STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1562

James Freihammer and Calise Freihammer,
individually and on behalf of minor children, petitioners,
Respondents,

vs.

Kristina Powers,
Appellant.

Filed June 15, 2010
Affirmed
Stauber, Judge

Wabasha County District Court
File No. 79CV09157

Marlene S. Garvis, Mark K. Hellie, Jardine, Logan & O'Brien, P.L.L.P., Lake Elmo, Minnesota (for respondents)

John R. Neve, Neve & Associates, P.L.L.C., Minneapolis, Minnesota; and

Timothy D. Webb, Timothy D. Webb, P.L.L.C., Minneapolis, Minnesota (for appellant)

Considered and decided by Lansing, Presiding Judge; Ross, Judge; and Stauber, Judge.

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

STAUBER, Judge

Appellant challenges the district court's imposition of a harassment restraining order pursuant to Minn. Stat. § 609.748 (2008), arguing that (1) the conduct alleged by

respondents does not constitute harassment under the statute and (2) the district court abused its discretion by denying electronic discovery and excluding certain evidence from the hearing on the harassment restraining order. We affirm.

FACTS

In May 2006, at age 17, appellant Kristina Powers began working for the Wabasha-Kellogg School District as a student assistant in the child-care program. As a district employee, Powers became acquainted with respondent James Freihammer, the district superintendent. Freihammer was not Powers's direct supervisor. But during the course of her employment with the district, Powers met with Freihammer on many occasions, including a one-on-one meeting in July 2008 that lasted approximately three hours.

On October 26, 2008, Powers sent Freihammer an e-mail stating: "We are both currently in a situation in which we are becoming more and more emotionally involved with each other." The e-mail also referenced Freihammer getting a divorce, in which case Powers wrote that she would be interested in being in a relationship with Freihammer "based on [their] feelings toward each other right now." According to Freihammer, he was surprised by the e-mail and discussed its contents with his wife and Jon Stern, the principal at the school.

The next day, Powers met with Freihammer twice. The first meeting occurred when Powers made an unannounced visit to Freihammer's office to discuss the e-mail she had sent him. According to Freihammer, Powers started talking about "vibes" that she thought Freihammer was sending. Powers also insisted that she and Freihammer

meet again later in the day after she was done working. Freihammer subsequently met with Powers at 5:45 p.m. in the cafeteria where, he told Powers that he was not confused about his marriage and that her e-mail was "way off base." Freihammer also told Powers that he would still meet with her to resolve school-related issues, but those meetings would need to be in the presence of another person.

A few hours after meeting Freihammer in the cafeteria, Powers sent an e-mail to Freihammer. The e-mail again referenced their emotional involvement, noted that Powers had been told that Freihammer had "turned to other women in the past," and stated that Powers just wanted to help him. The next day, Powers e-mailed Freihammer again. This e-mail indicated that she thought Freihammer was depressed and suicidal. Powers also wrote that "I actually do care about you a great deal," and that "I only am trying to do everything in my power to help you and your family." (Emphasis omitted.)

In November and early December 2008, Powers sent Freihammer several e-mails related to a job opening in the school. On December 3, 2008, Powers e-mailed Freihammer requesting to meet with him and stating that she was still worried about him. The next day, Powers sent two e-mails to Freihammer asking if he knew who had been hired for the job opening. In the second e-mail, Powers stated that she was still worried about Freihammer and indicated that Freihammer was the only person in the school whom she could trust.

On December 5, 2008, Freihammer attended a school-related meeting in the afternoon. Because he had received an e-mail from Powers earlier in the day stating that she would try to meet with him that afternoon, Freihammer asked Principal Stern to

accompany him back to his office at the end of the meeting. When they arrived at Freihammer's office, Powers was sitting in a chair outside the office. Powers left abruptly when Freihammer and Principal Stern went into the office to get an extra chair for her.

