

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-2084**

Pakou Lee-Barrios and o/b/o Minor Child, petitioner,
Respondent,

vs.

Eric Joseph Vacko,
Respondent Below,

Brittany Ann Vacko,
Appellant.

**Filed October 30, 2017
Affirmed
Kirk, Judge**

Ramsey County District Court
File No. 62-HR-CV-16-522

Pakou Lee-Barrios, St. Paul, Minnesota (pro se respondent)

Brittany Ann Vacko, St. Paul, Minnesota (pro se appellant)

Considered and decided by Florey, Presiding Judge; Rodenberg, Judge; and Kirk,
Judge.

UNPUBLISHED OPINION

KIRK, Judge

Appellant challenges an ex parte temporary harassment restraining order (THRO), arguing that: (1) the district court failed to find an immediate and present danger of harassment; (2) respondent's petition for a harassment restraining order (HRO) was not

formatted properly and was not properly served on appellant; (3) there was not a sufficient factual basis to grant the ex parte THRO; (4) the district court abused its discretion by denying appellant's initial applications to proceed in forma pauperis (IFP); and (5) respondent interfered with appellant's right to a hearing on the ex parte THRO. We affirm.

FACTS

On August 9, 2016, respondent Pakou Lee-Barrios filed an affidavit and petition for an HRO against E.V.¹ and his wife, appellant Brittany Vacko, on behalf of her and her minor child. Lee-Barrios requested a hearing on her petition if the district court denied her request for an ex parte HRO. She alleged that E.V. and Vacko "followed, pursued or stalked" her, sent harassing Facebook messages to Lee-Barrios's sister and to the minor child's friend, and attempted to hack into her and the minor child's Facebook accounts. Lee-Barrios noted that she received a threatening letter from E.V. who wanted Lee-Barrios's husband to adopt the minor child so E.V. would be relieved of his child-support obligation.

The Facebook message sent to the minor child's friend made derogatory allegations about Lee-Barrios and instructed the friend to tell the minor child never to contact E.V. or the minor child would be arrested. The message also stated that E.V. and his family hate the minor child and want nothing to do with her. The Facebook message sent to Lee-Barrios's sister alleged that Lee-Barrios's husband was sexually involved with the author, who Lee-Barrios asserted was Vacko. The message also included derogatory statements about Lee-Barrios and the minor child.

¹ E.V. is not a party to this appeal.

The district court denied Lee-Barrios's ex parte request because it found that her petition and affidavit did not show "an immediate and present danger of harassment to justify temporary relief." A hearing was scheduled for September 1. The Washington County Sheriff's Office attempted unsuccessfully to personally serve Vacko on August 12, 13, 16, and 19, and filed a certificate of non-service on August 31. The deputies that attempted service concluded that E.V. and Vacko were "avoiding service." The certificate of non-service noted that the "lights inside went off when [the deputy] began knocking," and that there were "[two] cars in [the] driveway; no answer at [the] door." Vacko failed to appear at the September 1 hearing.

At the hearing, the district court heard testimony from Lee-Barrios in support of her ex parte request, but declined to receive exhibits. Lee-Barrios testified that E.V. is the minor child's father and that Vacko is his wife. In the past, Lee-Barrios and the minor child have not had a relationship with E.V., but in January 2016, E.V. sent Lee-Barrios the threatening letter referenced in Lee-Barrios's original request. Lee-Barrios testified that E.V. threatened to pursue custody of the minor child if she pursued legal action against him. Lee-Barrios said that she then learned that E.V. was facing criminal charges for fraudulently obtaining state assistance, so she filed an action for back child-support payments, which led to a July 29 child-support hearing. Lee-Barrios testified that at the child-support hearing, E.V. became angry and stormed out. Lee-Barrios was awarded arrearages, interest, and attorney fees, which made E.V. and Vacko angry.

In addition, Lee-Barrios testified that she filed a police report on the night the minor child's friend received the upsetting Facebook message because she saw E.V. parked outside

her home. Lee-Barrios said that she also received at least two additional threatening letters from E.V. stating that he was pursuing custody of the minor child and threatening her with legal actions and mental-health evaluations. According to Lee-Barrios, the minor child has seen these communications and is very upset and “really scared.” Lee-Barrios said that after filing her petition for an HRO, she received another letter from E.V. in which he threatened her with civil and criminal legal actions. Lee-Barrios stated that she believes E.V. and Vacko will continue harassing her and the minor child because they are parties to many other HRO actions, and because Vacko was facing criminal charges for perjury and forgery for making false allegations in another HRO case involving one of E.V.’s former significant others.

