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What "Harassment" Must a Plaintiff Show to Obtain a Harassment Protection Order in Massachusetts Under Chapter 258E?

By Kimberley Keyes | September 25, 2018

Restraining Orders

Massachusetts attorney Kimberley Keyes explores how the MA legislature's failure to update the state's harassment protection law has clogged the courts with HPO appeals.

A recent Massachusetts Appeals Court decision reinforces that only certain types of behavior will qualify as "harassment" under the state's civil harassment-prevention law, G.L. c. 258E – and highlights another failure by the Massachusetts legislature to make a much needed update to state laws following a court decision. In the 2018 decision, the Appeals Court lamented the legislature's inability to update the language of the Massachusetts harassment protection law to reflect a Supreme Judicial Court decision that narrowed the grounds for issuing harassment orders *six years ago*.

The case also serves as a reminder to judges who issue harassment-prevention orders that definitional language set forth in G.L. c. 258E was invalidated by the SJC half a decade ago, and that making specific findings on the record might help insulate their rulings from being overturned or remanded on appeal.

A Brief History of Massachusetts Harassment Protection Orders (HPO) Under Ch. 258E

In 2010, the state Legislature enacted G.L. c. 258E to enable individuals to obtain civil restraining orders against others who are not family or household members. Prior to the law's enactment, individuals seeking protection from harassment had two avenues of recourse: G.L. c. 209A, which only applies to abuse by a household or family member (including a significant other); and Mass. R. Civ. P. 65, which allows for a temporary restraining order against anyone, regardless of their relationship to the plaintiff. Violation of a chapter 209A order is a criminal offense, while violation of Rule 65 is not.

General Laws Ch. 258E offers a third remedy, via the District Court, Superior Court, Boston Municipal Court or (if the defendant is under 18) the Juvenile Court: A protective order based upon a finding of harassment, which the statute defines as "[three] or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property." (The statute also allows issuance of a protective order on the basis of various other acts, including criminal harassment.) Violation of a G.L. c. 258E order, like violation of a 209A order, is a criminal offense. Records of 258E orders are entered in the statewide domestic violence registry and cannot almost never be removed.

SJC Narrowed Definition of Harassment Under *O'Brien* in 2012

In 2012, the state's highest court was asked to decide the constitutionality of Chapter 258E. The plaintiff in that case, O'Brien v. Borowski, 461 Mass. 415 (2012) (*O'Brien*), argued the statute was unconstitutionally overbroad "on its face" because it regulates speech that is protected by the First Amendment and Article 16 of the state constitution. The SJC declined to find Chapter 258E unconstitutionally overbroad in its entirety. However, the Court gave the law a "narrowing construction." Under *O'Brien*, each of the three acts that constitute harassment pursuant to the statute must either be a "true threat" or "fighting words" in cases where the alleged harassment is not an intentional act of either unlawful violence or property damage. In other words, words or acts that are constitutionally protected speech could not be grounds for the entry of a harassment order following the 2012 decision, despite the broad language of the G.L. c. 258E statute, which defines "harassment" in far broader terms, such as an "intentional" that is intended to cause "intimidation".

A "true threat," according to the SJC, is a "serious expression of an intent to commit an act of unlawful violence" to a particular individual (i.e., the plaintiff under Chapter 258E). Thus, only a threat intended to cause fear of physical harm or physical property damage will qualify as a true threat. "Fighting words," under

state and federal caselaw, must be a "direct personal insult addressed to a person, and they must be inherently likely to provoke violence." *O'Brien*, supra at 423. The Court limited the definition of the word "fear" in Chapter 258E to mean "fear of physical harm or of damage to property." Acts which cause a plaintiff to fear, for example, economic harm, negative publicity, or losing an election, will not suffice as a basis for issuing a protective order under Chapter 258E.

In short, under *O'Brien*, Courts were limiting to issuing harassment orders against individuals who posed a real and direct threat to a victim's physical health or property, or in response to a direct personal insult that is inherently likely to provoke island. Annoying behavior like prank phone calls, hostile behavior towards friends or co-workers, and other forms of highly inappropriate conduct appeared to be excluded from the equation under *O'Brien*.

Legislature Fails to Update Ch. 258, Leading to Many Appeals

The Massachusetts legislature is notorious for failing to update laws after SJC and Appeals Court decisions, remove old or constitutional laws off the books, like felonies for adultery and blasphemy, and jamming the entire year of legislation into the last two weeks of July every summer. Some blame one party rule (strong opposition parties tend to force tougher votes), others cowardice (legislators afraid to be blamed for "unpopular" laws), and other's laziness (see: 90% bills passing in the last two weeks of July each year). Whatever the cause, the Massachusetts general laws are full of outdated, unconstitutional, unenforced and unenforceable laws.

In the case of G.L. c. 258E, the SJC did not invalidate the law, but the *O'Brien* decision narrowed the grounds on which courts could issue anti-harassment orders so profoundly that anyone reading the original text – including parties, attorneys and lower court judges – would be likely to misunderstand how, why and when harassment protection orders can be issued in Massachusetts. It is thus unsurprising that the legislature's failure to amend G.L. c. 258E following the *O'Brien* decision has led to a huge load of appeals on HPO cases.

