

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

**Case No. 07-12196-DPW**

<hr/>	)	
<b>KEVIN M. THOMPSON,</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	
	)	
	)	
<b>CITY OF METHUEN, ET AL</b>	)	
	)	
<b>Defendants</b>	)	
<hr/>	)	

**PLAINTIFF KEVIN THOMPSON'S MEMORANDUM OF LAW IN SUPPORT  
OF HIS MOTION FOR RECONSIDERATION OF JUDGE WOODLOCK'S  
SEPTEMBER 26, 2008 MEMORANDUM AND ORDER**

**Introduction**

Plaintiff Kevin Thompson ("Thompson") contends that Judge Woodlock "creatively" interpreted the law in the least favorable light to Thompson to justify his same-day dismissal of two separate cases, filed by Thompson more than a year apart (USDC #06-11805-DPW, #07-12196-DPW).

Thompson further contends that these dismissals had nothing at all to do with the merits of the complaints, which were ironclad, and everything to do with retaliating against Thompson for reporting Judge Woodlock's negligence and obstruction of justice, as it pertained to these two cases, in a formal complaint to the Chief Judge of the United States Courts for the First Circuit.

Judge Woodlock's rationale for dismissing the above-referenced case is built on the false premise that the First Amendment only applies to speech that is "a matter of

public concern" and the equally false premise that a public school employer is free to restrain speech on whatever arbitrary topics it so chooses.

Moreover, none of Judge Woodlock's arguments justify a dismissal of the case pertaining to Thompson's claims of workplace harassment, retaliation, negligence, and breach of contract - a FACT, which Thompson finds particularly outrageous in light of Judge Woodlock's ruling in a very similar, but factually-weaker, workplace retaliation case, *Stoye v. Mansfield Municipal Electric Department, et al* (USDC Case No. 05-10354-DPW).

### **Basis for Reconsideration**

1. Reconsideration is warranted when the Court overlooks controlling decisions or factual matters that might have influenced its prior determination on a matter at issue. See *Eisemann v. Greene*, 204 F.3d 393, 395 n.2 (2d Cir. 2004); *Shrader v. CSX Transportation, Inc.*, 70 F.3d 255, 257 (2d Cir. 1995).
2. Judge Woodlock's Memorandum and Order reveals that he blindly 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.
3. With regard to factual matters, Judge Woodlock spun the facts in his Memorandum and Order to support his agenda. For example, Thompson is misquoted on page 7 of the Memorandum and Order so that Judge Woodlock could falsely imply that Thompson's word is not credible.

4. To be more specific, Judge Woodlock takes Thompson's assertion that he "had not been discussing his custody case in school", which was 100% accurate as it pertained to the time period surrounding a baseless directive that he had received, 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".
5. This misrepresentation of the facts allowed Judge 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 (See Mem. footnote 3 on page 7).
6. With regard to "controlling decisions", there is no evidence to suggest that Judge 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 (Document 1); his January 21, 2008-filed Memorandum in Opposition to the MTA's Motion to Dismiss (Document 10); his February 10, 2008-filed Memorandum in Opposition to the City of Methuen's Motion to Dismiss (Document 14); his April 21, 2008-filed Addendum to his Opposition to the Defendants' Motion to Dismiss (Document 22); and his May 16, 2008-filed Brief Requested by Judge Woodlock, himself, to incorporate the case of *Davignon v. Hodgson*.
7. The concern that Judge Woodlock did not read all of Thompson's documents is very real since Thompson has conclusive proof that Judge Woodlock did not read all of Thompson's motions before ruling on them in a separate case (06-11805-DPW).

8. Judge 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. In fact, the only prohibited topics that justify a "prior restraint" are "speeches" that are obscene or a threat to public order.
9. "Prior restraints", pursuant to Judge Woodlock's interpretation of this law, would mean the kind of censorship and suppression of thoughts and ideas that occurred in Nazi Germany.
10. 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 Judge Woodlock to claim that none of these incidents violated Thompson's First Amendment rights is mind-boggling.
11. Thompson's speech was restrained, not because it had been disruptive, but because a discussion on the illegally prohibited topics would implicate the former school superintendent.
12. The fact is that the only topic of discussion that proved to be disruptive at the high school was Thompson's whistleblower efforts to expose the corruption in his union's election process, which the superintendent did NOT prohibit. As Judge Woodlock admits himself in his Memorandum and Order, these facts must be taken as true in ruling on a motion to dismiss.
13. 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 Judge

Woodlock's Memorandum and Order does not contain a single argument that would justify the dismissal of ANY of his claims against the Defendants.

