

Hansen v. Volkov, 2023 DJDAR 10096

Unless containing threats of violence, all communicative acts performed by attorneys as part of their client representation are per se protected petitioning activity.

FACTS/PROCEDURE

Jacquelynn Hansen and Oleg Volkov, both members of the California State Bar, represent Husband and Wife, respectively, in an ongoing and contentious divorce proceeding pending in Los Angeles Superior Court. Volkov represented Wife in a failed effort to obtain a domestic violence restraining order, shortly after the Los Angeles City Attorney unsuccessfully prosecuted Husband for the same alleged conduct. Volkov appeared throughout the criminal proceedings but was removed from the court room for allegedly recording the proceedings in violation of the Superior Court rules.

According to Hansen, following the loss/dismissal of the criminal proceedings, Volkov became aggressive and threatening toward Hansen, her co-counsel, the Husband client, and Husband's family. Hansen alleges Volkov repeatedly came to her office, demanding to speak to an attorney about the pending family law matter and refused to leave even after repeated requests from office staff.

Following an incident at Hansen's office related to the cancelled deposition of Volkov's client, Hansen successfully obtained a three-year civil harassment restraining order pursuant to Code of Civil Procedure § 527.6, protecting her and her office staff from further harassment by Volkov. The order included no-contact and stay-away orders. In connection with his representation of Wife in the family law proceedings, Volkov could contact the protected parties only by United States mail or email, and only for purposes of service of legal papers.

Detailing its findings at the evidentiary hearing, the trial court stated that Volkov knowingly and willfully engaged in a course of conduct directed at Hansen that alarmed, annoyed, and harassed her; that served no legitimate purpose; that was not constitutionally protected; that caused Hansen substantial emotional distress and that would have caused a reasonable person to suffer the same. Volkov filed a timely notice of appeal.

HOLDING/DISCUSSION

The California Court of Appeal for the Second Appellate District reversed and remanded with directions. Code of Civil Procedure § 527.6 defines harassment as "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person" that would cause a reasonable person, and actually causes petitioner, substantial emotional distress. Constitutionally protected activity is not included within the meaning of "course of conduct" under § 527.6. A trial court may only issue a civil restraining order after finding by clear and convincing evidence that unlawful harassment existed and is reasonably likely to recur. Whether the facts, when construed in favor of the prevailing party below, are legally sufficient to constitute civil harassment, and whether the restraining order "passes constitutional muster" are questions of law reviewed de novo.

Here, the trial court found that the string of emails Volkov sent Hansen after she cancelled his client's deposition were argumentative, unnecessary, and annoying. However, because they did not contain a credible threat of violence, the Court of Appeal concluded they were communicative acts performed by an attorney as part of his client representation and therefore constitutionally protected litigation activity. Therefore, the trial court erred in concluding the emails were properly considered part of a "course of conduct" of harassment.

Moreover, other than the emails, the trial court identified only one other incident to support the finding that Volkov willfully or knowingly engaged in a "course of conduct" directed at Hansen, that seriously alarmed or harassed her, and that would have caused a reasonable person to suffer serious emotional damage. The court reasoned Hansen's testimony that she felt sick to her stomach and scared upon receiving a text that Volkov was at her office on the day in question was far from establishing his conduct caused Hansen "to suffer intense, enduring and nontrivial emotional distress," as required under § 527.6.

Therefore, the Court of Appeal reversed the civil harassment restraining order and remanded the matter back to the trial court, directing the court to enter a new order denying Hansen's request for a restraining order.