What have these appeals focused on? You guessed it: the Appeals Court has been forced to reverse decision after decision by lower court judges who applied the outdated legal standard set forth in G.L. c. 258E, rather the SJC's applicable standard from *O'Brien*.

Application of O'Brien Rule to Subsequent Cases

In A.R. v. L.C., issued on August 17, 2018, the Massachusetts Appeals Court was "faced once again" with the conflict that results between the plain language of G.L. c. 258E and the restrictions imposed on the law by the SJC in *O'Brien*. The Appeals Court asserted that state courts have issued protective orders under Chapter 258E based upon a range of activity "amounting to what, in colloquial terms, we would describe as harassment" before the SJC issued the *O'Brien* decision in 2012. It then pointed out that "confusingly, the law remains on the books in unamended form."

Since *O'Brien*, the Appeals Court noted, state appellate courts have held "conduct that might be considered harassing, intimidating, or abusive in the colloquial sense, and that thus might support issuance of an order under the plain language of the statute, was not adequate to meet the standard spelled out in *O'Brien*." (Emphasis in original.) It cited examples such as threatening to have an assistant little league coach thrown off the team in front of numerous parents; accusing the plaintiff of being corrupt, a liar, uneducated and stupid; and playing loud music, using strobe lights at night and installing security cameras.

This type of annoying and hostile behavior, the Court explained, was likely to meet the average person's definition of "harassment". However, it should not be grounds for the issuance for a harassment protection order (HPO) under G.L. c. 258E, where the SJC's decision in O'Brien limited the grounds for the issuance of an HPO to threats of physical harm or harm to property, and/or fighting words that were inherently likely to result in violence.

Appeals Court: More Clarification Needed for HPO Cases

The plaintiff in *A.R. v. L.C.* (and a companion case, A.R. v. J.C.) obtained harassment-prevention orders in Brookline District Court against both his mother- and father-in-law who, he claimed, yelled at him, belittled him and videotaped him without his permission during exchanges of the child whom plaintiff shared with his estranged wife (the defendants' daughter). Much of the evidence the district court judge relied on came from video footage of multiple interactions between the plaintiff and defendants during the exchanges of the child. The footage came from security cameras at the public places where the exchanges took place, as well as from the mother-in-law's smartphone, which she used to audio-and video-record the plaintiff despite his repeated requests that she stop. In neither case did the district court judge specify which three acts "within the judicially narrowed meaning of c. 258E" supported her finding that either defendant "harassed" the plaintiff. (The Appeals Court lamented that the lack of written findings by judges is "something we have seen repeatedly in appeals from the issuance of c. 258E orders.")

After viewing the videos that had been admitted into evidence, the Appeals Court concluded, “While L.C. (the mother-in-law) was certainly ‘harassing’ the plaintiff in the colloquial sense, only two videos contain any conduct that could even arguably be seen as threatening the plaintiff with physical harm” as required by *O’Brien*. The first showed that the mother-in-law and the child’s mother “might have been standing in the way of the door by which the plaintiff could exit the store.” The second, evidencing the mother-in-law’s “aggressive pulling of the child toward A.R.,” when paired with video footage of her demeanor (she and the plaintiff appeared to be arguing in the video, which lacked audio), “might be seen as threatening [the plaintiff] with physical harm.” However, it was not clear whether the district court judge deemed another incident (not shown on video) that plaintiff alleged had occurred years earlier, in which the mother-in-law “chopped him, scratched him, kicked him and pushed him down the stairs,” as the requisite third predicate act on which the harassment-prevention order was issued. As a result, the Appeals Court remanded the case against the mother-in-law for further clarification from the district court. The Court did say that “merely videotaping the drop off and pick up of a child in a contentious divorce in public does not amount to an act of harassment.” (If it did, it’s safe to say that Massachusetts family-law attorneys would be dealing with many more Chapter 258E cases than we already do!)

With respect to the father-in-law, the Appeals Court found that the lower judge’s order likewise failed to specify the three predicate acts that justified the issuance of the harassment-protection order against him. The videos showed no evidence of harassment by the father-in-law. Although the plaintiff testified to at least three incidents of the defendant punching him and throwing him to the ground, “nothing in the order implies that the judge found that these unrecorded events occurred,” so the Appeals Court declined to determine whether the three requisite acts took place. It remanded the case against the father-in-law to the district court to enable the judge to clarify the basis for the harassment-protection orders “included unrecorded incidents as described herein,” the Appeals Court required that both orders be vacated.

Legislature Should Relieve Appeals Court by Amending Ch. 258E

A search of Google Scholar shows that the Appeals Court (which is where relief from Chapter 258E orders must initially be sought, pursuant to *O'Brien*), receives numerous requests for review of Chapter 258E orders. Many – if not most – of appeals of G.L. c. 258E orders center on the same issue: parties, attorneys and judges following the language of at statute that should have been amended by the legislature six years ago, after the SJC ruled in *O'Brien*.

The Massachusetts legislature could help rectify this issue by clarifying the statutory language to comport with the requirements imposed by *O'Brien*.

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