woodlock. Thompson's *other* lawsuit (USDC Case No. 06-11805-DPW) was a case brought against five judges on October 4, 2006.

When it became clear that Woodlock was obstructing justice in this *other* case to protect five of his "brother judges" from facing a jury trial, Thompson reported Woodlock in a formal complaint to the Chief Judge of the First Circuit on August 4, 2008.

Seven weeks later, Woodlock dismissed both of Thompson's lawsuits on the very same day (September 26, 2008) and then denied Thompson's motion(s) for reconsideration within a single business day of the time that each was filed. Thompson has appealed both of these cases to the U.S. Court of Appeals (Case Nos. 08-2264, 08-2265).

D. STATEMENT OF FACTS

On appeal from a dismissal under Fed. R. Civ. P. 12(b)(6), all facts alleged by the plaintiff are taken as true. Steckman v. Hart Brewing Company, Inc., 143 F.3d, 1293, 1295 (9th Cir, 1998).

1. Thompson is a forty-seven year old teacher with a Bachelor of Arts degree in Physics from the University of Massachusetts-Boston and a Master of Arts degree in Educational Administration from California State University in Los Angeles. Prior to his dismissal, he had been a teacher for twenty-three years and a tenured-teacher in the Methuen Public School System for nine years.
2. In Thompson's nine-year tenure at Methuen High School, he never received anything but outstanding observation reports and evaluations.
3. Thompson met his six-year old son's mother, Kathleen Moran ("Moran"), at Methuen High School, where they both worked as teachers in the school's science department. When Thompson would not agree to Moran's plan to quit her job and have Thompson support the three of them, Moran broke off their engagement.
4. Aware that the facts of the case would not convince an honorable court to give her sole custody of their child, Moran resorted to false

- allegations and the recruitment of accomplices in the school system to lie for her and slander Thompson.
5. The crimes committed by Moran's accomplices and the response to these crimes by Thompson to hold them accountable generated two groups of people who conspired over three years to run Thompson out of the school system.
 6. The first group knows that Thompson has the evidence to confirm their crimes against him and believed that by manufacturing a case against Thompson with baseless disciplinary actions, it would drive him out of the school system or discredit him and reduce the threat of a successful lawsuit against them.
 7. The second group consists of the "union-involved" teachers in the school, who took issue with Thompson because he sued one of Moran's accomplices, Union President Diane Dandreta ("Dandreta"), and exposed the crimes committed by Dandreta *as* union president.
 8. The majority of teachers in the school were unaware of the harassment against Thompson because his hands were tied by Superintendent Littlefield, who thought that he could keep HIS actionable crimes concealed by restraining Thompson's First Amendment right to talk about them.

9. Over Thompson's first six years in the school system, Littlefield had never met Thompson or spoken to him directly. Littlefield also had never observed Thompson either in or outside of the classroom.
10. This reality did not prevent Littlefield from stating to a DSS investigator on April 8, 2004 that Thompson's custody case was "the worst he had ever seen" and that Thompson is "revengeful and hateful" toward Moran.
11. Littlefield also denied knowledge of Moran's attendance record despite the fact that she had been averaging 30 absences per school year over her five years at the high school.
12. On this same date and to the same DSS worker, Dandreta, portraying herself as a neutral "school official", fraudulently claimed that she had seen Thompson "out of control verbally at the school" and "fears" him.
13. Dandreta also concealed Moran's excessive absences and her knowledge of Moran's two mental breakdowns.
14. The documentation, which confirms Moran's mental breakdowns and which was provided to Dandreta to approve paying Moran from the union's sick leave pool, is currently being denied to Thompson by the Methuen City Solicitor, Peter McQuillan.

15. Littlefield and Dandreta's wildly slanderous statements, combined with their concealment of material facts, convinced the DSS worker, who only interviewed individuals hand-picked by Moran, to write in her report that "Miss Moran describes Mr. Thompson as very intimidating and verbally abusive toward her. This has been confirmed by speaking with the school."
16. The judge in Thompson's family court case described this DSS report at a June 4, 2004 contested child custody trial as the most influential piece of evidence to justify his ruling of sole custody to Moran.
17. The appeals court cited this same report to deny Thompson's appeal and order Thompson to pay double Moran's attorney fees and costs in the amount of \$8,606.72.
18. The irony of the DSS conclusion is that Thompson is always polite and respectful to Moran when they interact outside of school and did not speak to her at all or so much as glance in her direction during her last two years at the high school.
19. More importantly, the school principal, Arthur Nicholson, and the science department head, Joe Harb, conducted their own investigation into Moran's chronic complaints of a hostile work environment and concluded that her allegations were baseless and unfounded.

20. When confronted with the results of the school investigation, which confirmed that Moran was unsuccessful at convincing other teachers at the school to lie for her and slander Thompson; Moran was forced to admit that she had not been truthful.
21. Despite the fact that this school investigation into Moran's allegations was conducted just one week before the DSS investigation and reached a conclusion that was the polar opposite of the conclusion reached by the DSS after speaking with Moran's accomplices; not one school employee, questioned by the DSS, chose to share these results.
22. The accusations of a hostile work environment continued in the 2004-2005 school year. When it became clear that Dandreta was still conspiring with Moran to run Thompson out of the school system with fraudulent complaints, Thompson filed a lawsuit against her for defamation of character and workplace harassment on March 2, 2005.
23. Thompson requested a lawyer from his union to hold Dandreta accountable, but his request was denied with the claim that the MTA does not get involved in union member versus union member litigation.

24. When Thompson was forced to file his lawsuit pro se, the MTA immediately stepped in to provide Dandreta with free legal services to oppose Thompson's lawsuit. In response to this double standard, Thompson expanded his lawsuit to include the MTA.
25. The lawsuit was dismissed five months after Lawrence Superior Court Judge Diane C. Kottmyer took it under advisement with the fact-defying claim that Dandreta's fraudulent accusations constituted opinion and not slander.
26. On March 4, 2005, two days after the filing of his lawsuit against Dandreta, Thompson received a baseless written warning from his department head, per order of the superintendent, to not discuss his custody case in school.
27. The directive is referred to as "baseless", because Thompson had not been discussing his custody case in school with anyone at the time to warrant a directive.
28. On April 11, 2005, Thompson reported Dandreta's unethical stunts involving the union's nomination and election process after she denied a colleague's nomination and Thompson's self-nomination for union president.

29. Specifically, Thompson put a four-page letter in the faculty mailbox of every union member in Methuen, detailing the corrupt schemes that had allowed Dandreta to run "unopposed" in seven of the eight years that Thompson had been working in the school system.
30. After filing his lawsuit against Dandreta and exposing the corruption in the Methuen union's nomination and election process, the harassment against Thompson escalated.
31. A group of Dandreta's "people" went to the principal, Arthur Nicholson, with the baseless claim that Thompson had used school supplies to make copies of his whistleblower letter and had used students to put the letter in faculty mailboxes for him.
32. Although both allegations were easily rebutted with Staples receipts and witnesses who saw Thompson put the letters in the mailboxes himself, his accusers did not receive so much as a reprimand for their lies about Thompson.
33. Another group went straight to Littlefield at a school telethon to convince him to fire Thompson. This discussion was overheard by Thompson's department head, Joe Harb, who quoted Littlefield as saying, "What do you want me to do? I reviewed his file and his record is outstanding."