### **Federal Questions**

14. Whether Thompson is correct in his assertion that the United States Constitution is the Supreme Law of the Land and supersedes all other law and case law.
15. Whether Thompson is correct in his assertion that Judge Woodlock's Memorandum and Order focuses on inapplicable case law to distract from the self-evident fact that his arguments defy the very words of the First Amendment.
16. Whether Thompson is correct in his assertion that Judge Woodlock's 36-page Memorandum and Order fails to discredit ANY of the claims contained in Thompson's Complaint and supporting documents.
17. Whether Thompson is correct in his assertion that a prior restraint on speech is the most extreme form of censorship and the reason why the government has restricted its application to speech that is obscene or a threat to the public order.
18. Whether Thompson is correct in his assertion that Judge Woodlock's dismissal of this case defies his own track record on cases pertaining to workplace harassment and retaliation. See *Stoyle v. Mansfield Municipal Electric Department, et al* (USDC Case No. 05-10354-DPW)
19. Whether Thompson is correct in his assertion that Judge Woodlock misinterpreted case law to falsely claim that the protections of the First Amendment are exclusive to speech that is a matter of public concern.
20. Whether Thompson is correct in his assertion that the First Amendment is *more* protective of private speech.

21. Whether Thompson is correct in his assertion that he has a right to a jury trial as it pertains to his wrongful termination on the grounds that it was obtained through fraud and the pretext claim that Thompson's email, which reported an act of workplace harassment, violated a prior restraint on his speech.
22. Whether Thompson is correct in his assertion that he has a right to a jury trial as it pertains to his wrongful termination 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 and showed up to the arbitration hearing without a single first-hand witness who Thompson could confront on the stand as a false witness against him.
23. Whether Thompson is correct in his assertion that, in the interests of justice, Judge Woodlock has a legal obligation to overturn Thompson's wrongful termination immediately based on the indisputable FACT that three separate administrative agencies found the specific reason cited by the Employer to fire Thompson to be baseless.
24. Whether Thompson is correct in his assertion that Judge Woodlock has a legal obligation to hear Thompson's negligence, retaliation, and breach of contract claim against the Massachusetts Teachers Association, particularly in light of Judge Woodlock's footnote-stated opinion that "a federal court has discretion to exercise supplemental jurisdiction over such claims so long as they form 'part of the same case or controversy.'" (Mem. p.2)

25. Whether Thompson is correct in his assertion that the *Davignon v. Hodgson* case, which Judge Woodlock assigned to the litigants for analysis, confirms the fact that the dismissal of Thompson's case is without merit.

**Contrary to the Opinion Expressed by Judge Woodlock to Dismiss this Case,  
Thompson DOES, in Fact, State SEVERAL Federal Claims Upon Which Relief Can  
be Granted**

26. 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.
27. The reference to Garcetti v. Ceballos does 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 v. Ceballos, Thompson's speech was not communicated pursuant to his official employee duties.
28. 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).
29. Borrowing from the Defendants' citations, "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).
30. The Defendants improperly cite Connick, 461 U.S. at 147, where it states, "matters of speech that are only of personal interest are prohibited," to argue that Thompson's speech "constituted matters of personal interest" and therefore, is not appropriate for review in federal court.
  31. 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.
  32. 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.
  33. To exclude victims of public corruption from reporting it or even discussing it, simply because the misconduct has affected them personally, would set a dangerous precedent.
  34. Furthermore, the majority of disciplinary actions against Mr. Thompson were for statements made in private communications, which are ALWAYS entitled to full First Amendment protection. Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979).
  35. The Defendants write in their motion to dismiss:  
  
*The plaintiff himself admits 'the topics of conversation that Mr. 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.'*

36. The above statement is entirely true. These two topics were not prohibited because they had disrupted the school environment. **They were prohibited because a discussion on these topics would implicate the superintendent.**
37. Judge 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 Judge Woodlock's law-defying Memorandum and Order.
38. Equally absurd is Judge Woodlock's claim that there were no facts presented to justify recovery. Contrary to Judge 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.
39. 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.

40. 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.
41. With regard to the claim that Thompson's speech was made in his official capacity as a teacher and therefore not as a citizen for First Amendment purposes, Thompson's claims against the superintendent and union president were communicated not as a teacher, but as a father whose relationship with his son was damaged by the crimes committed by two school officials.

**Contrary to Court Opinion, Thompson HAS Pled a Viable Claim for Retaliation**

42. Thompson's union-related whistleblower letters, his email to the newspaper and school committee, and his reporting of workplace harassment, which was the "protected speech" that provoked retaliatory actions, *do* relate to matters of public concern (ie. union corruption and public school workplace harassment); the retaliatory action *did* deprive Thompson of some valuable benefit (ie. legal benefits 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.
43. 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).

44. Thompson has the witnesses for trial to confirm that his union denied him legal services and arbitration costs specifically because he sued the union president and exposed the corruption in his union's election process.
45. And Thompson has the witnesses and court-recorded transcripts to confirm that he was wrongfully terminated because of his email, in which he reported an act of harassment against him. To be more specific, his witnesses are Personnel Manager Colleen McCarthy and Superintendent Whitten, who each testified at two separate hearings that Thompson would NOT have been fired if he had NOT sent the email.
46. 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.
47. 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.
48. 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.

**The Standard of Review is Higher for Pro Se Litigants When Faced With a Motion to Dismiss**

49. 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.
50. 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).
51. 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).
52. 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).
53. Moreover, "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).

