STATE OF MINNESOTA
IN COURT OF APPEALS
A11-630

Ann Marie Johnson for herself and
on behalf of John Youngs, petitioner,
Respondent,

vs.

Andrew John Arlotta,
Appellant.

Filed December 12, 2011
Affirmed as modified
Bjorkman, Judge

Hennepin County District Court
File No. 27-CV-10-21534

Ann Johnson, Plymouth, Minnesota (pro se respondent)

Andrew S. Birrell, Steve Gaskins, Nicholas Rogers, Eric Newmark, Gaskins Bennett Birrell & Schupp, L.L.P., Minneapolis, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Johnson, Chief Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant challenges the district court's entry of a 51-year harassment restraining order (HRO) against him, contending that the district court erred in determining that his blogging and other speech constitutes harassment and that the HRO violates his

constitutional rights. Because the district court did not abuse its discretion in issuing the HRO but its duration exceeds the authorized limit, we affirm as modified.

FACTS

Appellant Andrew John Arlotta and respondent Ann Marie Johnson had a romantic relationship from late 2008 to September 2009. After the relationship ended, Arlotta continued to contact Johnson against her wishes and Johnson obtained a temporary HRO against Arlotta on October 13, 2009. On December 22, Arlotta consented to entry of a six-month HRO that prohibited him from (1) committing any acts "intended to adversely affect [Johnson's] safety, security, or privacy," (2) having "any contact" with Johnson "in person, by work or home e-mail, by telephone, or by other means or persons," and (3) visiting Johnson's Morgan Stanley "worksite." By its terms, the HRO expired on June 22, 2010.

Two days after entry of the 2009 HRO, Arlotta created an Internet blog titled, "Help Ann Johnson." The blog was written in the third-person and documented Arlotta's ongoing relationship issues with Johnson. In the blog, Arlotta discussed personal information about Johnson, including her involvement in sexually and physically abusive relationships, and questioned the state of her mental health. Arlotta publicized and promoted the blog by sending electronic messages to Johnson's relatives, friends, and others, and posting links to the blog on other websites. He used fake Facebook identities ("Dana Russel" and "Pekin Ilanis") to post the blog to other Facebook users. As "Dana Russel," Arlotta contacted the father of Johnson's child nine times between December 28, 2009, and January 27, 2010. Arlotta asked him to "stop by" the blog, telling him, "this

involves your child," and claiming that "[c]hild & family services have been contacted." Arlotta also contacted Johnson's grandmother telling her that Johnson "seems to have been abused," and "was either molested or abused as a child or witnessed domestic violence." As "Pekin Ilanis," Arlotta sent messages publicizing the blog to members of Johnson's high school graduating class, a local television news anchor, and other organizations unrelated to Johnson. As a result, Johnson was contacted by friends, family, and others who expressed concern over Arlotta's communications.

On August 22, 2010, Arlotta sent an e-mail to a Morgan Stanley employee asserting that Johnson was connected to "hardcore criminals" and that she "could be bad for business." The e-mail included a link to the blog. The employee, believing the e-mail to be genuine, informed her supervisor, who met with Johnson to discuss the e-mail. No other action was taken by Johnson's employer.

On September 10, Johnson petitioned for a new HRO. After an evidentiary hearing, the district court issued an HRO on March 28, 2011, that would "remain in effect until March 28, 2062." The HRO prohibits Arlotta from: (1) "[a]ny repeated, intrusive, or unwanted acts, words, or gestures that are intended to adversely affect [Johnson's] safety, security, or privacy"; (2) "[a]ny contact, direct or indirect, with [Johnson] in person, by telephone, by email or by other means or persons"; and (3) "[a]ny email or other electronic message contact with third-parties that contains any material concerning [Johnson] that affects or intends to adversely affect [her] safety, security, or privacy." The HRO also directs Arlotta to remove his blog from the Internet. This appeal follows.