After Powers left, Freihammer and Principal Stern discussed the situation in Freihammer's office. During their meeting, Powers called Freihammer twice, and Freihammer let both calls go to voicemail. Near the end of the meeting, Powers called the district bookkeeper, who transferred the call to Freihammer. Freihammer tried to end the phone call several times. Eventually, after about 15 or 20 minutes, Freihammer told Powers that he had to go, and he hung up the phone.

That evening, Powers sent Freihammer an e-mail stating that she had "changed [her] mind" and that she would not call or e-mail him anymore. But two days later, Powers sent another e-mail to Freihammer stating that she had been crying ever since he hung up on her and that she had been depressed since their conversation in October. Powers again concluded that this would be her "last note."

On December 8, 2008, Powers went to the district office and handed a sealed envelope to a secretary. Powers asked the secretary to deliver it to Freihammer, but not tell him who it was from. The secretary complied, but in response to Freihammer's inquiry, she confirmed that Powers had delivered the envelope. With Principal Stern present, Freihammer opened the envelope, which contained a handwritten letter. In the letter, the author repeatedly professed her love for Freihammer and stated that she had wanted to convey this information to him for the past six months.

Shortly thereafter, Powers sent Freihammer an e-mail stating that she meant what she wrote in the letter. Powers also stated that she would try to meet with Freihammer one more time. Freihammer subsequently noticed that Powers was waiting to meet with him outside his office. Consequently, Freihammer contacted Principal Stern, who approached Powers and asked if he could help her. Powers replied that she had an appointment with Freihammer. Principal Stern told her that he knew that she did not have an appointment with Freihammer. He again asked if he could help Powers with any school-related matters. At that point, Powers left the office area. Later that afternoon, Powers resigned from her job with the district.

After resigning, Powers sent Freihammer an e-mail informing him that she had quit her job. Although she admitted that Freihammer "never touched [her]" or "made inappropriate remarks or said anything offensive to [her]," Powers accused him of emotionally manipulating her.

At some point in December 2008, Powers sent an e-mail to the chairman of the school board indicating that she was concerned about Freihammer's mental and emotional well-being. About a month later, Powers sent two facsimiles to the workplace of Freihammer's wife. The first facsimile claimed Freihammer was in love with Powers. The second facsimile revealed the identity of a person who could be contacted to verify the contents of the first facsimile.

On January 24, 2009, Powers sent Freihammer an e-mail claiming that someone had hacked into her school e-mail account and sent Freihammer e-mails. A week later, Powers sent Freihammer four e-mails alleging that people in the district were trying to set

him up. Powers again claimed that someone had accessed her school and personal e-mail accounts. The next day, Powers sent Freihammer another e-mail referencing Freihammer's job security. Powers sent another e-mail to Freihammer on February 7, 2009. This e-mail further discussed the alleged "complaints" against Freihammer, as well as Powers's emotional state.

On February 8, 2009, Powers sent Freihammer an e-mail requesting to know what e-mails Freihammer had received from her so that she could give the chairman of the school board the "correct information so he can get to the bottom of this outrageous move on behalf of apparently [Principal Stern] and [the] school attorney, trying to take you down in my name." Powers also wrote "please get ahold of . . . me ASAP by phone." Later that evening, Powers called Freihammer at his house. But as soon as Freihammer answered the telephone, he heard Powers state, "Jim, I'm trying to help you," prompting Freihammer to hang up the telephone. A few hours later, Powers left two lengthy messages on Freihammer's voicemail at school.

The next day, Powers called Freihammer's office three times, but hung up immediately after someone answered the telephone. Two days later, Freihammer received a package from Powers. The package contained a letter from the district's attorney that was addressed to Powers. The letter requested an interview with Powers concerning a possible complaint she had against Freihammer. The package also contained a copy of a letter that Powers had sent to the chairman of the school board.