The district court found that E.V. and Vacko were avoiding personal service, that there was “an immediate and present danger of harassment to justify temporary relief,” that there were reasonable grounds to believe that Vacko harassed Lee-Barrios and the minor child, and that “[t]he harassment has had or is intended to have a substantial adverse effect on [their] safety, security, or privacy.” The court granted an ex parte THRO. Lee-Barrios’s attorney requested that Vacko be served by alternative means, and the court granted the request, ordering that Vacko be served by U.S. mail and by publication. The THRO notified Vacko that the THRO would remain in place until September 1, 2018, unless changed by the court, and that Vacko could “ask the court to change or vacate the Restraining Order by filing a *Request for Hearing* within 20 days of service of the petition.” The Washington County Sheriff’s Office attempted to personally serve E.V. and Vacko on September 2, 5, 9, and 10, which they continued to avoid.

On September 3, Vacko filed a request for a hearing on the THRO and an application to proceed IFP. Vacko acknowledged that she was served by mail with the THRO on September 3. On September 4, Vacko filed an ex parte motion to vacate the THRO. Vacko's first application to proceed IFP and her ex parte motion to vacate were denied. The district court found that Vacko's claims in support of her ex parte motion were not credible. On September 8, Vacko filed another IFP application, which was denied as "frivolous" because "[t]he relief requested ha[d] already been denied."

On September 13, Vacko filed a motion to change the THRO. Vacko again requested a hearing and asserted that she was entitled to a hearing because she made her request within 20 days of being served with the THRO. Minn. Stat. § 609.748, subd. 3(d) (2016). Vacko filed this motion again on September 14 and included a hearing date of October 4. She also filed a third IFP application, which was granted on September 14. Vacko later refiled her motion to indicate the correct hearing date of October 6.

On September 18, Vacko requested a continuance of the October 6 hearing, which was denied. On October 5, Vacko requested a two-week continuance of the October 6 hearing because she had to drop her son off at school on the morning of the hearing, and because she had subpoenaed Lee-Barrios's cellphone records. This request was also denied. Vacko failed to appear at the October 6 hearing, and her September 4th and 13th motions were dismissed. Lee-Barrios requested attorney fees, and the issue was reserved. The order dismissing her motions was served on Vacko on October 7.

On October 7, Vacko filed another motion to change the HRO and again requested a hearing. Vacko refiled her motion on October 10 indicating a November 3 hearing date. On

October 30, Vacko requested that the hearing be continued until after February 7, 2017. Her request was denied.

Vacko appeared at the November 3, 2016 hearing. At the hearing, the district court verified that Vacko failed to appear at the October 6 hearing on her previous motions to vacate the THRO. The district court stated, “So when you failed to appear at the October 6th, 2016 hearing, that would have been the hearing on your initial request. And if you would have appeared at that hearing, that’s when the evidentiary hearing would have been set; correct?” Vacko agreed. Lee-Barrios argued that Vacko had simply refiled the same motion that was dismissed when she failed to appear on October 6, and that Vacko’s current motion was barred because it was already decided. Lee-Barrios requested that Vacko’s motion be denied and that the HRO remain in place. Lee-Barrios also renewed her request for attorney fees.

The district court dismissed Vacko’s motion, noting that she failed to appear at the hearing on her previous motion. The court ordered that the ex parte HRO remain in effect and took the matter of attorney fees under advisement. In its order, filed November 4, the court concluded that “[b]ecause . . . Vacko has shown no good cause why the [T]HRO . . . should be vacated, her request is denied.” The district court also denied Lee-Barrios’s request for attorney fees.

Vacko appeals.²

² Lee-Barrios did not file a responsive brief. On July 11, 2017, this court issued an order directing that this matter proceed on the merits pursuant to Minn. R. Civ. App. P. 142.03.

DECISION

I. The district court did not err in granting the ex parte THRO.

A. The district court made the required finding of “an immediate and present danger of harassment.”

Vacko argues that the district court abused its discretion when it granted the ex parte THRO on September 1 because the court previously concluded that “there was no immediate and present danger of harassment” based on Lee-Barrios’s petition and affidavit. *See* Minn. Stat. § 609.748, subd. 4(b) (2016). But the court made this finding based on Lee-Barrios’s petition and affidavit only, before the court heard testimony by Lee-Barrios at the September 1 hearing, which Vacko failed to attend. After considering Lee-Barrios’s petition, affidavit, and testimony, the district court granted the ex parte THRO under Minn. Stat. § 609.748, subd. 4 (2016). The district court made the required finding that there was “an immediate and present danger of harassment” and that there were “reasonable grounds to believe that [Vacko] engaged in harassment” to justify granting temporary relief pursuant to Minn. Stat. § 609.748, subd. 4(b).