D E C I S I O N

This court reviews a district court's issuance 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 will set aside a district court's findings in support of an HRO only if they are clearly erroneous, giving due regard to the district court's credibility determinations. *Id.* at 843-44. But statutory interpretation and the constitutionality of a statute present questions of law, which we review de novo. *State v. Wolf*, 605 N.W.2d 381, 386 (Minn. 2000); *Peterson v. Johnson*, 755 N.W.2d 758, 761 (Minn. App. 2008).

I. The district court properly determined that Arlotta engaged in harassment and violated the first HRO.

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) (2010). The statute defines "harassment" to include "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." Minn. Stat. § 609.748, subd. 1(a)(1) (2010). A party seeking an HRO must show (1) "objectively unreasonable conduct or intent on the part of the harasser" and (2) an objectively reasonable belief by the object of the harassing conduct that he or she was being "subject[ed] to harassing conduct." *Peterson*, 755 N.W.2d at 764, 766 (quotations omitted). Intent to harass may be considered from a subjective standard "to the extent the court may determine the harasser's intent." *Kush*, 683 N.W.2d at 845. A district court may grant relief "for a period of up to 50 years" "[i]f

the court finds that . . . the respondent has violated a prior or existing restraining order on two or more occasions." Minn. Stat. § 609.748, subd. 5(a).

The district court found that Arlotta's "repeated email contacts with the father of [Johnson's] child, her friends, family, and employer as well as his posting of messages on public sites were both objectively harassing and had a substantial adverse effect on [Johnson's] privacy." The district court also determined that Arlotta "published the blog on the internet and sent numerous electronic messages with links to the blog and messages about [Johnson] . . . while the December 22, 2009 HRO was in effect." The district court emphasized that Johnson was subsequently contacted by the persons to whom Arlotta directed his communications, and found that it was "inescapable" that Arlotta intended to adversely affect Johnson's privacy. The district court expressly discredited Arlotta's contention that he is trying to help Johnson, finding that his "claimed good faith intentions are in every respect inconsistent with the malicious content of the blog and messages."

Arlotta argues that his blogging and communications to third parties cannot be construed as harassment because they were not directed at Johnson. We disagree. First, Arlotta provides no legal support for this narrow interpretation of the statute. The statute defines harassment to include "repeated incidents of intrusive or unwanted acts, words, or gestures that . . . have a substantial adverse effect on the . . . privacy of another." Minn. Stat. § 609.748, subd. 1(a)(1). Words are no less intrusive, unwanted, and detrimental to privacy if they are conveyed to the victim through third parties. "There is no less significance or special significance to the contact simply because it was completed by a

third party after being instigated or initiated" by the harassing party. *See State v. Egge*, 611 N.W.2d 573, 575 (Minn. App. 2000) (affirming jury determination that defendant violated HRO by initiating contact with victim through a third party), *review denied* (Minn. Aug. 15, 2000). Indeed, the fact that an actor's harassing words are conveyed to the victim through others may, if anything, make them more egregious.

Second, the record supports the district court's determination that Arlotta intended his communications to reach Johnson and that they did, causing her humiliation and embarrassment. Arlotta directed his numerous communications to members of Johnson's family, her friends, and organizations connected to Johnson and used aliases because he "knew his contacts were unwanted." The evidence clearly shows that these contacts ultimately reached Johnson. And the district court specifically discredited Arlotta's testimony that he was trying to "help" Johnson rather than undermine her privacy or security. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that appellate courts defer to district court credibility determinations).

Arlotta also contends that his speech cannot be harassment, as a matter of law, because the content of his communications "was truthful and in all instances obtained through lawful means." We are not persuaded. Whether words constitute harassment does not turn on their truth or falsity. Rather, it is the repeated use of the words and the substantial adverse effect they have or are intended to have on the victim's "safety, security, or privacy" that is determinative. Minn. Stat. § 609.748, subd. 1(a)(1). On this record, we conclude that the district court's findings of fact are not clearly erroneous, and

the court did not abuse its discretion in determining that Arlotta committed acts of harassment as defined in the statute and in issuing the HRO.