On February 12, 2009, Freihammer and his wife, individually and on behalf of their five children (collectively "respondents") petitioned for a temporary harassment

restraining order (HRO) against Powers. Although the district court granted the petition, Powers sent Freihammer a handwritten letter making various accusations and threats before the HRO was served. Freihammer then had no further contact with Powers until the HRO hearing in June and July 2009.

At the hearing, Freihammer testified that Powers's conduct affected his work and ability to perform his job and was an unwanted invasion of his privacy. In contrast, Powers denied writing or sending the e-mails to Freihammer and denied sending the handwritten letters to Freihammer. After a three-day hearing, the district court concluded that Powers's "story is simply not credible," and "the evidence that [Powers] sent [the] communications is overwhelming." The district court issued a final HRO. This appeal followed.

D E C I S I O N

I.

This court reviews a district court's grant of an HRO under an abuse-of-discretion standard. *Kush v. Mathison*, 683 N.W.2d 841, 843 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). This court will set aside a district court's findings in support of its grant of an HRO only if they are clearly erroneous. *Id.* But statutory interpretation is a question of law, which this court reviews de novo. *Peterson v. Johnson*, 755 N.W.2d 758, 761 (Minn. App. 2008).

A district court may grant an HRO if "the court finds at the hearing that there are reasonable grounds to believe that the respondent has engaged in harassment." Minn. Stat. § 609.748, subd. 5(a)(3). "Harassment" is defined in the statute as:

> a single incident of physical or sexual assault or 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.

Id., subd. 1(a)(1).

Powers argues that her communications and conduct, even if true, do not constitute harassment under the HRO statute. To support her claim, Powers cites *Dunham v. Roer*, in which this court stated that the focus of the HRO statute "is to prohibit repeated and unwanted acts, words, or gestures that have or are intended to have a substantial adverse effect on the safety, security, or privacy of another." 708 N.W.2d 552, 566 (Minn. App. 2006), *review denied* (Minn. Mar. 28, 2006). In *Dunham*, this court went on to reject the argument that the HRO statute was unconstitutional because the statute "only regulates speech or conduct that constitutes 'fighting words,' 'true threats,' or substantial invasions of one's privacy." *Id.*

Powers contends that because there is no allegation that her conduct constitutes "fighting words" or "true threats," the sole issue "is whether [her] alleged communications constitute a 'substantial invasion of [Freihammer's] privacy.'" Powers asserts that because there is no clear standard as to what constitutes a "substantial invasion of privacy," this court should look to Title VII, intentional-infliction-of-emotional-distress, and invasion-of-privacy cases to interpret the statutory definition of "harassment." Powers argues that because her actions are not actionable under these other theories of law, her communications and conduct do not constitute harassment

within the meaning of the HRO statute. Therefore, Powers argues that the district court abused its discretion in granting the HRO.

We disagree. The laws pertaining to Title VII, intentional infliction of emotional distress, and invasion of privacy are neither analogous nor applicable to the HRO statute. Moreover, "[t]he determination of what constitutes an adequate factual basis for a harassment order is left to the discretion of the district courts." *Kush*, 683 N.W.2d at 846. It is sufficient if the district court finds the respondent's "actions had, or were intended to have, a substantial adverse effect on the safety, security, or privacy of [the petitioner]." *Id.* at 844. "The determination of whether certain conduct constitutes harassment may be judged from both an objective standard, when assessing the effect the conduct has on the typical victim, and a subjective standard, to the extent the court may determine the harasser's intent." *Id.* at 845.

