COURT OF APPEALS
DECISION
DATED AND FILED

November 24, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2312 **Cir. Ct. No. 2009CV2866**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

MARK GUTHIER,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

V.

PAUL PENKALSKI,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Dane County: DAVID FLANAGAN, Judge. *Affirmed.*

Before Vergeront, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Paul Penkalski appeals an amended harassment injunction that barred him from being on the grounds of the Wisconsin Memorial

Union for any purpose for a period of one year.[1] Mark Guthier, director of the Wisconsin Union, cross-appeals on the grounds that the trial court improperly revised its original restrictions against Penkalski in response to a motion for reconsideration. We affirm for the reasons discussed below.

¶2 Penkalski is a former member of the Wisconsin Union and the Hoofer Sailing Club. After his membership privileges were revoked in 2005, the Union sent Penkalski a series of letters over the following years asking him to cease and desist from all contact with Hoofers or Union staff. Guthier's petition for a temporary restraining order alleged that Penkalski continued to appear at the Union and Hoofers Club area, causing disturbances, harassing student staff members and refusing to leave.

¶3 Tyler Dovenbarger, a student building manager for the Union, testified at the injunction hearing that, in June of 2008, he was informed and then personally observed that Penkalski was in the Hoofer area photographing patrons. Knowing that Penkalski was banned from the building, Dovenbarger approached him and asked for his membership credentials. Penkalski became agitated, "raising his voice, just making claims" and told Dovenbarger to stop harassing him or he would sue him. Penkalski also appeared to be videotaping the confrontation. On another occasion, in January of 2009, Dovenbarger observed Penkalski in the union throwing away stacks of Hoofer brochures. When Dovenbarger approached Penkalski, Penkalski "kind of hovered above

[1] We note that the injunction expired July 3, 2010. We conclude that the matter is not moot, however, because part of the relief sought by Guthier would extend the injunction to the original two-year period imposed by the court. *See* ***W.J.C. v. County of Vilas***, 124 Wis. 2d 238, 239, 369 N.W.2d 162 (Ct. App. 1985) ("[A] case is moot when the decision sought by the parties cannot have any practical legal effect upon a then existing controversy.").

[Dovenbarger], raised his voice and told Dovenbarger to stop looking at him and never approach him again, again complaining that he was being harassed and would sue. Dovenbarger described Penkalski's behavior as "very irrational" and said that he felt intimidated by how close Penkalski got to him. On a third occasion in March of 2009, Dovenbarger was called to speak with Penkalski at a desk in the Union, and again advised Penkalski that he could not be in the Hoofers area. When Dovenbarger then headed toward the Hoofer area himself to speak with the Hoofers director, Penkalski followed him uncomfortably closely, until Dovenbarger threatened to call the police.

¶4 Another student building manager, Abby Panozzo, testified about an incident in May of 2009 when she asked Penkalski to leave the Hoofers area. Penkalski responded that it was his civil right to be present in the area and proceeded to walk into a lounge area, blocking her exit and making her "very scared." When Panozzo again asked him to leave, Penkalski continued to insist that he was allowed to be there, becoming increasing agitated and angry and so loud that her supervisor heard him down the hall and came to investigate. Several days later, Penkalski came and sat "relatively close" to her on Bascom Hill and repeatedly looked over and stared at her. Panozzo had the impression that he recognized her from the Union.

¶5 A third building manager, Theresa Horn, testified about the same incident Panzonno had described. She thought Penkalski's behavior was irrational and intimidating, particularly when he pulled out a camera to film her, and she felt nervous and scared having to deal with him. A week or two later, she noticed Penkalski walking behind her for several blocks as she was walking home, and was not sure whether he was following her.

¶6 A fourth student building manager, Joel Bins, described an incident in November of 2008, during which he and Dovenbarger had responded to a staff call that Penkalski was in the Hoofers area. When Bins asked Penkalski to leave, Penkalski became very aggressive and upset, calling Bins a crook and a dirt bag, and Bins ended up calling the university police. Bins noted that he only gave Penkalski his first name, because he knew that Penkalski had sued a prior building manager, and did not want him to know who he was. Shortly after that incident, Penkalski sent Bins an email through his personal student account asking him to leave him alone and stop harassing him, which made Bins feel nervous and threatened, since he had not given Penkalski his name or email address. On other occasions, Bins had observed Penkalski taking nearly all of the ketchup packets from the condiment station and tearing down notices from bulletin boards.

