STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2017

Martina Bazzaro,
Respondent,

vs.

Olga Aleksandrovna Issaenko,
Appellant.

Filed June 17, 2013
Affirmed and remanded
Klaphake, Judge[*]

Hennepin County District Court
File No. 27-CV-11-22810

Carol M. Grant, Kurzman, Grant & Ojala, Minneapolis, Minnesota (for respondent)

Rick L Petry, Petry Law Firm, Minneapolis, Minnesota; and

Albert T. Goins, Goins Law Firm, Minneapolis, Minnesota (for appellant)

Considered and decided by Chutich, Presiding Judge; Smith, Judge; and Klaphake, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

KLAPHAKE, Judge

Appellant Olga Aleksandrovna Issaenko challenges the district court's harassment restraining order (HRO), which prohibits her from contacting respondent Martina Bazzaro by any means, arguing that (1) the evidence does not support the issuance of an HRO; (2) the referee hearing the matter made evidentiary errors; (3) the referee violated the district court's remand order; (4) the district court erred by confirming the HRO; and (5) the HRO violates appellant's First Amendment rights. We affirm the HRO, but remand to the district court for correction of a clerical error in accordance with Minn. R. Civ. P. 60.01.

D E C I S I O N

We review the district court's grant of an HRO for an abuse of discretion. *Kush v. Mathison*, 683 N.W.2d 841, 843 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). We review the district court's findings for clear error and defer to the district court's opportunity to judge the witnesses' credibility. *Id.* at 843-44. But whether the facts found by the district court satisfy the elements of harassment is a question of law that we consider de novo. *Peterson v. Johnson*, 755 N.W.2d 758, 761 (Minn. App. 2008), *review denied* (Minn. Mar. 28, 2006).

Respondent was a professor and the head of a research laboratory at the University of Minnesota. Appellant, a research scientist, was a probationary employee in respondent's laboratory. At respondent's request, the university's human resources department terminated appellant's employment before the end of her probationary period.

Appellant was warned by human resources representatives, the university police, and representatives of the university's Office of the General Counsel not to contact respondent. After an extended period of unwanted contacts, respondent sought and the district court issued an HRO.

Sufficiency of the evidence

An HRO can be granted on a showing of "repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another, regardless of the relationship between the actor and the intended target." Minn. Stat. § 609.748, subds. 1(a)(1), 2 (2010).

Appellant argues that the district court[1] erred by issuing an HRO without finding that there was an "imminent threat" or that the harassing conduct was likely to continue. Appellant cites to no authority that the party requesting an HRO must be under an "imminent threat." Appellant bases her continuing conduct argument on *Davidson v. Webb*, 535 N.W.2d 822 (Minn. App. 1995), which has been superseded by statute. Under the current version of the statute, the person seeking an HRO must demonstrate repeated incidents of harassment, but is not required to establish the likelihood of future harassing conduct.

[1]This hearing was held before a referee, whose decision was confirmed by the district court. *See* Minn. Stat. § 484.70 (2010) (permitting chief judge of district court to appoint referees to hear contested trials, hearing, motions, or petitions, and to make recommended findings subject to confirmation by a judge). Upon confirmation, the referee's findings become the findings of the district court. Minn. Stat. § 484.70, subd. 7(c).

Appellant argues that there was no evidence of repeated incidents of intrusive or unwanted acts, because "all of the communications from [appellant] to [respondent] related to a single incident, namely her employment with the University of Minnesota." This is an extremely narrow reading of the word "incident." In *Kush*, this court ruled that when a dispute between the parties centered on the use of an easement, telephone calls, face-to-face arguments, and the posting of "no parking" signs around the property were sufficient evidence of repeated incidents of intrusive or unwanted conduct. 683 N.W.2d at 844. Although appellant's employment or termination may have been the root cause of her conduct, the record supports the referee's finding of repeated incidents, all occurring after appellant was warned not to contact respondent: (1) respondent had records of 15 telephone calls; (2) respondent produced 16 emails sent by appellant; (3) respondent testified that in total she received at least 100 unwanted emails from appellant; and (4) other university staff and respondent's professional colleagues reported receiving multiple unsolicited emails from appellant accusing respondent of professional misconduct. This court has stated that the first element requires "objectively unreasonable conduct or intent on the part of the harasser." *Dunham v. Roer*, 708 N.W.2d 552, 567 (Minn. App. 2006), *review denied* (Minn. Mar. 28, 2006). The sheer number of unwanted contacts is sufficient to satisfy the first element required for issuance of an HRO.