34. Moran was overheard arguing with Dandreta because Dandreta had not come through on her promise to run Thompson out of the school system.
35. Since Thompson is an exceptional teacher with tenure, who has always received outstanding evaluations from his immediate supervisors and praise from his students in his 23 years in the classroom, the individuals who were conspiring to run him out of the school system faced a dilemma.
36. They knew that Thompson could not be fired legally without just cause. Consequently, they resorted to lies and unethical stunts to make up in quantity what they lacked in quality.
37. On April 19, 2005, Thompson faxed a letter to Jill Coleman, an MTA regional consultant in Lynnfield, requesting an investigation into the union's nomination and election process in Methuen.
38. Coleman took this private, MTA-addressed letter and forwarded it to the defendant in Thompson's lawsuit, Dandreta, who shared the content of the letter with several teachers and administrators.
39. The letter served Dandreta's purpose by generating disruption in the school setting and animosity toward Thompson. One of Dandreta's

- friends, Ann Marie Krusell, threatened to sue Thompson through her attorney for referencing her in the letter.
40. At some point, this MTA-addressed letter ended up in the hands of Littlefield, who took this confidential union letter, which he should have never had access to in the first place, and referenced Thompson's mention of Dandreta's impact on his custody case in the letter as an excuse to suspend him without pay for three days (May 4 - May 6, 2005).
 41. Littlefield claimed that Thompson had violated his March 4, 2005 directive to not "discuss" his custody case in school because Dandreta's impact on his custody case was referenced on the last two pages of this 8-page letter and Thompson had admitted to "showing the letter" to four similarly outraged union members, two of them administrators, who each intended to speak at the special executive board meeting that had been called to respond to Thompson's claims of corruption. The suspension letter included the fraudulent claim that there had been "several warnings and infractions."
 42. Dandreta did not attend the April 29, 2005 special executive board meeting that had been called to address her misconduct, but instead

- had her "people" boo over Thompson and cause a scene when he got up to speak.
43. Although Thompson proved conclusively that Dandreta had manipulated the nomination process to avoid an election and was given access to nomination details that were prohibited to her as a candidate for office, the unopposed results were allowed to stand and Thompson's request for an election that would allow him to run for union office was denied without explanation.
 44. It should be noted that the union election date, which the executive board refused to postpone in 2005, WAS postponed in 2006 to allow more time to recruit a candidate to oppose Thompson for union president.
 45. When the executive board could not convince a single candidate to run against Thompson, including Dandreta, the bylaws were changed just prior to the nomination period to allow two individuals to run as one candidate against Thompson and share the responsibilities.
 46. Over the summer of 2005, Thompson appealed his three-day suspension and requested that his union take his grievance to arbitration.

47. Although the suspension was clearly illegal, which Thompson proved at the meeting called to address his suspension, with references to the First Amendment and case law; the union's executive board, made up of the same people who booed over Thompson the previous Spring, voted to deny his request for arbitration.
48. The harassment and retaliation continued in 2006. On May 12th of 2006, Thompson was placed on paid administrative leave through the end of the school year for using ten minutes of a ninety-minute long block class answering student questions about his appearance on a television show, which was seen locally by several of his students.
49. The conversation was exclusive to civil rights and the First Amendment as it pertained to a book that Thompson had written, which became a news story when it was banned by a judge who is criticized in the book.
50. There was nothing about the discussion that was inappropriate. In effect, Thompson was suspended for having a ten-minute conversation on a history topic in a physics class.
51. This ten minutes spent off topic was brought to the attention of the superintendent by a union-connected teacher at the school, who

- initially tried to use these ten minutes to blackmail Thompson into changing her daughter's physics grade.
52. Only after Thompson refused to change the student's grade was he suspended and handed a notice of intent to dismiss.
 53. When Thompson again went to the MTA for legal services to which he was entitled, they denied his request and suggested that he find himself a private attorney.
 54. The MTA also negligently failed to notify Thompson that he had only ten days to respond to the notice of intent to dismiss or he would forfeit his legal right to fight the dismissal. Thompson would have missed the deadline for a response if not for school committee member, Gary Marcoux, who informed Thompson of this ten-day deadline.
 55. Over the summer of 2006, Thompson met with Littlefield, who agreed to drop the dismissal if Thompson would agree to sign an agreement that illegally restrained his speech.
 56. Faced with the choice to either lose his job, his family group health insurance, and the twenty year investment that he had made into the state's retirement system OR sign Littlefield's memorandum of agreement (Appendix, pp.205-206); Thompson chose to sign the

- agreement provided that it was first amended to "wipe the slate clean" and prohibit the school from ever referencing the baseless paper trail that had been generated over the previous three years to run Thompson out of the school system (See Appendix, p.205, item 3).
57. Littlefield resigned over the summer of 2006 and Whitten took over as superintendent, but the harassment against Thompson continued.
 58. On November 30, 2006, Thompson received a letter of reprimand from Harb for adhering to the same homework policy that Thompson had successfully had in place for his nine years at the high school - a policy that is distributed to his students in writing on the first day of the school year as part of a student contract and discussed with parents at the Fall open house.
 59. This reprimand was more accurately the work of Assistant Principal Jane Obshatkin, who was behind several of the schemes to run Thompson out of the school system during Littlefield's tenure. The reprimand contained slanderous accusations and frivolous "directives" that defied Thompson's stated policy and were not required of any other teacher in the school building.

60. Reacting to the slander contained in the letter and the efforts to compromise his classroom instruction, Thompson got in an argument with Harb.
61. The argument led to a December 4, 2006 reprimand from the principal, who reprimanded both Harb and Thompson for raising their voices to a level that could be heard outside of Harb's "portable-walled" office.
62. In December of 2006, Thompson was also notified that he would have to make up two flood days that occurred while he was on paid administrative leave the previous school year or be "docked" those two days of pay.
63. On December 20, 2006, Thompson met with Superintendent Whitten to discuss this issue and fill her in on the harassment that he had been enduring prior to and since her arrival.
64. At the meeting, Thompson argued that since thirty instructional days remained in the school year at the time that he was placed on paid administrative leave, then he was on paid leave for those specific thirty days regardless of when the school decided to make them up.
65. According to Whitten, the City Solicitor was unable to comprehend this argument and informed her that Thompson would still have to

make up the days or be docked those days from his salary. With this information, Thompson informed Whitten to expect a lawsuit.

66. Three weeks later, on January 11, 2007, a harassing, anonymous note was left in Thompson's faculty mailbox. The note, which was a response to Thompson's efforts to be helpful and provide a couple of additional options to the proposed changes to the school's bell schedule, stated:

Kevin,

For the millionth time, you have been repeatedly warned not to send the staff any of your inane thoughts via mass email without the permission of the administration. We were asked to comment on one particular schedule, not to come up with a new one. No one in this building wants to hear your opinions and a lot of us are not happy that you are back here again. You are a bitter person and you need psychological help. We do not value your opinion as evidenced by the last MEA election. We want you to leave us alone. Stop thinking that you are important and that your colleagues care about what you think - we don't. You are an embarrassment to us. Confine your opinions to your mirror.

67. Thompson immediately forwarded the letter to the superintendent at 10:40 AM with a proposal to share the letter with the entire staff by email so that he could address the ongoing harassment that he was experiencing head on.
68. Thompson reasoned that the email should be sent to the entire staff because the individual who wrote the harassing note did not sign it to allow Thompson to confront him or her directly and because the individual who wrote the letter claimed to be speaking for the entire staff.
69. Whitten responded by email at 12:17 PM of the same day with the words,
- The [letter] that you received is, quite frankly, malevolent. Personally speaking, I have no use for such rhetoric... Although your anger is well founded, I still think you win if you ignore the complaint... This is just my point of view.*" (Appendix, pp. 207-208)
70. What was NOT communicated to Thompson was Whitten's "opinion" that Thompson's email proposal would violate Littlefield's memorandum of agreement and cost him his job.
71. To avoid needless drama, Thompson chose discretion and did NOT send the bulk email message to the entire staff as he had originally

- proposed. Instead, he shared the letter and the same thoughts and opinions that he had communicated to the superintendent with a select group of teachers at the school, who he thought he could trust to be discreet.
72. Apparently, Thompson's trust was betrayed because the email did get into the hands of his enemies at the school, who generated their own disruption by running around the school to rant and rave to whomever would listen or was forced to listen.
73. A meeting was scheduled shortly after this incident with Whitten, who defied Thompson's due process rights to be heard and confront these witnesses against him by denying his request to attend the meeting.
74. On January 30, 2007, without warning or an attempt to get both sides prior to taking action, Thompson was placed on paid administrative leave for the second straight school year and served with another "notice of intent to dismiss" (Appendix, pp.210-212) with the claim that Thompson's email violated the memorandum of agreement that was signed the previous summer.
75. This disciplinary action contradicted the superintendent's initial response to Thompson's email. When Thompson told Whitten exactly what he had done at 2:06 PM on January 11th - that he had limited his