Vacko also argues that the district court’s September 1 decision was not adequately supported because the district court relied on Lee-Barrios’s petition and affidavit without making additional findings. Although the district court did not make additional findings after hearing Lee-Barrios’s testimony in support of her petition, there were additional facts and details presented, and the court was able to make a credibility determination. More specific findings would have been helpful on appeal, but a lack of findings by the district court does not require reversal when the record adequately supports the district court’s decision. *See*

Roberson v. Roberson, 296 Minn. 476, 478, 206 N.W.2d 347, 348 (1973) (“We have held that where the record is reasonably clear and the facts not seriously disputed, the judgment of the [district] court can be upheld in the absence of [district] court findings made pursuant to Rule 52.01, Rules of Civil Procedure.”).

Further, the district court could infer an immediate and present danger of continued harassment by Vacko from Lee-Barrios’s testimony that Vacko has a history of being a party to HRO actions and that Vacko is being prosecuted for making false allegations in another HRO case. *See Fogarty v. Martin Hotel Co.*, 257 Minn. 398, 403, 101 N.W.2d 601, 605 (1960) (“Where reasonable minds might reach different conclusions based upon inferences which may reasonably be drawn from the evidence, the determination of the factfinder is conclusive.”). Here, the district court did not abuse its discretion in finding that the requirements for an ex parte THRO were met.

B. Lee-Barrios’s petition and affidavit complied with Minn. Stat. § 609.748, subd. 3 (2016), and service on Vacko was not required before the ex parte THRO was granted.

Vacko argues that because Lee-Barrios’s initial request for ex parte relief was denied, Minn. R. Gen. Pract. 3.02 required Lee-Barrios to submit a new affidavit in support of her petition before ex parte relief could be reconsidered.³ Vacko’s argument appears to be that when the district court initially denied Lee-Barrios’s ex parte request and set a hearing on the

³ Minn. R. Gen. Pract. 3.02 provides that: “Before an ex parte order is issued, an affidavit shall be submitted with the application showing: (1) No prior applications for the relief requested or for a similar order have been made; or, (2) The court and judge to whom the prior application was made; the result of the prior application; and what new facts are presented with the current application. Failure to comply with this rule may result in vacation of any order entered.”

petition, it denied her HRO petition outright and that Lee-Barrios was therefore required to file a new affidavit in order to proceed. Neither Minn. Stat. § 609.748 (2016) nor Minn. R. Gen. Pract. 3.02 require a person who has petitioned for an HRO to supplement the original petition with a second affidavit if the initial request for an ex parte THRO is denied. *See* Minn. Stat. § 609.748, subds. 3, 4, 5; Minn. R. Gen. Pract. 3.02.

Vacko also suggests that because she was not served with notice of the September 1 hearing, and as a result failed to appear, Lee-Barrios's petition could not be addressed by the district court. Vacko concludes that because she was not served, the court "lacked jurisdiction to hold the hearing and issue the THRO." But service on Vacko was not required before the court could grant an ex parte THRO. Minn. Stat. § 609.748, subd. 4(c) ("Notice need not be given to the respondent before the court issues a [THRO] under this subdivision."). Vacko's arguments regarding the contents of Lee-Barrios's petition and lack of service are meritless.

C. There was a sufficient factual basis to grant the ex parte THRO.

We review the district court's grant of an HRO for an abuse of discretion. *Peterson v. Johnson*, 755 N.W.2d 758, 761 (Minn. App. 2008). We will reverse the issuance of an HRO if it is not supported by sufficient evidence. *Kush v. Mathison*, 683 N.W.2d 841, 844 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). "A district court's findings of fact will not be set aside unless clearly erroneous, and due regard is given to the district court's opportunity to judge the credibility of witnesses." *Id.* at 843-44. "Findings of fact are clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been made." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (quotation omitted). Whether the facts found by the district court satisfy the statutory criteria

for harassment “is a question of law, which we review de novo.” *Peterson*, 755 N.W.2d at 761.

A district court may issue an HRO if it finds that there are reasonable grounds to believe that a person has engaged in harassment. Minn. Stat. § 609.748, subd. 5(b)(3). To obtain an HRO, the petitioner must show “both objectively unreasonable conduct or intent on the part of the harasser[,] and an objectively reasonable belief on the part of the person subject to harass[ment],” and that the conduct caused or intended to cause a substantial adverse effect on the person’s safety, security, or privacy. *Dunham v. Roer*, 708 N.W.2d 552, 567 (Minn. App. 2006), *review denied* (Minn. Mar. 28, 2006). For the purposes of an HRO, objectively unreasonable conduct is limited to conduct that “goes beyond an acceptable expression of outrage and civilized conduct, and instead causes a substantial adverse effect on another’s safety, security[,] or privacy.” *Kush*, 683 N.W.2d at 846.