Further, appellant asserts that there was no evidence that respondent suffered a "substantial adverse effect" or that appellant intended to cause such an effect on respondent's safety, security, or privacy. *See* Minn. Stat. § 609.748, subd. 1(a)(1). This

second element requires "an objectively reasonable belief on the part of the person subject to harassing conduct." *Id.* The record does not support appellant's claim. Respondent testified that she felt her privacy was invaded because appellant advised her in some of the emails to get a divorce and that she was "very scared" because some of the emails were threatening. After she received an email from appellant listing the five stages of dying, respondent felt her "safety was in danger because I really didn't know what else she was going to do after this. It seems to me that she is planning on doing something and it's unclear where it is that she's at, if it is anger or what it is." After receiving an email in which appellant stated, "You might need protections. There is a knife for you, not me who is holding it, though," respondent was "[v]ery, very scared and very anxious." Appellant's emails used words like "obsession" and "worship" that made respondent feel "very uncomfortable." Respondent testified that appellant's emails to respondent's professional collaborators "made [her] life difficult" and were "embarrassing" and time-consuming. This is sufficient evidence to show an adverse impact on respondent because of appellant's conduct.

Evidentiary rulings

Appellant argues that the referee abused his discretion by accepting "manufactured" evidence, permitting respondent's attorney to ask compound questions, and crediting respondent's testimony over appellant's testimony. We review the district court's evidentiary rulings for an abuse of discretion. *Kelly v. Ellefson*, 712 N.W.2d 759, 766 (Minn. 2006). On April 20, 2012, appellant filed a notice requesting that the district court review the referee's findings. *See* Minn. Stat. § 484.70, subd. 7(d) (setting forth

method for district court review of referee's recommended order). Although parties seeking review are directed to state "with particularity, each contested finding," appellant did not allege specific evidentiary errors.

Appellant does not cite to the record to support her claim that the referee admitted manufactured evidence or allowed respondent's attorney to ask compound questions. *Anderson v. Comm'r of Health*, 811 N.W.2d 162, 166 (Minn. App. 2012) (refusing to consider issue unsupported by reasoning or authority), *review denied* (Minn. Apr. 17, 2012). Appellant appears to object to the referee's admission of certain emails, which were printed out as PDF files. In fact, the referee rejected some email exhibits but accepted others. Both appellant's and respondent's attorneys were repeatedly advised not to ask compound questions.

A referee sits as a fact finder and as such it is "within the referee's province to determine credibility and such decisions should not be reweighed." *Zahler v. Minn. Dept. of Human Servs.*, 624 N.W.2d 297, 303 (Minn. App. 2001), *review denied* (Minn. Jun. 19, 2001); *see* Minn. Stat. § 484.70, subds. 1, 7 (permitting chief judge of district court to appoint referees to hear contested trials, hearings, motions or petitions, and to make recommended findings and conclusions, subject to confirmation by a judge). The referee here found respondent to be a more credible witness than appellant, and therefore rejected some of appellant's testimony. The district court affirmed the referee's findings of fact, thereby making them the findings of the court. Minn. Stat. § 484.70, subd. 7(c). We defer to the credibility determinations of the factfinder. Minn. R. Civ. P. 52.01; *Roberts v. Brunswick Corp.*, 783 N.W.2d 226, 230 (Minn. App. 2010), *review denied*

(Minn. Aug. 24, 2010). We conclude that the referee did not abuse his discretion in his evidentiary rulings.

Remand order

Appellant contends that the referee failed to follow the district court's remand instructions. Appellant cites no authority for this argument. *See Anderson*, 811 N.W.2d at 166 (refusing to consider issue unsupported by reasoning or authority). The district court instructed the referee to either make additional findings supported by the record evidence or to amend the overbroad prohibitions of three paragraphs.

On remand, the referee amended paragraph four to read "[Appellant] shall not call [respondent's] work supervisors, subordinates, or academic or research collaborators and mention or allude to [respondent] or her work in any way." This significantly narrows the scope of prohibited conduct from the original findings and is supported by the evidence. The referee made no change to paragraph five, which permits appellant to raise legitimate grievances about respondent's work or authorship issues with the appropriate authorities at the university, while prohibiting appellant from directly contacting respondent. And, because university job postings do not always display who the principal researcher is, the referee amended paragraph eight from "[Appellant] shall not apply for a job opening in [respondent's] lab and shall check before making any job application to ensure that the application is not for [respondent's] lab" to "[Appellant] shall not apply for a job opening in [respondent's] lab." These modifications to the original findings narrowed appellant's prohibited conduct while protecting appellant's

right to apply for jobs or air legitimate grievances. As they are not clearly erroneous, we decline to disturb them.