- email audience to a specific group of teachers at the school, Whitten responded at 3:41 PM of the same day with the words, "*Glad to hear that, Kevin.*" (Appendix, p.207)
76. The harassment did not end with Thompson's dismissal. The school system fought Thompson's claim for unemployment benefits, going so far as to appeal the appeal of the Division of Unemployment Assistance's decision; it rewrote a check that was issued a month before Thompson's dismissal, which the school had failed to direct deposit into his bank account, for less than the amount on the original check; and it twice delayed the arbitration hearing on his wrongful termination.
77. And for a third time, the MTA denied Thompson's request for legal services and arbitration costs to fight his dismissal.
78. At the initial unemployment hearing on May 30, 2007, Colleen McCarthy, the school system's personnel manager and the only "witness" for the school system, claimed that Thompson was fired for a violation of the school's email policy.
79. After this claim was rebutted with references to the fact that a violation of the email policy is not mentioned anywhere in the notice of intent to dismiss Thompson and the fact that the email was school-

- related and, therefore, not a violation of the school's email policy as alleged, the school's attorney, Kevin Bresnahan, conceded that Thompson was not fired for this reason.
- 80. McCarthy also stated at this meeting that Thompson would not have been fired if he had not sent the email.** (Appendix, p.214)
81. On September 27, 2007, at the appeal of the unemployment decision, which was appealed by the "Town of Methuen" after the Division of Unemployment Assistance ("DUA") ruled against them, Thompson referenced the DUA paperwork where it states that he was discharged because "he continued, after warning, to engage in inappropriate behavior in violation of a June 29, 2006 agreement between his work and himself." (Appendix, p.215)
82. When Thompson asked the superintendent to explain the violations of the agreement that had occurred prior to his email and produce the "warning" that he had allegedly received prior to her notice to dismiss him, Whitten and her attorney were clearly caught off guard and denied making such a statement.
83. When Thompson asked Whitten to explain why she had not warned Thompson that his email proposal would jeopardize his teaching career, Whitten responded with the claim that the email server is a

- public domain and she did not want to include a reference to the memorandum of agreement out of concern for Thompson's privacy.
84. This "concern" for Thompson's privacy at the expense of his teaching career and Whitten's claim that her emails are publicly accessible defies the disclaimer at the bottom of her emails where it states:
- The information contained in this electronic communication is intended to be sent only to the stated recipient and may contain information that is confidential, privileged, or otherwise protected from applicable law. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of the information is strictly prohibited.* (Appendix, p.207)
85. When Thompson referenced Whitten's response, "Glad to hear that, Kevin," at the news that Thompson had limited his email to selective individuals at the high school, Whitten claimed that she was not aware that Thompson had already sent out the email at the time of her response.
86. Thompson responded, reading from the email itself (Appendix, p.207), "What about the words, 'I have shared my thoughts and the original letter with selective individuals at the high school,' did you NOT understand?"

87. On December 20, 2007, the Board of Review affirmed the DUA's original decision in favor of Thompson, stating:

Under G.L. c. 151A, § 25(e)(2), the burden of proof is upon the employer to establish that it discharged the claimant either for a knowing violation of a reasonable and uniformly enforced rule, or for deliberate misconduct in willful disregard of the employer's interest. The employer has not met its burden... Even though the claimant contacted the superintendent specifically to ask her advice about sending the email, the superintendent failed to inform the claimant that she considered the email to violate the memorandum or that she would consider the publishing of the email to be a dischargeable offense. The superintendent spoke in-person to the claimant the next day, and still did not inform him that sending the email violated the memorandum. In fact the employer took no formal disciplinary measure against the claimant until two weeks later, when it suspended the claimant pending discharge. (Appendix, p.222)

88. The Employer did not appeal the case further and the decision became final on January 23, 2008.

89. At the arbitration hearing, the city of Methuen again showed up without a single first hand witness and repeated its claim that

- Thompson was fired for violating a June 29, 2006-signed "Memorandum of Agreement" between Thompson and the previous superintendent.
90. At this hearing, Whitten admitted that she had nothing negative to say about Thompson that was not conveyed to her by the six people who Thompson calls out in his email as his six enemies at the high school.
 91. At this hearing, Superintendent Whitten and Personnel Manager McCarthy repeated the claim, first expressed at the initial hearing before the DUA, that Thompson would not have been fired if he had not sent the email.
 92. Excluding Thompson, the only first hand witness at the hearing was Thompson's student-witness, Andrew Burbine, who rebutted the slanderous claims that were made about Thompson, his teaching, and what his students thought about him.
 93. Thompson's credibility was neither challenged nor discredited by the Employer, while the Employer's credibility and evidence was not only challenged, but discredited during Thompson's testimony, in his cross examination of Whitten and Nicholson, with his exhibits, and in his post-hearing briefs.

94. Despite these FACTS, a reading of the post hearing briefs (Appendix, pp.224-314) proves that the well-supported arguments and "first hand" rebuttals contained in Thompson's documents were completely disregarded by the arbitrator, Gary D. Altman, who based his "Decision" entirely on the unsupported and exhibit-discredited allegations conveyed by the school system's lawyer and its three "hearsay" witnesses.
95. Incredibly, the specific reason alleged by the Employer to justify Thompson's dismissal (the email, which the Employer called a violation of a Memorandum of Agreement between Thompson and the former superintendent) was deemed baseless by Altman himself as a reason to dismiss Thompson.
96. Altman stated on page 25 of his "Arbitration Decision and Award":
- It is difficult to view Mr. Thompson's January 11, 2007 e-mail as a specific violation of the parties June 29, 2006 last chance agreement. In particular, Mr. Thompson's e-mail does not mention any of his ongoing litigation, nor does it refer to his custody dispute. In addition, Mr. Thompson, in his email, does not disparage School Administration officials for actions that occurred prior to the date of the Agreement. Thus, it cannot be concluded that Mr. Thompson's*

actions in sending the e-mail can warrant a finding that he should be summarily dismissed based upon violation of the last chance agreement. (Appendix, p.340)

97. Regarding the same email, evaluated independent of the Memorandum of Agreement, Altman wrote:

In and of itself, it cannot be concluded that this email would justify an employee's discharge. The email refers to "worms" and "suspects"; hardly flattering terms, but they are certainly not obscene comments. (Appendix, p.341)

98. Instead, Altman came up with his own "theory" to justify Thompson's dismissal, which he called the Employer's "progressive discipline."

99. **This "progressive discipline theory" required Altman to ignore the burden of proof that the Employer was legally required to overcome; ignore the FACT that Thompson did not have the opportunity to confront the Employer's witnesses against him (because none were at the hearing to question!); AND ignore the pages and pages of well-supported argument contained in Thompson's two briefs (Appendix, pp.224-277), which confirmed the FACT that the Employer's "progressive discipline" was nothing more than a paper trail of fraud, baseless allegations, and**

First Amendment-defying reprimands, generated by six specific staff members and the former superintendent to run Thompson out of the school system.

100. Thompson refers to Altman's progressive discipline argument as a "theory" because the Employer did not even attempt to justify these "other" disciplinary actions against Thompson with either witnesses or evidence that had not *already* been discredited by Thompson at the hearing and in his post hearing briefs.
101. Altman's "progressive discipline theory" also required him to disregard item 3 of the June 29, 2006 "Memorandum of Agreement" between Thompson and the former superintendent, which Altman erroneously calls a "last chance" agreement in his "Arbitration Decision and Award".
102. Item 3 of this Memorandum of Agreement unambiguously states:
Mr. Thompson shall not be in violation of this agreement for any actions or statements, either orally or in writing, made prior to the execution of this Agreement. (Appendix, p.205)
103. Ironically, what Altman calls "progressive discipline" is Thompson's evidence of employer fraud, employer retaliation, and the "grounds" for his federal court lawsuit.

104. The "facts" pertaining to the arbitration case are included in these "Statement of Facts" and discussed in greater detail in the "Arguments" section of this brief at the insistence of the Defendants, who contend that the Arbitrator's "Decision and Award" is relevant to this appeal.
105. Lastly, it is worth repeating that all facts alleged by Thompson in his "Statement of Facts" are to be taken as true when ruling on a motion to dismiss. See Steckman v. Hart Brewing Company, Inc., 143 F.3d, 1293, 1295 (9th Cir, 1998).