We next consider Arlotta's challenge to the district court's findings that he violated the first HRO. By its terms, the first HRO prohibited Arlotta from directly or indirectly contacting Johnson and from engaging in "repeated, intrusive, or unwanted acts, words, or gestures that are intended to adversely affect" Johnson's privacy. The record shows that while using the assumed Facebook identity of "Dana Russel," Arlotta e-mailed the father of Johnson's child nine times to promote his blog and initiate contact with Johnson. Arlotta used the same Facebook profile to contact Johnson's grandmother. All of these messages were sent between December 28, 2009, and January 20, 2010, while the first HRO was in effect, and referenced extremely personal, sensitive information about Johnson. The frequency and content of these communications amply support the district court's findings that Arlotta created and repeatedly published the blog to "harass and humiliate" Johnson in violation of the first HRO.

Arlotta's argument that he had "no notice" that his blog and e-mails to third parties would violate the first HRO is likewise unavailing. Arlotta had notice under the first HRO that "[a]ny contact" with Johnson was prohibited, including by phone, e-mail, "or by other means or persons." And as the district court emphasized, the statutory definition of harassment is not restricted to direct contacts between the offending actor and the victim. *See* Minn. Stat. § 609.748, subd. 1(a)(1). On this record, the district court did not clearly err in determining that Arlotta violated the first HRO.

II. The HRO is not an unconstitutional prior restraint.

The United States and Minnesota Constitutions guarantee the right to free speech. U.S. Const. amend. I; Minn. Const. art. I, § 3. A primary purpose of the First Amendment freedoms is "to prevent previous restraints upon publication." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713, 51 S. Ct. 625, 630 (1931). "Temporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550, 113 S. Ct. 2766, 2771 (1993). If a prior restraint exists, it bears "'a heavy presumption against its constitutional validity.'" *Minneapolis Star & Tribune Co. v. Schmidt*, 360 N.W.2d 433, 435 (Minn. App. 1985) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S. Ct. 631, 639 (1963)). To overcome that presumption, the prior restraint "must be necessitated by a compelling state interest, and . . . narrowly tailored to serve that interest." *Id.* (quotation omitted).

Arlotta argues that the HRO does not overcome the presumption because it prohibits "pure speech." He argues that blogging is "comparable to publishing pamphlets and leaving them on your front doorstep for the public," and that the First Amendment protections extend to speech that is distasteful or offensive. *See United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010) (protecting depictions of animal cruelty because the "First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits"). We agree that material published on the Internet receives the same level of protection as information

published in other media. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870, 117 S. Ct. 2329, 2344 (1997). But that does not end our analysis.

We first note that the terms of the HRO largely track the language of the statute, prohibiting repeated words and contact that are intended to or have a substantial adverse effect on Johnson's "safety, security, or privacy." This court previously ruled, in the context of a facial challenge to the HRO statute, that the constitution does not protect harassing words. *Dunham v. Roer*, 708 N.W.2d 552, 565-66 (Minn. App. 2006), *review denied* (Minn. Mar. 28, 2006). In *Dunham*, we observed that since the ratification of the constitution, "our society . . . has permitted restrictions upon the content of speech 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 them is clearly outweighed by the social interest in order and morality." *Id.* at 562 (quotations omitted). We likened the speech that the HRO statute prohibits to other constitutionally unprotected speech, including "fighting words" and "true threats." *Id.* at 565-66; *see also Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572, 62 S. Ct. 766, 769 (1942) (affording no protection for obscenity and "fighting words"). Accordingly, we held that the HRO statute does not implicate the First Amendment because it is narrowly tailored to ban unprotected words or conduct. *Dunham*, 708 N.W.2d at 565.

Although not determinative of Arlotta's as-applied constitutional challenge, we find *Dunham* instructive. The record amply demonstrates that Arlotta's repeated electronic messages and promotion of his blog were not "merely attempt[s] to publish his thoughts and ideas to an audience," but shared sensitive information about Johnson in a

manner that substantially and adversely impacted her privacy interests. Arlotta's posts and communications with Johnson's family, friends, and coworkers were calculated to and did reach Johnson. The content of Arlotta's speech did not implicate matters of public concern—it was harassing to Johnson. *Cf. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59, 105 S. Ct. 2939, 2944-45 (1985) (recognizing that "not all speech is of equal First Amendment importance," and emphasizing that speech on "matters of public concern" is "at the heart of the First Amendment's protection" (quotations omitted)). As the district court determined, the state has a compelling interest in ensuring Johnson's right to be free from harassment. *See Dunham*, 708 N.W.2d at 565 (holding the state may permissibly "regulate conduct that is invasive of the privacy of another"). Because the HRO prohibits unprotected speech, we conclude that it is not an impermissible prior restraint.