In determining whether conduct constitutes harassment, this court has sufficiently defined the bounds of the district court's discretion. This court has held that inappropriate or argumentative statements alone do not constitute harassment. *Beach v. Jeschke*, 649 N.W.2d 502, 503 (Minn. App. 2002); *see also Witchell v. Witchell*, 606 N.W.2d 730, 732 (Minn. App. 2000) (reversing harassment restraining order because four argumentative comments written in a parenting notebook, although inappropriate, were not intended to adversely affect safety, security, or privacy). But a party's actions need not be obscene or vulgar to constitute harassing conduct. *Welsh v. Johnson*, 508 N.W.2d 212, 216 (Minn. App. 1993). And harassment may be found where the record shows two specific instances as well as other harassing conduct which, taken together, formed an

ongoing situation. *See Kush*, 683 N.W.2d at 844 (stating that repeated incidents of intrusive or unwanted acts may be shown through specific harassing incidents in conjunction with general harassing conduct).

Here, the record reflects that in October 2008, Powers sent Freihammer an e-mail contemplating Powers's emotional involvement with Freihammer and addressing Freihammer's relationship with his wife. Freihammer subsequently met with Powers, told her that the e-mail was "way off base," and stated that he would still meet with Powers to resolve school-related issues but the meetings would need to be in the presence of another person. After this meeting, Powers sent Freihammer more than 15 e-mails over the course of the next few months. The e-mails addressed Powers's feelings toward Freihammer, as well as allegations that people in the district were trying to "take [him] down." In addition to the e-mails, Powers sent multiple handwritten letters to Freihammer, including a letter in which she expressed her love for Freihammer. Powers also repeatedly tried to meet with Freihammer in person and called his office and home phone on numerous occasions. She sent two facsimiles to Freihammer's wife's place of employment, stating that Freihammer was in love with and having an affair with another woman. Freihammer testified that Powers's conduct affected his work and ability to perform his job and was an unwanted invasion of his privacy. When viewed objectively, Powers's communications and conduct constituted a substantial invasion of Freihammer's privacy.

Powers further argues that her communications and conduct do not constitute harassment because Freihammer never told Powers that her communications were

unwelcome. But the record reflects that after Powers sent the initial e-mail to Freihammer addressing their purported emotional involvement, Freihammer met with Powers, told her the e-mail was "way off base," and informed her that any further meetings between them should be school-related and conducted in the presence of a third party. Although Freihammer did not discuss the e-mails with Powers further, subsequent e-mails and letters sent by Powers indicate that she knew that the communications were unwanted and that Freihammer was avoiding her. While we find it troublesome that the record does not show that Freihammer unequivocally directed Powers to stop her behavior, the evidence in the record demonstrates that the district court could reasonably conclude that Powers knew that her communications were unwanted and that they constituted harassing conduct. Therefore, the district court did not abuse its discretion in issuing the HRO.

II.

"The district court has broad discretion in granting or denying discovery requests." *Dunham*, 708 N.W.2d at 572. Similarly, evidentiary rulings are within the district court's discretion. *Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001). This court will not disturb a district court's evidentiary ruling unless the district court has erroneously interpreted the law or abused its discretion. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). An appellate court will grant a new trial because of improper evidentiary rulings only if a party demonstrates prejudicial error. *Id.* at 46.

Powers argues that the district court abused its discretion by (1) declining to grant her request for production of electronic versions of e-mails rather than e-mails that were produced in paper form; (2) excluding the telephonic testimony of her computer and audio experts; and (3) excluding an audio recording purported to be between Powers and Freihammer. Powers argues that the cumulative effect of these errors denied her a fair hearing on the HRO.

A. Electronic discovery of e-mails

Powers issued a subpoena to the district seeking discovery of electronic copies of e-mails. The district moved to quash the subpoena, and the district court initially denied the motion to quash. The district subsequently moved for reconsideration and, following a hearing, the district court reversed its prior order and quashed the portion of the subpoena that requested electronic copies of the e-mails. Over Powers's objection, the district court allowed respondents to introduce paper copies of the e-mails.

Powers argues that because she alleged that many of the e-mails were fabricated or altered, "the district court should have allowed Powers access to the electronic copies of the e-mails to give her an opportunity to prove that the e-mails had been fabricated or altered." Thus, Powers argues that the district court abused its discretion in declining to grant her request for production of the electronic versions of the e-mails.