E. SUMMARY OF ARGUMENT

The City of Methuen, through its school superintendents and as a government-funded public school Employer, denied to Thompson his First Amendment right to free speech, and then responded to fraudulently alleged violations of what amounted to a "prior restraint" with reprimands, suspensions, and a wrongful dismissal.

Thompson was ultimately fired for an email, in which he reported an act of workplace harassment to a select group of teachers at the school, which the Employer called a violation of the aforementioned "prior restraint" to justify Thompson's dismissal.

Three different administrative agencies concluded that the email did not violate the prior restraint and that it was not grounds to fire Thompson. **But... two years later, and Thompson is still on the outside looking in at a teaching career that was stolen from him without just cause.**

It is relevant to note that Thompson was suspended and ultimately fired just one month after meeting with the superintendent to inform her that a lawsuit against the school system was imminent. And as it pertains to age discrimination, it should be noted that the school has saved more than \$80,000 over the last two years by replacing a 45 year-old tenured teacher at the top of the pay scale with a teacher right out of college.

The "memorandum of agreement", which the school system referenced to dismiss Thompson, was nothing more than a self-serving directive, drawn up by the former superintendent, to prohibit speech on topics that would implicate him.

This "prior restraint" on Thompson's speech was a blatant overreach of the superintendent's authority because the topics of conversation that Thompson was restrained from discussing (ie his family issues and issues related to litigation) had nothing at all to do with the effective operation of the school, his performance as a teacher, or faculty harmony.

The First Amendment was also not the only constitutional right denied to Thompson. Other rights denied to Thompson and conveyed in court documents filed by Thompson were his Fourth Amendment right to privacy and his Fourteenth Amendment rights to due process and equal protection (specifically Thompson's right to be heard, to present evidence favorable to his case, to confront the Employer's false witnesses against him, to an impartial enforcement of "evidence admissibility" standards, and to a presumption of innocence until proven guilty).

Woodlock justified his dismissal of this 42 U.S.C. § 1983 lawsuit by limiting the application of the First Amendment; expanding the application of prior restraints; disregarding all the *other* constitutional rights denied to Thompson; and disregarding the egregious crimes committed by Thompson's own union (which included defamation of character, conspiring with the Employer to run Thompson out of the school system, concealment of material facts, retaliation, negligence, and breach of contract).

It should be noted that when it comes to pro se litigants, "the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory... If there is any possible theory that would entitle the Plaintiff to relief, even one that the Plaintiff has not thought of, the court cannot dismiss this case." Bonner v. Circuit Court of St. Louis,

526 F.2d 1331, 1334 (8th Cir. 1975)(quoting Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974). In Teamsters Local Union No. 171 v. Keal Driveway Co., 173 F.3d at 918 (4th Cir. 1999), it was stated, "dismissal of a case is a drastic remedy, which should be employed only sparingly." .

Thompson contends that Woodlock's dismissal of this case had nothing at all to do with the merits of Thompson's lawsuit and everything to do with retaliating against Thompson for reporting Woodlock's negligence and obstruction of justice in a formal complaint to the Chief Judge of the United States Courts for the First Circuit.

F. STANDARD OF REVIEW

A dismissal for failure to state a claim is reviewed de novo. Steckman, 143 F.3d at 1295 (1998); Pruitt v. Cheney, 963 F.2d at 1160 (1992). "A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [his] claim that would entitle [him] to relief." Yamaguchi v. Department of the Air Force, 109 F.3d 1475, 1480 (1997).

G. ARGUMENT

1. THE FIRST AMENDMENT IS NOT LIMITED TO SPEECH THAT IS A MATTER OF PUBLIC CONCERN. IT APPLIES TO ALL SPEECH

A prohibition against expression of opinion, without any evidence that the rule is necessary to avoid substantial interference with school discipline or the rights of others, is not permissible under the First and Fourteenth Amendment. Tinker v. Des Moines Independent School District, 393 U.S. 514 (1969).

While government may deny employment, or any benefit for that matter, for any number of reasons, it may not deny employment or other benefits on a basis that infringes that person's constitutionally-protected interests. "For if the government could deny a benefit to a person because of his constitutionally-protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible." Perry v. Sindermann, 408 U.S. 593, 597 (1972).

Thompson was disciplined for speech that ran the full gamut, from public to private speech and from speech that was a matter of public concern to speech that impacted Thompson personally.

For Woodlock to claim that none of these incidents violated Thompson's First Amendment rights is mind-boggling, particularly in light of the fact that he "must take as true all well pleaded facts alleged in the

complaint and draw all reasonable inferences in the plaintiff's favor." (See Addendum, pp. 2-3)

Thompson's right to free speech was violated by the Employer; the illegal restraint on his speech was used to retaliate against him; and Thompson's speech is protected under the First Amendment.

Since the Constitution of the United States is the Supreme Law of the Land and supersedes all other law and case law, case law that defies constitutional law has no legal force or effect.

Woodlock justified his dismissal of this case by creatively interpreting case law to claim that the First Amendment is limited to speech that is a matter of public concern. Contrary to Woodlock's analysis, case law-generated "multi-pronged tests" are not needed to understand the clear and unambiguous words of the First Amendment.

Since the U.S. Supreme Court *has* addressed public speech that is disruptive or a threat to the "efficiency of a public service" and ruled that it may be unprotected if it is not on a matter of public concern, Woodlock creatively interpreted this "exception to the rule" to mean that speech on a matter of public concern is the **ONLY** type of speech that is protected.

Thompson contends that the same case law cited by Woodlock to dismiss this case is more accurately interpreted to mean that IF the speech is

public and IF it is a threat to public order, then it may not be protected if it is not on a matter of public concern.

Private speech, which is what the Defendants in this case have called Thompson's email to claim that it is unprotected, is "almost always" protected (by both the First Amendment AND the "right to privacy" clause of the Fourth Amendment).

Otherwise, we would have the kind of "censorship" and "thought police" that they had in Nazi Germany!

Thompson writes, "almost always", because there are some exceptions to the rule. Since the First Amendment protects citizens from government interference of speech, it does not apply to private industry. And even the government has the authority to prohibit private speech on topics that are treasonous. Neither of these exceptions applies.

It can hardly be disputed that restraints on private speech are more intrusive than restraints on public speech. Consequently, the burden to justify such restraints increases significantly.

In Givhan v. Western Line Consolidated School District, the U.S. Supreme Court made clear that "private communications are always entitled to full First Amendment protection" in a public school setting. Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979).

In Pickering v. Board of Education, 391 U.S. 574 (1968), the U.S. Supreme Court considered the case of a public school teacher fired for writing a letter to a newspaper critical of the local school board. In ordering the teacher reinstated, the Court found that "a public employee's statements on a matter of public concern could not be the basis for discharge unless the statement contained knowing or reckless falsehoods, or the statements were of the sort to cause a substantial interference with the ability of the employee to continue to do his job."

Contrary to Woodlock's claim otherwise, reporting workplace harassment in a public school setting IS a matter of public concern, particularly for the public school students and parents of the targeted teacher.

The fact that Thompson chose to report public school-related harassment in a private email is irrelevant. The U.S. Supreme Court has indicated that an employee's speech may be protected as relating to matters of public concern even in the absence of any effort or intent to inform the public. Rankin v. McPherson, 483 U.S. 378 (1987).

In the U.S. Supreme Court case, Mt. Healthy City Board of Ed v. Doyle, 429 U.S. 274 (1977), an untenured public school teacher's contract was not renewed because he called a radio station and mentioned the

contents of a memorandum from the administration. The Court held that Doyle's communication to the radio station was "clearly protected by the First Amendment" and that because it had played a "substantial part" in the decision of the Board to not renew Doyle's employment, he was entitled to reinstatement with backpay.