¶7 A fifth student building manager, Tara Gushure, said that she was called to respond when Penkalski attempted to get into a Hoofers meeting in the early summer of 2008. When Gushure told Penkalski it did not make sense for him to try to attend the meeting when he was banned from the organization, Penkalski became very agitated, pacing and raising his voice. He told her that her boss was a felon and that he was suing people before storming away. Gushure felt intimidated during the encounter because he kept taking steps closer to her every time she backed away and was waving a video camera around. Gushure also reported incidents away from work when Penkalski kept pacing and staring at her at the library and videotaped her from afar, which made her feel unsafe.

¶8 Penkalski himself testified that he had no intent to harass anyone. He agreed that he had been involved in a number of interactions with Union building managers who asked him to leave, but asserted that they were "distorting" the nature of the contacts. In his view, the building managers were

the ones harassing him, by following him around every time he entered the Union, which he believed he had the right to do. Penkalski acknowledged that the building managers "basically have no choice but to do what their boss is telling them to do" in terms of asking him to leave. However, he maintained that "[a]ny time [he] raised [his] voice or anything was a reaction to their approaching [him]," and explained his belief that they had been "deliberately provoking [him] in the hopes [he would] lose [his] temper and yell at them so they can charge [him] with disorderly conduct again."

¶9 The trial court repeatedly stated that it did not consider it to be relevant whether Penkalski did or did not have a right to be in the Union or Hoofers area, and it refused to allow Penkalski to present testimony or documentary evidence relating to his membership status. When Penkalski sought to introduce videotape of several of the incidents during his cross-examination of the petitioner's witnesses, the court directed him to continue asking any questions he had. After listening to all of the testimony, the trial court stated:

> Well, it is pretty clear to me, Mr. Penkalski, that what you regard as normal conduct is perceived at least to be harassment by the staff of the Union, and what they regard as doing their job you perceive to be harassment. You folks are kind of two sides of a coin.
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> ….
>
> I will accept that your intent is not to harass. I conclude, though, that the effect of what you do is to harass. That's the important thing.

The court went on to determine, without making explicit factual findings relating to any of the alleged incidents, that there were reasonable grounds to believe that Penkalski had engaged in harassment with intent to harass or intimidate the petitioner, as defined in the statutes.

¶10 The Wisconsin Statutes authorize a court to issue an injunction ordering someone to cease harassing another person or to avoid the petitioner's residence or any premises temporarily occupied by the petitioner, if the court "finds reasonable grounds to believe that the respondent has engaged in harassment with intent to harass or intimidate the petitioner." WIS. STAT. §§ 813.125(3)(a) and (4)(a)3. (2007-08).[2] The definition of harassment includes "[e]ngaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose." WIS. STAT. § 813.125(1)(b).

¶11 Acting "with intent" requires "that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." ***W.W.W. v. M.C.S.***, 185 Wis. 2d 468, 488-89, 518 N.W.2d 285 (Ct. App. 1984) (citing WIS. STAT. § 939.23(4)). Intent is a question of fact that must be inferred from the circumstances surrounding a person's acts and statements. ***Id.*** at 489. Where more than one inference could be reasonably drawn, we must accept that made by the trial court. ***Id.***

¶12 Penkalski argues on appeal that: (1) the trial court's statement that it accepted Penkalski's testimony that he did not intend to harass precludes its subsequent determination that he acted with intent to harass; (2) Penkalski's alleged conduct did not constitute harassment within the meaning of the statute because, in each instance, Union staff approached him while he was going about his legitimate business; (3) Guthier and the Union staff members made numerous

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

false statements and/or distortions in the petition and their hearing testimony; (4) the trial court's refusal to allow Penkalski to present videotape and documentary evidence during his cross-examination of the petitioner's witnesses deprived him of due process; (5) the trial court also violated Penkalski's due process rights by allowing Guthier to present evidence about Penkalski's membership status, but denying Penkalski the opportunity to rebut that evidence; (6) the trial court denied Penkalski equal protection by denying his request to issue an injunction against the building managers; (7) the trial court denied Penkalski meaningful access to the courts by not appointing counsel on his behalf; and (8) banning Penkalski from the "social and cultural center of the community" was overly broad. We will address each contention in turn.