At oral argument, appellant argued, and respondent conceded, that an apparent clerical error occurred after the revised order was issued. Respondent moved to have the word "call" in paragraph four of the HRO amended to read "contact." The referee ordered this change, but in doing so, mistakenly included the original language of paragraph four. We conclude that this is a clerical error that the district court can correct on remand; we direct the court to do so. Minn. R. Civ. P. 60.01.

District court confirmation of HRO

Appellant argues that the district court applied an incorrect standard in reviewing the referee's decision. A referee's recommended findings and order are subject to confirmation by the district court. Minn. Stat. § 484.70, subd. 7(d). Here, the district court summarized the referee's harassment findings and confirmed those findings as supported by the evidence. The district court further stated that the "exhibits admitted during the March 2012 hearing support the Referee's findings that [appellant] threatened and harassed [respondent]." The district court clearly considered the referee's findings and conclusions in light of the HRO statute.

Appellant also asserts that she sought a new trial, but her notice of review did not request a new trial and only contested the referee's findings. In any event, an HRO hearing is in the nature of a special proceeding. *See State v. Ness*, 819 N.W.2d 219, 223 (Minn. App. 2012), *review granted* (Minn. Oct. 24, 2012). In a special proceeding, the appeal is from the original order; a new trial motion is unnecessary to preserve issues for

appeal, unless the legislature has signaled its intent that the particular special proceeding is governed under the same rules as other civil cases. *Steeves v. Campbell*, 508 N.W.2d 817, 818 (Minn. App. 1993). The HRO statute does not indicate a legislative intent that an HRO matter proceeds as a civil case and new trial motions are therefore not authorized.

First Amendment considerations

Appellant argues that the HRO is an unconstitutional prior restraint on her First Amendment rights to free speech. First Amendment rights are subject to some restraints; "[t]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S. Ct. 2559, 2564 (1981). For example, the right of free speech or expression is subject to time, place, and manner restrictions. *Welsh v. Johnson*, 508 N.W.2d 212, 215 (Minn. App. 1993). "The time, place, and manner restriction is constitutionally permissible if (1) it is justified without reference to the content of the regulated speech; (2) it is narrowly tailored to serve a significant government interest; and (3) it leaves open ample alternative channels for communication of information." *Id.* (quotation omitted). Even the content of speech is subject to restriction "'in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from is clearly outweighed by the social interest in order and morality.'" *Dunham v. Roer*, 708 N.W.2d 552, 562 (Minn. App. 2006) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83, 112 S. Ct. 2536, 2542-43 (1992) (citation omitted)), *review denied* (Minn. Mar. 28, 2006). Harassing conduct

within the meaning of Minn. Stat. § 609.748, consisting of repeated unwanted acts, words, or gestures that have a substantial adverse effect on the safety, security, or privacy of another, is not constitutionally protected speech. 708 N.W.2d at 565-66. "Because the harassment statute only regulates speech or conduct that constitutes 'fighting words,' 'true threats,' or substantial invasions of one's privacy, we conclude that the statute is narrowly tailored and is, therefore, constitutional." *Id.* at 566.

The amended order[2] here, when read as a whole, meets these considerations. Appellant is prohibited from contacting respondent's "work supervisors, subordinates, or academic or research collaborators and mention[ing] or allud[ing] to respondent or her work in any way." This paragraph was narrowed on remand and now does not prohibit appellant from contacting the Office of Research Integrity in Minnesota or Washington D.C. or the editorial office of any journal in which respondent has been published. Paragraph five directs that any communication by appellant about respondent's work or relating to unresolved issues of authorship or credit for work performed should be addressed to the university Office of General Counsel or the human resources department. This provides appellant with an alternate channel for communication or airing of grievances, so that she is not left without a remedy. Finally, appellant is prohibited from applying for any job in respondent's laboratory, but the amended paragraph takes the onus off of appellant to ascertain which job listings are for

[2] As we noted, respondent conceded that the district court's order contains a clerical error that will be corrected on remand.

respondent's laboratory. As amended, this HRO does not improperly infringe on appellant's First Amendment rights.

Affirmed and remanded.