Justice Rehnquist, writing for the Court, stated "I believe the better law would be for the Court to declare that abuse of civil liberties by managers would mandate that those managers tolerate even offensive employees, a result that would encourage managers to respect civil liberties. Further, the reason(s) for non-renewal... should be conclusively presumed to be the true reason(s) for the employer's decision. The employer should not be permitted to assert later, in litigation for wrongful discharge, that there were other reasons. Id. at 286.

Woodlock's references to Garcetti v Ceballos, 547 U.S. 410 (2006) do not apply since the restraints on Thompson's speech had nothing at all to do with "constitutionalizing the employee grievance." And unlike the issue that was heard and ruled on in Garcetti, Thompson's speech was not communicated pursuant to his official employee duties.

The claim that Thompson's speech was not a matter of public concern is false. An allegation that a department is corrupt [as alleged in

Thompson's complaint against his teacher's union] is always a matter of public concern. Likewise, public assertions of official misconduct [as alleged against the superintendent who perjured himself and concealed material facts] are "a topic of inherent concern to the community." Pickering v Board of Education, 391 U.S. 574 (1968).

"Speech implicates a matter of public concern if it can be fairly considered as relating to any matter of political, social, or other concern to the community." Taylor v. Town of Freetown, 479 F.Supp.2d at 236 (citing Connick, 461 U.S. at 146).

Woodlock repeatedly cites Connick v. Myers, 461 U.S. 138 (1983) in his Memorandum and Order to argue that Thompson's speech is not protected by the First Amendment.

It should first be noted that this case did not involve a teacher, but an attorney in the District Attorney's office. Such a difference is relevant because the U.S. Supreme Court has held that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Shelton v. Tucker, supra, 364 U.S., at 487; Keyishian v. Board of Regents of the State of New York, 385 U.S. 589, 603 (1967).

Connick v. Myers was also a highly controversial and criticized 5-4 decision, which did rule in favor of the employer, in effect, weakening the

previous case law established in Pickering. The majority held that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by an agency. 461 U.S. at 147.

The relevant word here is "only". Just because Thompson's discovery of public corruption occurred as a victim of that corruption does not make his information of any less interest or concern to the community.

Thompson does not dispute that the restricted topics of conversation are a matter of personal interest, but they are also a matter of public concern and, therefore, not a matter that is only of personal interest. To exclude victims of public corruption from reporting it or even discussing it, simply because the misconduct has affected them personally, would also defy "whistleblower" laws and set a dangerous precedent.

In the case of Waters v. Churchill, Justice Stevens wrote, "Federal constitutional rights merit at least the normal degree of protection. Doubts concerning the ability of juries to find the truth, an ability for which we usually have high regard, should be resolved in favor of, not against, the protection of First Amendment rights." Waters v. Churchill, 511 U.S. at 696 (Stevens, J., dissenting).

Justice Anthony M. Kennedy wrote: "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."

Freedom of speech is not valuable merely because it protects open discussion of political issues. It is valuable because it protects the entire spectrum of ideas and opinions.

2. PRIOR RESTRAINTS ARE ILLEGAL EXCEPT IN THE MOST EXTREME CIRCUMSTANCES.

Woodlock's claim that a public school employer can place "prior restraints" on *any* topic that is not a matter of public concern is absurd. The law pertaining to prior restraints is extremely restrictive with very few exceptions.

Not only must a state show a compelling interest to restrict speech, but the U.S. Supreme court has limited the use of "prior restraints" to the topics of pornography, obscenity, and speech that is used to create a "clear and present danger."

Thompson's speech was restrained, not because it was obscene, a threat, or even disruptive; but because a discussion on the prohibited topics would implicate the former school superintendent.

The fact is that the only topics of discussion that proved to be "disruptive" at the high school were Thompson's whistleblower efforts pertaining to workplace harassment and the corruption in his union's election process, neither of which was a "prohibited" topic.

Since Thompson was fired for reporting an act of workplace harassment and since the paper trail generated against him pertained to alleged violations of a "prior restraint", it should be noted that the U.S. Supreme Court has stated:

It can hardly be argued that neither students nor teachers shed their Constitutional rights to freedom of speech and expression at the schoolhouse gate. Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." School officials may not prohibit speech merely to avoid "discomfort and unpleasantness" accompanying a particular viewpoint. Tinker v. Des Moines Independent School District, 393 U.S. 509 (1969).

A prior restraint is considered to be the most extreme form of censorship. The United States Supreme Court expressed this view in Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976), by noting:

The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.

The first notable case in which the United States Supreme Court ruled on a prior restraint issue was Near v. Minnesota, 283 U.S. 697 (1931). In that case, the Court held prior restraints to be unconstitutional, except for extremely limited circumstances such as national security issues.

U.S Supreme Court cases that followed affirmed this sentiment. In the case of Carroll v. Princess Anne, 393 U.S. 175, 181 (1968), the Court stated, "Any prior restraint on expression comes to this Court with a heavy presumption against its Constitutional validity."

Woodlock takes a polar opposite position on "prior restraints". According to Woodlock, public employers have the legal authority to issue prior restraints on anything, regardless of its impact on the workplace, so long as the topic is not a matter of public concern. Common sense alone says that this position flies in the face of the First Amendment and the law pertaining to prior restraints.

3. THE ARBITRATOR'S LAW-DEFYING RULING PERTAINING TO THOMPSON'S WRONGFUL DISMISSAL PROVES HIM TO BE EITHER INCOMPETENT OR CORRUPT

Since it is unlikely that an arbitrator could possibly be as incompetent as his ruling would confirm him to be, Thompson contends that the arbitrator was illegally influenced to rule against him.

The "issue" before the arbitrator was whether there was just cause under General Law chapter 71, section 42 to dismiss Thompson from his tenured teaching position. Under this law, the school district had the burden to prove that Thompson was dismissed for inefficiency, incompetency, incapacity, conduct unbecoming a teacher, insubordination, or failure on the part of the teacher to satisfy teacher performance standards (Appendix, p.305, ¶3).

From the list of reasons that a school district can reference to justify the dismissal of a teacher with professional status; "conduct unbecoming a teacher" and "insubordination" were the only reasons even referenced.

With the burden of proof to overcome, the school district did not produce a single witness to testify that Thompson had been "insubordinate" and based its "conduct unbecoming a teacher claim" solely on its opinion that Thompson's reporting of workplace harassment was "unbecoming."

Article XII of the Massachusetts Constitution (which affirms the rights secured by the U.S. Constitution's Sixth Amendment) states that "every subject shall have the right to produce all proofs that may be favorable to him, to meet the witnesses against him face to face, and to be fully heard in his defense."

The Employer did not produce a single first-hand witness at the evidentiary hearing to testify because, as Thompson argued at the hearing and in his briefs, there was not a single individual at the high school, who could substantiate the slander being expressed about him without committing perjury.

Arbitrator Gary D. Altman's due process-defying response to this argument was that the Employer, specifically Jeanne C. Whitten, who became Superintendent just six months before firing Thompson, did not have to produce any firsthand witnesses because her hearsay testimony was good enough.

As argued by Altman on page 27 of his Decision and Award, "*Superintendent was new to the school system and had no prior history with Mr. Thompson, thus her observations were not biased or influenced by past events.*" (Appendix, p.342)

Whether Whitten was "biased or influenced by past events" is irrelevant since Whitten did not "observe" anything herself or testify to anything herself that supported her decision to dismiss Thompson.

Whitten admitted that her only "observations" of Thompson - a five-minute visit to his class one day in October of 2006 and a thirty-minute meeting in her office on December 20, 2006 - had not contributed, in any way, to her negative opinion of Thompson.

Whitten testified to the fact that her negative opinion of Thompson was based entirely on the agenda-driven hearsay conveyed to her by the six people who Thompson calls out in his email as his six enemies at the high school.

M.G.L. c. 71, § 42 also required the school district to provide Thompson with the grounds for his dismissal in "sufficient detail" (Appendix, p.345, ¶2).