¶13 First, we agree that the trial court's comment that it accepted that Penkalski's intent was not to harass is difficult to reconcile with its subsequent determination that Penkalski did have the requisite statutory intent to harass or intimidate. Viewed in the context of all the trial court's entire discussion, however, it is plain that the court's comment was an inartful attempt to distinguish between the purpose and awareness aspects of the definition of intent. In other words, we understand the trial court to have meant that, while Penkalski did not go to the Union for the *purpose* of harassing anyone, he should certainly have been *aware* that the *effect* of his pattern of yelling at student building managers who approached him in the course of their job duties would be to intimidate or harass them.

¶14 Second, and similarly, Penkalski's focus on his belief that he had a legitimate right to be in the Union and/or Hoofer's area misses the point that the primary allegations of harassment were repeated incidents in which he yelled at student managers. The trial court did not find that Penkalski harassed or

intimidated anyone merely by showing up at the Union. Penkalski himself acknowledged that he was aware that the student managers were essentially following orders by asking him to stay away from or leave the Union building or the Hoofers area. Therefore, notwithstanding Penkalski's belief that Guthier or Hoofers personnel had improperly banned him from those places, there was no legitimate reason for him to be yelling at or intimidating student managers.

¶15 Third, we have no basis to determine that any of the witnesses presented false testimony. Because the trial court is in the best position to observe witness demeanor and gauge the persuasiveness of testimony, it is the "ultimate arbiter" for credibility determinations, and we will defer to its resolution of discrepancies or disputes in the testimony, and its determinations of what weight to give to particular testimony. ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). Since we can infer from the trial court's decision that it accepted the student manager's account of the incidents, we accept them as well.

¶16 Fourth, the time for Penkalski to present testimony and evidence would have been during his own case in chief; that is, after the petitioner had called his last witness. While it may be that Penkalski did not understand that each party has a separate turn to present evidence, and that he did not understand that he could have offered his evidence during his own testimony, the trial court did not commit error by refusing to allow Penkalski to present his videotape and documentary evidence out of order during Penkalski's cross-examination of the petitioner's witnesses.

¶17 Fifth, while it is true that Guthier began his case by presenting evidence about Penkalski's membership status, the court repeatedly noted that the petition dealt with a series of incidents beginning in June of 2008, and that it was

not interested in events that occurred before that such as the membership dispute. In other words, although the court initially allowed Guthier's evidence to come in, perhaps before the court understood where the petitioner was going, it is clear that the court subsequently disregarded that evidence. In particular, the court made several comments suggesting that it would assume that Penkalski was a member of the Union, and that anyone could join Hoofers. Therefore, we see no prejudice or denial of due process from the court allowing Guthier but not Penkalski to submit evidence relating to the membership dispute.

¶18 Sixth, the only matter properly before the court was Guthier's petition for a harassment injunction. The court could either grant or deny the relief Guthier was requesting. Since Penkalski did not file his own injunction petition, the court had no authority to grant an injunction against Guthier or the building managers, and its refusal to do so was not a denial of equal protection.

¶19 Seventh, a lack of counsel does not result in a lack of access to the court; those rights derive from separate provisions. Penkalski had no statutory or constitutional right to counsel in a civil matter such as this, and he was afforded meaningful access to the court when he was allowed to cross-examine the petitioner's witnesses and present his own side of the incidents.

¶20 Eighth, the court reasonably tailored the injunction to the actual Union property. The cultural importance of the Union is irrelevant; it is where the majority of the alleged incidents of harassment had occurred.

¶21 Finally, regarding the cross-appeal, the court had the authority to modify the terms of the injunction in response to Penkalski's motion for reconsideration. It was not necessary for the court to provide further explanation

where, as here, the modified terms were already in accordance with the court's discussion following the hearing.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.