### ***Davignon v Hodgson* Comparison**

54. The case of *Davignon v. Hodgson*, which Judge Woodlock ordered the litigants to review and which Judge Woodlock cites repeatedly in his Memorandum and Order, is just the most recent case of many, which validate Thompson's well-supported § 1983 claim against the Defendants.
55. 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.
56. 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 attached chalk (Exhibit A) summarizes the reasons why Thompson's Complaint is actually superior in merit to the *Davignon* case.

### **Prior Restraints**

57. Not only must a state show a compelling interest to restrict speech, but its use of "prior restraints" is limited to the topics of pornography, obscenity, and any speech that is used to create a "clear and present danger."
58. 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."
59. A prior restraint is often 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."
60. 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.
61. 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."
62. Judge Woodlock takes a polar opposite position on "prior restraints". According to Judge Woodlock, who supports his position with a creative interpretation of inapplicable case law, the State and public employers have the legal authority to issue prior restraints on anything 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.

### Responses to Judge Woodlock's Incident Analysis

63. Judge Woodlock claims that Thompson's one-on-one conversations with other employees outside of school hours did not involve any matters of public concern. Thompson agrees, but notes that the Defendants and Thompson's enemies at the high school generated a paper trail by falsely alleging that these conversations were occurring *during* school hours over a time period a full year after they were not.
64. Judge Woodlock admits that Thompson's "Letter to Union Members" did involve matters 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. Thompson agrees, but notes that the "Letter to Union Members" was a substantial motivating factor for the retaliation that he 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 two separate occasions.
65. Judge Woodlock admits that Thompson's "Letter to Ms. Coleman" did involve a matter of public concern, but argues that it also contains statements that are not. Thompson agrees, but disputes Judge Woodlock's claim that "public concern" is a prerequisite for protection of private speech under the First Amendment.
66. The topic that Judge Woodlock calls "unprotected" (the school's impact on Thompson's custody case) had never been disruptive to anyone but Thompson. Therefore, the only compelling reason to restrain speech on this specific topic was self-serving.

67. Superintendent Littlefield issued a prior restraint on Thompson for one reason and one reason only, to censor Thompson's speech on a topic that would implicate him.
68. Judge Woodlock claims that Thompson was suspended for mentioning the school's impact on his custody case in a private letter. Thompson disagrees. Since it was the topic of corruption in his union's election process that generated the school-wide disruption, to which Littlefield was responding, and not the mention of his custody case, Thompson contends that Littlefield used the prior restraint as a pretext reason to suspend Thompson.
69. Judge Woodlock claims that Thompson's class discussion pertaining to the First Amendment and the banning of his book is not protected because it is not a matter of public concern. Thompson disputes this argument and asserts, once again, that the First Amendment is NOT exclusive to speech that is a matter of public concern.
70. Judge Woodlock claims that Thompson's email to the school committee, the local newspaper, and his students is not a matter of public concern. Thompson disputes this claim and notes that this "speech" reported the illegal reasons why the physics education at Methuen High School was being compromised.
71. Judge Woodlock claims that the email, which reported an act of workplace harassment, is not a matter of public concern. Thompson disputes this claim but finds this disagreement irrelevant since Thompson again asserts that the First Amendment is NOT exclusive to speech that is a matter of public concern.

## Conclusion

72. 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.
73. Since the U.S. Supreme Court has addressed public speech and ruled that it may be unprotected if it is not a matter of public concern, Judge Woodlock is spinning this "exception to the rule" as a smoke screen to argue that this is the only type of speech that is protected.
74. The U.S. Supreme Court stated in its famous 1969 opinion that, "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." Moreover, 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).
75. 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).

76. Judge Woodlock cites *Connick v. Myers*, 461 U.S. 138 (1983) to argue that Thompson's speech is not protected by the First Amendment. It should 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; See also *Keyishian v. Board of Regents of the State of New York*, 385 U.S. 589, 603 (1967).
77. Freedom of speech is not valuable merely because it protects open discussion of public issues. It is valuable because it protects the entire spectrum of ideas and opinions.
78. In the case of Waters v. Churchill, Justice Stevens writes, "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).
79. Contrary to Judge Woodlock'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.
80. The only thing, of which Thompson is guilty, is standing up to years of workplace harassment, reporting corruption in a public school, and attempting to hold those who committed crimes against him accountable - activities which are all protected

under the First Amendment.

For all the foregoing reasons, Plaintiff, Kevin M. Thompson, moves this Court to reconsider its decision to dismiss this case.

#### REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(d), Thompson requests that the Court schedule this motion for oral argument on the earliest available date.

Date: October 5, 2008

/s/ Kevin M. Thompson  
Kevin M. Thompson, Pro Se  
20 Washington Street #1  
Methuen, MA 01844  
(978) 691-1191

#### **CERTIFICATE OF SERVICE**

I, Kevin M. Thompson, Plaintiff, hereby certify that a true copy of this document was served upon the attorney of record for each party (Joseph G. Sandulli and David C. Jenkins) by e-filing on October 5, 2008.

/s/ Kevin M. Thompson  
Kevin M. Thompson, Plaintiff