In the arbitration case of Whittier Regional Voc. Tech. High School v W.R. (AAA # 11 390 2098 95), the arbitrator overturned the dismissal of a long-term teacher with the finding that the district's claim that the dismissal was based upon conduct unbecoming a teacher, insubordination, failure to follow directives and school policy, and knowingly making false statements

in documentation regarding students and a parent did not constitute "detailed grounds" for dismissal (Appendix, p.347, ¶1)

The only "detailed" reasons given for Thompson's dismissal was an argument with his department head that had long been resolved and the email, which the school creatively called "insubordination, conduct unbecoming a teacher, extreme disruption of the efficiency and effectiveness of the educational process at Methuen High School, and other just cause, including a violation of the terms of an Agreement reached with Thompson on June 29, 2006." (Appendix, p.212, ¶2)

Superintendent Whitten and Personnel Manager Colleen McCarthy testified at two separate hearings, including the arbitration hearing itself, that Thompson would not have been fired if he had not sent the email.

Incredibly, the specific reason alleged by the Employer to justify Thompson's dismissal (the email) was deemed baseless by the arbitrator as a reason to dismiss Thompson. Moreover, if we erroneously accept the Defendants' description of the "Memorandum of Agreement" as a "last chance" agreement, then Thompson *still* has a "last chance" coming to him pursuant to the fact that the agreement has yet to be violated.

Also, pursuant to M.G.L. Chapter 71, Section 42, the school district was the party with the burden of proof to overcome (Appendix, p.346, ¶1).

In the arbitration case of Hester v. City of Lawrence, the arbitrator noted the absence of first hand witnesses to rule that there was insufficient evidence to warrant [Hester's] termination and ordered him back to work with back pay. The arbitrator concluded that the presence of first hand witnesses, who the employee could cross-examine, was "a necessary component at the hearing to buttress the city's position." (Appendix, p.349, ¶4)

With a reference to the Fourteenth Amendment of the U.S. Constitution, which protects every citizen's right to due process and equal protection under the law, Altman established his "standard" for admissible evidence with his denial of Thompson's attempt to submit the findings from two previous evidentiary hearings into evidence, referring to this documentation as "inadmissible hearsay".

What can be confirmed is that this "standard" was only a restriction for Thompson since the Employer's evidence did not include a single exhibit in support of Altman's "progressive discipline" theory that was anything but Employer-generated "inadmissible hearsay".

The Employer was allowed to submit whatever it wanted into evidence over Thompson's objections while Thompson was precluded from submitting several exhibits into evidence, including the evidence which

substantiated *some of* the fraud contained in the Employer's post-hearing brief.

Thompson was also "muzzled" when he attempted to communicate the school's "double standard" interpretation of "conduct unbecoming a teacher" with a reference to the indiscretions of his own department head, who did not receive so much as a slap on the wrist for his very public arrest in a prostitution sting.

The school district's evidence was not only inadmissible as hearsay, but inadmissible pursuant to item 3 of the June 29, 2006 "Agreement" that the school district had referenced to fire him (Appendix, p.205).

Incredibly, Altman accepted the Employer's claim that Item 3 would apply "so long as" there were not any future alleged infractions. This "interpretation" is not any less absurd than an automobile insurance company providing collision coverage "so long as" the insured does not get in an accident.

Thompson knows exactly why this item was included in the Memorandum of Agreement because he wrote it! It was included to "wipe the slate clean" and prevent the school from ever referencing the merit-less disciplinary actions that had been generated over the previous three years by Littlefield and his accomplices to run Thompson out of the school system.

It is self-evident to anyone who examines the briefs and reply briefs submitted by both parties and compares them to the arbitrator's 29-page Decision and Award (Appendix, pp.316-344), that the arbitrator completely disregarded every substantiated argument and rebuttal contained in Thompson's 34-page brief (Appendix, pp.224-258) and 19-page reply brief (Appendix, pp.259-277) and based his findings exclusively on the discredited hearsay and fraud conveyed by the Employer (Appendix, pp.278-314).

Thompson discredited the Employer's hearsay "sources" one by one on pages 6-11 of his post hearing brief (Appendix, pp. 229-234) and discredited the Employer-generated paperwork one exhibit at a time on pages 11-24 of the same brief (Appendix, pp.234-247). A reply brief then became necessary (Appendix, pp.259-277) when the Employer's lawyer resorted to fraud in *his* post hearing brief.

The only plausible explanation for the arbitrator's fact and law-defying ruling is that the Employer was in a wildly favored position to influence him. And although Thompson cannot prove that the arbitrator was illegally influenced, it would explain why MTA attorney, Joseph G. Sandulli, referred to the arbitrator by name to "sing his praises" at a March 11, 2008 federal court scheduling conference, which took place after the

arbitration hearing, but before the release of the arbitrator's "Decision and Award".

Sandulli interrupted Thompson to refer to the arbitrator by name when Thompson referenced the fact that two prior evidentiary hearings had already concluded that Thompson's dismissal was without merit.

Sandulli, who should have had limited knowledge of the arbitration case as a lawyer for the MTA and not the Employer, praised Altman as one of the most respected arbitrators in the state - a praise that Thompson found suspicious since he is not aware of any surveys that are being conducted on the competence and integrity of this state's arbitrators or any reports that would produce such a public "reputation".

In fact, from what Thompson has discovered in his efforts to hold this particular arbitrator accountable, there is not anyone in this state evaluating these arbitrators, investigating complaints, or even accepting complaints to hold them accountable.

If Sandulli had not already proven himself to be unethical in this case with his fraudulent claim that there was a statute that precluded unemployment findings from being used in future hearings and if Thompson were not already the victim of such "backroom deals", he might think

differently, but Sandulli's words sounded too much like the endorsement of someone who was already in *his* back pocket.

The stakes were certainly high enough to suspect foul play. Thompson had already filed a multi-million dollar lawsuit against the MTA for breach of contract. Since Thompson had already succeeded at two prior evidentiary hearings on this same matter, it would have been difficult, if not impossible, for the MTA to justify its decision to deny Thompson legal services and costs, if Thompson had succeeded for a THIRD time on the merits of his case.

Altman literally had no other choice but to rule in favor of Thompson if he were to have adhered to the law and had based his ruling on the admissible evidence and testimony presented at the arbitration hearing and argued in the post-hearing briefs.

4. WOODLOCK DEFIED THE LAW AND CREATIVELY INTERPRETED THE FACTS IN THE LEAST FAVORABLE LIGHT TO THOMPSON TO DISMISS THIS CASE

On a motion to dismiss, the court takes as true all well-pleaded facts contained in the complaint and draws all reasonable inferences arising from them in the plaintiff's favor. Phuong Luc v. Wyndham Mgmt. Corp., 496 F.3d 85, 88 (1st Cir. 2007). A complaint should not be dismissed for failure to state a claim unless the complaint, so viewed, presents no set of facts

justifying recovery. Cooperman v. Individual, Inc., 171 F.3d 43, 46 (1st Cir. 1999). All of the facts contained in Thompson's complaint and supporting documents were well pleaded and Woodlock did not draw a single inference in Thompson's favor on any one of them.

Woodlock's Memorandum and Order reveals that he eagerly accepted the Defendants' arguments, which are unsupported by the facts and applicable law, and completely disregarded every rebuttal argument expressed in documents submitted by Thompson.

With regard to factual matters, Woodlock spun the facts in his Memorandum and Order in the least favorable light to Thompson. For example, Thompson is misquoted in the Memorandum and Order so that Woodlock could falsely imply that Thompson's word is not credible.

To be more specific, Woodlock took Thompson's assertion that he "had not been discussing his custody case in school" (Appendix, pp.13-14, ¶34), which was 100% accurate as it pertained to the time period surrounding a baseless directive that he had received in March of 2005, and takes these words out of context to mean that Thompson alleges that he "had not, in fact, ever discussed his custody case with anyone at the High School". (Addendum, p.7, ¶1)

This misrepresentation of the facts allowed Woodlock to compare this deceptive statement to a second truthful and accurate statement, made by Thompson in a separate document, to falsely allege that Thompson's version of what happened was inconsistent (Addendum, p.7, footnote 3).