III. The HRO is not unconstitutionally vague.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298 (1972). An order is unconstitutionally vague if persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127 (1926).

The HRO requires Arlotta to remove the "Help Ann Johnson" blog from the Internet, and prohibits:

> a. Any repeated, intrusive, or unwanted acts, words, or gestures that are intended to adversely affect the safety, security, or privacy of [Johnson].

> b. Any contact, direct or indirect, with [Johnson] in person, by telephone, by email or by other means or persons.
>
> c. Any email or other electronic message contact with third-parties that contains any material concerning [Johnson] that affects or intends to adversely affect the safety, security, or privacy of [Johnson].

Arlotta argues that the order is vague because it does not define his right to publish or identify the subject matters he may appropriately discuss. He also contends that the HRO does not adequately explain the prohibition against "emailing to third-parties any material concerning [Johnson]," arguing that it is unclear whether discussions "about this case" with friends and family would violate the order. We disagree.

The HRO incorporates the language of the harassment statute, which we held is not unconstitutionally vague. *See Dunham*, 708 N.W.2d at 568 (stating that "[n]o reasonable person could inadvertently violate the statute because of an inability to determine what type of conduct is prohibited"). The HRO does not prohibit the communication of "any material" related to Johnson or this case. Rather, it prohibits communications that are "intentionally calculated" to harass Johnson or have the effect of harassment, directly or indirectly, as exemplified by Arlotta's "Help Ann Johnson" blog and his contact with people close to Johnson. The HRO cannot reasonably be read to bar Arlotta from engaging in discussions with his own friends and family about this case, or from publishing on interests or topics other than Johnson. Accordingly, we conclude that the HRO is sufficiently specific so that Arlotta need not "guess at its meaning." *See Connally*, 269 U.S. at 391, 46 S. Ct. at 127.

IV. The availability of other legal redress does not preclude issuance of an HRO.

Arlotta argues that public policy weighs against issuance of an HRO because Johnson has "adequate" alternatives for obtaining relief. First, Arlotta suggests that Johnson should complain to the blogging-service company on which he maintained his blog, or to Facebook, both of which have policies regarding publishing private information. Second, Arlotta argues that the "proper vehicle" for Johnson to seek redress is a tort action based on the publication of private facts or defamation. *See Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998). He contends that procedural safeguards within the civil litigation context "provide a more appropriate forum" than the HRO process. We are not persuaded. The legislature enacted the HRO statute to protect people from harassing words and actions, and Johnson is entitled to seek that protection. Moreover, because we are not a policy-making court, Arlotta's public-policy argument is unavailing. *See Sefkow*, 427 N.W.2d at 210 ("The function of the court of appeals is limited to identifying errors and then correcting them.").

V. The district court erred in extending the HRO beyond 50 years.

The statute authorizes relief "for a period of up to 50 years." Minn. Stat. § 609.748, subd. 5(a)(3). The HRO, dated March 28, 2011, states that it "shall be in effect for the full period allowed by law—50 years." But the HRO goes on to specify that it "shall remain in effect until March 28, 2062," a period of 51 years. Arlotta contends that entry of a 51-year HRO "was likely a mere clerical error." We agree. *See Wilson v. City of Fergus Falls*, 181 Minn. 329, 332, 232 N.W. 322, 323 (1930) (holding that clerical error is one "which cannot reasonably be attributed to the exercise of judicial

consideration or discretion"). "Clerical mistakes in a judgment, order, or in the record arising from oversight or omission may be corrected by the court at any time, or after notice if ordered by the court." Minn. R. Crim. P. 27.03, subd. 10. Accordingly, the HRO is modified so that it expires on "March 28, 2061."

Affirmed as modified.