Vacko argues that the district court erred in granting the THRO because Lee-Barrios’s allegations do not meet the definition of harassment in Minn. Stat. § 609.748, subd. 1(a)(1).⁴ Minn. Stat. § 609.748, subd. 1(a)(1), defines “harassment,” in relevant part, as: “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

⁴ Vacko also argues that the THRO should not have included an order to stay away from Lee-Barrios’s grandparents’ home because Lee-Barrios did not allege that harassment occurred at that address. Whether harassment occurred at the address is not a relevant consideration, and there is no reason to conclude that ordering Vacko to stay away from that address was erroneous. Minn. Stat. § 609.748, subd. 4(a), provides that a THRO may order that a respondent “cease or avoid the harassment of another person” and/or “have no contact with another person.” This language permits the district court to order a respondent to stay away from a location frequented by a petitioner.

another, regardless of the relationship between the actor and the intended target.” The district court incorporated the allegations in Lee-Barrios’s petition and affidavit into its order granting the ex parte THRO, and found that the harassment “has had or is intended to have a substantial adverse effect on [Lee-Barrios’s and the minor child’s] safety, security, or privacy.”

Vacko claims that Lee-Barrios’s affidavit in support of her petition did not clearly indicate that Vacko was the actor in any of the incidents. She also claims that Lee-Barrios did not sufficiently establish that both she and the minor child experienced, or were intended to experience, the adverse effects of the incidents. Vacko also questions the credibility of Lee-Barrios’s allegations while attempting to supplement the record with additional and/or contradicting facts. Vacko’s supplemental facts are not appropriately before this court and should have been presented at the September 1 hearing. *See* Minn. R. Civ. App. P. 110.01 (defining the record on appeal as the record presented to the district court plus any transcript prepared); *Kucera v. Kucera*, 275 Minn. 252, 254, 146 N.W.2d 181, 183 (1966) (“It is not within the province of this court to determine issues of fact on appeal.”). Furthermore, we defer to the district court’s credibility determinations. By granting the ex parte THRO, the district court made an implicit finding that Lee-Barrios and her allegations were credible. *Kush*, 683 N.W.2d at 843-44.

The record reveals that Lee-Barrios alleged that Vacko sent the harassing Facebook messages to her sister and to the minor child’s friend, and that Vacko attempted to hack into Lee-Barrios’s and the minor child’s Facebook accounts. The fact that both Lee-Barrios and the minor child were targeted supports the district court’s finding of an intent to cause an adverse effect on both Lee-Barrios and the minor child. Again, more specific findings would

have been helpful, but here the record adequately supports the district court's decision to grant the ex parte THRO. *See Roberson*, 296 Minn. at 478, 206 N.W.2d at 348.

II. Any error in denying Vacko's first two IFP applications was harmless.

The district court has broad discretion to grant or deny an IFP application, and its decision will not be reversed absent an abuse of discretion. *See* Minn. Stat. § 563.01, subd. 3 (2016); *Thompson v. St. Mary's Hosp. of Duluth*, 306 N.W.2d 560, 563 (Minn. 1981) (“The [district] court has broad discretion in determining whether expenses should be paid under the IFP statute.”). To prevail on appeal, an appellant must show both error and prejudice resulting from that error. *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975); *Bloom v. Hydrotherm, Inc.*, 499 N.W.2d 842, 845 (Minn. App. 1993), *review denied* (Minn. June 28, 1993).

Vacko argues that the district court abused its discretion in denying her IFP applications. Vacko appears to argue that her first and second IFP applications should have been granted, and that they were erroneously denied because the motions she filed were determined to be frivolous. This argument is not supported by the record. Here, Vacko's first IFP application was denied when she filed it with her first motion. Then, Vacko's second IFP application was denied as frivolous because she had already been denied IFP status. When Vacko's third IFP application and motion were filed, the IFP application was granted. There is no evidence in the record that Vacko paid any filing fees before obtaining IFP status.

Although Vacko asserts that her first and second IFP applications should have been granted, she failed to allege or offer evidence of prejudice. Accordingly, she cannot prevail on this issue. *See Midway*, 306 Minn. at 356, 237 N.W.2d at 78; *State v. Modern Recycling*,

Inc., 558 N.W.2d 770, 772 (Minn. App. 1997) (holding that an assignment of error in a brief “based on mere assertion and not supported by any argument or authorit[y] . . . is waived . . . unless prejudicial error is obvious on mere inspection”).

III. There is no evidence that Lee-Barrios interfered with Vacko’s right to a hearing on the ex parte THRO.

Lastly, Vacko argues that Lee-Barrios repeatedly attempted to interfere with Vacko receiving an evidentiary hearing. This allegation is not supported by the record, and Vacko failed to accompany her assertion with argument or legal citations. Vacko did not receive a contested hearing because she failed to appear on her motion, not because of any action taken by Lee-Barrios. *See LaFond v. Szczepanski*, 273 Minn. 293, 295-96, 141 N.W.2d 485, 487-88 (1966) (holding that willful failure to appear by a defendant served as a waiver of his right to pursue relief).

Affirmed.