With regard to "controlling decisions", there is no evidence to suggest that Woodlock reviewed any of the legal arguments contained in Thompson's documents since his arguments defy the very law and case law cited in Thompson's November 27, 2007-filed Complaint (Appendix, pp.7-34); his January 21, 2008-filed Memorandum in Opposition to the MTA's Motion to Dismiss (Appendix, pp.57-67); his February 10, 2008-filed Memorandum in Opposition to the City of Methuen's Motion to Dismiss (Appendix, pp.97-112); his April 21, 2008-filed Addendum to his Opposition to the Defendants' Motion to Dismiss (Appendix, pp.113-126); his May 16, 2008-filed Brief Requested by Judge Woodlock, himself, to incorporate the case of *Davignon v. Hodgson* (Appendix, pp.142-158); and his October 6, 2008-filed Memorandum in Support of his Motion for Reconsideration (Appendix, pp.176-194).

The concern that Woodlock did not read all of Thompson's documents is very real since Thompson has conclusive proof that Woodlock did not

read all of Thompson's motions before ruling on them in a separate case (06-11805-DPW).

In his Memorandum and Order, Woodlock claims that Thompson's one-on-one conversations with other employees outside of school hours did not involve matters of public concern. Thompson agrees, but notes that the Defendants and Thompson's enemies at the high school generated *their* paper trail by falsely alleging that these conversations *were* occurring *during* school hours over a time period a full year *after* they were not.

Woodlock admits that Thompson's "Letter to Union Members" *did* involve a matter of public concern, but argues that there is no indication that this letter was a substantial or motivating factor in any adverse action taken by the school against Thompson (Addendum, pp.24-25).

Thompson disagrees since it was the "Letter to Union Members" that was used by Thompson's enemies to generate their first of several school-wide disruptions (which were all blamed on Thompson to allege a "pattern" of disruptive behavior).

The letter was also a "substantial motivating factor" for the retaliation that Thompson endured from members of his own union, who conspired to get him fired and who refused to provide him with legal services and

arbitration costs, to which he was entitled as a paying union member, on three separate occasions.

Woodlock admits that Thompson's "Letter to Ms. Coleman" also involved a matter of public concern, but argues that it contains statements that are not (Addendum, pp.25-26). Thompson disputes the relevance of this claim since it was the speech *on* the matter of public concern (ie. corruption in his union's election process) that generated the disruption in the school setting.

The statements that were NOT a matter of public concern in the letter were also NOT disruptive. **They were only cited by Littlefield as a pretext excuse to suspend Thompson.**

Since Thompson alleges this as a fact, a judge who was genuinely drawing inferences in the Plaintiff's favor, as required by law, would have accepted this allegation as true for purposes of ruling on a motion to dismiss.

Woodlock's reference to Gustafson v. Jones, 290 F.3d at 908, also does not apply where it states, "[E]ven speech on a subject that would otherwise be of interest to the public will not be protected if the expression addresses only the personal effect upon the employee, or if the only point of the speech was to further some purely private interest" (Addendum, p. 21)

Once again, as previously rebutted in Woodlock's reference to Connick, the relevant word here is "only". The first six pages of this eight-page letter are exclusive to a matter of public concern that affected every union member in Methuen.

The topic that Woodlock calls "unprotected" in this letter (the union president's impact on Thompson's custody case) had never been disruptive to anyone but Thompson.

It was NOT a threat to faculty harmony and it was NOT a threat to the efficiency of the service provided by the public employer. It was prohibited for two reasons - to censor speech on a topic that could implicate the Superintendent and to cite as a tool to generate a paper trail against Thompson.

Woodlock claims that Thompson's class discussion pertaining to the banning of his book is not protected because it is not a matter of public concern. Thompson disputes this claim.

A matter of public concern is not a "prerequisite" to protection under the First Amendment despite some of the law-defying case law that Woodlock cites to claim otherwise.

For if it was, a public employer could censor speech on whatever arbitrary topics it so chooses and use such restraints to target individual

teachers, who spend four to five hours a day speaking before a captive audience on topics that *rarely* involve matters of public concern.

To restrain speech on ANY topic requires a compelling reason, such as "the government employer's interest in operating efficiently." Thompson's ten minute discussion on his TV appearance had no impact at all on the efficient operation of the school and was not any more out of the ordinary than the off topic "breaks" that occur in most classes on any given school day.

Woodlock claims that Thompson's email to the school committee and the local newspaper was not a matter of public concern. Thompson disputes this claim and notes that this "speech" reported the illegal and retaliatory reasons why the physics education at Methuen High School was being compromised.

Woodlock claims that the email, which reported an act of workplace harassment, is not a matter of public concern. Thompson finds it hard to believe that a reasonable person could even suggest that workplace harassment in a public school setting, involving teachers who work with the children of that community, is not a matter of public concern.

Woodlock's dismissal of this case also defies the very case law that he ordered the parties to review. The particular case, Davignon v. Hodgson, --

F.3d --, 2008 WL 1822375 (1st Cir.2008), 194 L.R.R.M. (BNA) 2007, is just one case of many, which validates Thompson's § 1983 claim against the Defendants. In this case, a jury found in favor of the employees on a retaliation claim, which was affirmed by the First Circuit of the United States Court of Appeals.

What makes this case similar to Thompson's complaint is that both complaints allege that retaliation took place in response to "protected" employee speech and both complaints include the "employer-rebuttal" that restraints on speech were necessary to maintain harmony among co-workers - a rebuttal that does not hold water in either case.

The reasons why Thompson's Complaint is far superior in merit to the Davignon case are stated in Thompson's May 16-2008-filed Memorandum (Appendix, pp.142-158) and summarized in the chalk attached to Thompson's Motion for Reconsideration (Appendix, pp.201-204).

Woodlock's ruling on Thompson's lawsuit even defies his *own* case law. In the case of Stoyle v. Mansfield Municipal Electric Department, et al (USDC Case No. 05-10354-DPW), Woodlock allowed this particular harassment and retaliation case to go to trial with little, if any, speech on matters of public concern.

In the cited case, the jury ruled in favor of the employee, finding the employer guilty of treating the employee unfairly. In what was reported by the Boston Globe as an unusual move, Woodlock held Mansfield Town Manager John D'Agostino personally responsible for paying \$500,000 in punitive damages to former municipal employee, Kimberly Stoye (Appendix, p.350-352).

Apparently in Woodlock's courtroom, those who file misconduct complaints to the Chief Judge of the First Circuit are denied such justice with their cases dismissed before a constitutionally-prescribed jury can rule in their favor.

5. THOMPSON DID PLEAD A VIABLE CLAIM FOR RETALIATION

Thompson's union-related whistleblower letters, his email to the newspaper and school committee, and his reporting of workplace harassment, which each provoked retaliatory actions against him, *do* relate to matters of public concern (ie. union corruption and harassment in a public school setting); the retaliatory action *did* deprive Thompson of some valuable benefit (ie. legal benefits, arbitration costs, and his job); and there was a causal relationship between the protected expression and the

retaliatory action. This is the three-part test to establish retaliation. Storlazzi v. Bakey, 894 F.Supp. 494, 501-02.

Once the plaintiff satisfies the threshold requirement, the burden shifts to the defendant to establish that the decision regarding the plaintiff's employment would have been the same regardless of the plaintiff's protected speech. Mt. Healthy v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977).

Thompson was harassed with false allegations and anonymous items left in his faculty mailbox and retaliated against by union-involved teachers at the school, who denied him legal services to which he was entitled, solely because he sued the union president and exposed the corruption in his union's election process.

It is a FACT that the MTA/MEA would have voted to represent any other teacher in that union with the cases that were brought before them by Thompson.

Thompson was denied representation and arbitration costs on three separate occasions by the same people who made it clear to him and numerous witnesses at the Executive Board meeting called to address his claims of union corruption that Thompson was despised.

The Employer's response to the retaliatory harassment against Thompson was to put its collective head in the sand and hope that the problem would just go away by ignoring it and ordering Thompson to not talk about it.

Not only did the Employer do nothing to address this harassment, but ultimately "added insult on top of injury" by dismissing Thompson for taking matters into his own hands and reporting the harassment that he was experiencing to a select group of teachers at the high school.

The Employer "materially contributed to creating the specific 'condition or situation' that resulted in the harm" (See Jacome v. Commonwealth, 56 Mass. App.Ct. 486, 489) by allowing Thompson's enemies to run around the school to badmouth Thompson with impunity. Consequently, the Employer is liable for the harassment that it allowed to occur.