To support her claim, Powers cites *White v. Graceland Coll. Ctr. for Prof'l Dev. & Lifelong Learning Inc.*, in which a federal district court held that the defendants were required to produce electronic copies of e-mails in response to a request from the plaintiff because the defendants "failed to produce the e-mails and attachments in either the form

in which they are ordinarily maintained, or in a 'reasonably usable form.'" 586 F. Supp. 2d 1250, 1264 (D. Kan. 2008) (quoting Fed. R. Civ. P. 34(b)(2)(E)(ii). But *White* is a federal district court case from Kansas with no precedential value. Moreover, the court in *White* concluded that the electronic versions of the e-mails were discoverable because the defendants failed to produce the e-mails and attachments in a "reasonably usable form." *Id.* Here, the district court admitted the e-mails in paper form. Powers was able to testify that she did not send the e-mails and that they were fabricated. Therefore, the e-mails were admitted in a "reasonably usable form." Powers has not demonstrated that the district court abused its discretion in denying her request for production of the electronic versions of the e-mails.

B. Telephonic testimony

Powers sought to have a computer-forensics expert from Texas testify by telephone as to the inherent unreliability of paper copies of e-mails and the ease with which they can be fabricated. Powers also sought to have an audio-forensics expert from Texas testify by telephone that the audio voicemail recordings presented by Freihammer were inconsistent with recordings that are genuine, authentic, and unaltered. The district court excluded the testimony of both experts.

Powers argues that the district court abused its discretion by excluding the telephonic testimony of her experts. We disagree. The Minnesota Rules of Civil Procedure provide that the testimony of witnesses shall be taken orally in open court unless otherwise provided by statute or by the rules. Minn. R. Civ. P. 43.01. Moreover, this court has held that under rule 43.01, telephonic testimony is not a permitted

substitute for oral testimony in open court. *In re Bieganowski*, 520 N.W.2d 525, 528 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994).

Powers argues that this case is distinguishable from *Bieganowski* because the telephonic testimony in that case concerned a "fact" witness, whereas the testimony at issue here concerns expert witness testimony. Powers argues that in contrast to the testimony of a "fact witness," the "question for the trier of fact with regard to expert witnesses is not whether the expert is telling the truth about facts but rather whether the testimony is scientifically believable."

Powers's argument is without merit. In *Bieganowski*, this court stated: "With telephone testimony, the trier of fact can perceive some of the indicia of credibility, such as tone of voice, but cannot perceive others, such as body language. With in court testimony, the trier of fact can perceive both visual and aural indicia of credibility." 520 N.W.2d at 528.

Here, the fact that the challenged testimony is that of two expert witnesses is a distinction without a difference. Just as with "fact witnesses," the believability of the expert testimony hinges upon credibility. As this court held in *Bieganowski*, telephonic testimony inhibits the trier of fact's ability to perceive credibility. Therefore, the district court did not abuse its discretion by excluding the telephonic testimony.

C. Alleged recordings of Freihammer

At trial, Powers attempted to introduce the recordings of two conversations purported to be between Powers and Freihammer. In one recording, Freihammer allegedly called Powers "baby," as a term of endearment. In the other recording,

Freihammer allegedly told Powers that he was not an honest person. The district court excluded the recordings because they were recorded outside of the time periods claimed in the petition and, therefore, irrelevant.

Powers argues that the district court abused its discretion by excluding the recordings. But the record reflects that the recordings of the two conversations occurred in January and July 2008. Respondents' petition alleged that Powers's harassing conduct occurred during October 2008 through February 2009. Although the recordings may have been relevant to support Powers's claim that Freihammer may have acted inappropriately at certain times before the alleged harassment occurred, they are not relevant in determining whether Powers engaged in harassing behavior under the HRO statute. Therefore, the district court did not abuse its discretion in excluding the recordings.

Affirmed.