6. THE LEGAL GROUNDS TO DISMISS THIS PRO SE LITIGANT'S CASE WERE NOT MET

Since Thompson is pro se, the Court has a higher standard when faced with a motion to dismiss. Pro se litigants' court submissions are to be construed liberally and are to be held to less stringent standards than submissions by lawyers. White v. Bloom, 621 F.2d 276 (1980)

A court faced with a motion to dismiss a pro se complaint must read the complaint's allegations expansively, Haines v. Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594, 596, 30 L. Ed. 2d 652 (1972), and take them as true for purposes of deciding whether they state a claim. Cruz v. Beto, 405 U.S. 319, 322, 92 S. Ct. 1079, 1081, 31 L. Ed. 2D 263 (1972).

The courts provide pro se parties wide latitude when construing their pleadings and papers. When interpreting pro se papers, the Court should use common sense to determine what relief the party desires. S.E.C. v. Elliott, 953 F.2d 1560, 1582 (11th Cir. 1992). See also, United States v. Miller, 197 F.3d 644, 648 (3rd Cir. 1999).

Courts shall go to particular pains to protect pro se litigants against consequences of technical errors if injustice would otherwise result. U.S. v. Sanchez, 88 F.3d 1243 (D.C.Cir. 1996).

7. AN HONORABLE JUDGE WOULD HAVE RECUSED HIMSELF FROM THIS CASE

In 1994, the U.S. Supreme Court held that "disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge

must be disqualified." [Emphasis added]. Liteky v. U.S., 114 S.Ct. 1147, 1162 (1994).

Courts have repeatedly held that positive proof of the partiality of a judge is not a requirement, only the appearance of partiality. Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194 (1988) (what matters is not the reality of bias or prejudice but its appearance); United States v. Balistreri, 779 F.2d 1191 (1985) (Section 455(a) "is directed against the appearance of partiality, whether or not the judge is actually biased.") ("Section 455(a) of the Judicial Code, 28 U.S.C. § 455(a), is not intended to protect litigants from actual bias in their judge but rather to promote public confidence in the impartiality of the judicial process."). Section 455(a), "requires a judge to recuse himself in any proceeding in which [his] impartiality might reasonably be questioned." Taylor v. O'Grady, 888 F.2d 1189 (1989).

In Pfizer Inc. v. Lord, 456 F.2d 532 (1972), the Court stated "it is important that the litigant not only actually receive justice, but that he believes that he has received justice."

The Supreme Court has ruled and has reaffirmed the principle that "justice must satisfy the appearance of justice", Levine v. United States, 362 U.S. 610, 80 S.Ct. 1038 (1960), citing Offutt v. United States, 348 U.S. 11,

14, 75 S.Ct. 11, 13 (1954). "Recusal under Section 455 is self-executing; a party need not file affidavits in support of recusal and the judge is obligated to recuse [himself] sua sponte under the stated circumstances." Taylor v. O'Grady, 888 F.2d 1189 (1989).

"Judges do not have discretion to not disqualify themselves. By law, they are bound to follow the law. Should a judge not disqualify himself as required by law, then the judge has given another example of his 'appearance of partiality' which further disqualifies the judge. None of the orders issued by any judge who has been disqualified by law would be valid. They are void as a matter of law, and are of no legal force or effect. **Should a judge not disqualify himself, then the judge is in violation of the Due Process Clause of the U.S. Constitution.**" United States v. Sciuto, 521 F.2d 842, 845 (1996) ("The right to a tribunal free from bias or prejudice is based on the Due Process Clause.").

The Supreme Court has held that "if a judge acts after he has been automatically disqualified by law, then he is acting without jurisdiction and engaged in acts of treason to the Constitution." U.S. v. Will, 449 U.S. 200, 216, 101 S.Ct. 471, 66 L.Ed.2d 392, 406 (1980).

The bottom line is that Woodlock was legally required to recuse himself from the two cases involving Thompson at the moment in time when

he was notified of Thompson's complaint of misconduct against him - a complaint in which Thompson reasonably questioned Woodlock's ability to be impartial.

H. CONCLUSION

Contrary to the Employer's opinion, the Superintendent as a public employer did not have the authority to mandate what Thompson could or could not say or write in private communication, particularly since the prohibited topics had not been disruptive or a threat to workplace harmony.

The U.S. Constitution is the Supreme Law of the Land and the First Amendment of this document is clear and unambiguous. It protects a citizen from government interference in his or her free expression of thoughts and ideas. Absolutely nothing in this amendment limits its protection to public speech or speech that is a matter of public concern. Case law that defies this Amendment is not law at all.

Woodlock's claim that he can only consider the Complaint document itself in a motion to dismiss is pure nonsense. There is a reason why post-complaint documents such as Memorandums of Law, Addendums, and Oppositions to Motions to Dismiss are filed with the Court. Thompson questions whether this claim was expressed to explain why Thompson's

post-complaint documents appear to have been ignored in the production of Woodlock's law-defying Memorandum and Order.

Equally absurd is Woodlock's claim that there were no facts presented to justify recovery. Contrary to Woodlock's opinion, Thompson's Complaint does not contain a single "legal conclusion couched as a factual allegation." nor does it contain any "bald assertions, unsupportable conclusions, [or] opprobrious epithets" as further alleged. These comments are nothing more than "judicial babble", expressed by a judge with no legitimate grounds to dismiss this case. Such a fraudulent claim is a frightening betrayal of public trust and the laws of the land that Woodlock has sworn to uphold.

The Defendants' conduct did amount to a constitutional violation; the constitutional right was clearly established at the time of the alleged violation; and reasonable officials would understand that their conduct violated that clearly established right.

It should be noted that the civil rights violations against Thompson occurred over three years. And with every violation that occurred over those three years, Thompson provided written and oral notice that the actions taken against him were in violation of his First Amendment rights and United States Supreme Court case law.

Thompson does not dispute that the Employer had generated a paper trail against him, what he disputes is that there was anything at all about the Employer's paperwork that was truthful and accurate.

Thompson was twice suspended and ultimately fired for writing about union corruption and workplace harassment, but his enemies at the school were free to run around the school on multiple occasions to badmouth Thompson to whomever would listen, or were forced to listen, during school hours and in front of students.

The only thing that Thompson is "guilty of" is standing up to years of workplace harassment, reporting corruption in a public school setting, and attempting to hold those who committed crimes against him accountable - activities which are all protected under the First Amendment.

Lastly, a motion to dismiss cannot be granted unless it can be determined that the plaintiff cannot succeed on ANY of his claims. Thompson contends that Woodlock's Memorandum and Order does not contain a single credible argument that would justify the dismissal of ANY of his claims against the Defendants.

Thompson seeks a constitutionally-prescribed jury trial, at which time, after proving his case, he will be requesting the following relief:

1. Overturn Thompson's wrongful termination and order the immediate return of Thompson to his position as the sole physics teacher at Methuen High School.
2. Reimburse Thompson for all back pay, benefits, and costs incurred to fight his wrongful dismissal.
3. Award Thompson compensatory and punitive relief against Dr. Jeanne C. Whitten individually in the amount of \$300,000.
4. Award Thompson compensatory and punitive relief against Dr. Charles P. Littlefield individually in the amount of \$700,000.
5. Award Thompson compensatory and punitive relief against the City of Methuen in the amount of \$5,000,000.
6. Award Thompson compensatory and punitive relief against the MTA/MEA in the amount of \$5,000,000.
7. Award Thompson reasonable attorney fees and costs.

I. CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,872 words.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6)

because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point font in Times New Roman.

Dated: December 24, 2008

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CERTIFICATE OF SERVICE

I, Kevin Thompson, hereby certify that a true copy of the brief and appendix were mailed, postage prepaid, to David C. Jenkins, legal counsel for Littlefield, Whitten, and the City of Methuen, at Kopelman and Paige, PC, 101 Arch Street, Boston, MA 02110 and Joseph G. Sandulli, legal counsel for the MTA, at Sandulli Grace, PC, One State Street, Suite 200, Boston, MA 02109 on December 24, 2008.

Kevin M. Thompson

ADDENDUM TO THE BRIEF

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