



LEGAL DEFENSE TRUST TRAINING BULLETIN

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Vol. VIII, Issue No. 2

February, 2005

ARE ON-DUTY POLICE OFFICERS PROTECTED BY CIVIL HARASSMENT STATUTES ENTITLING THEM TO INJUNCTIONS AGAINST "CITIZEN COMPLAINANTS"?

Appellate Court Reverses Trial Court's Finding that On-Duty Cops Cannot be Plaintiffs

by Michael P. Stone and Marc J. Berger

Hollenbeck Area gang officers have been victimized over the last several years by a woman who has several close relatives in the "Big Hazard" gang in East Los Angeles, and styles herself as a "community activist." Guadalupe Andrade has been engaged in a pattern of conduct designed to intimidate or neutralize any Hollenbeck officer who is active in gang investigations involving "Big Hazard."

Officers Adrian Parga, James Lopez, Felipe Pardo, Tony Perez, Francisco Macias, and their supervisor Sergeant Michael Morrisseau, were referred to us by the Hollenbeck Area Captain, Bill Fierro, and by Los Angeles Police Protective League Director Mitzi Grasso, to take any legal action that might be appropriate to restrain that course of conduct. We assembled a Complaint based on the civil harassment statute, *Code of Civil Procedure* section 527.6. As relevant for this case, section 527.6 provides that an injunction can be granted to enjoin and restrain a

"knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose." The statute provides that "The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff."

The term "course of conduct" is defined by the statute as "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an individual, making harassing telephone calls to an individual, or sending harassing correspondence to an individual by any means, including, but not limited to, the use of public or private mails, interoffice mail, fax, or computer e-mail." Finally, the statute declares that "Constitutionally protected activity is not included within the meaning of "course of

conduct." This statutory definition obviously excludes free speech activity from the reach of the statute. Without this definitional safeguard, the statute would eventually be held unconstitutional.

Factually, the officers signed declarations under penalty of perjury that detailed Andrade's conduct. The declarations recited specific instances by date, time and place, where Andrade had filed numerous frivolous personnel complaints on which she invariably refused to be interviewed. The declarations detailed by date, time and place numerous instances where Andrade had engaged in conduct such as blocking the officers' entrance and exit from the station with her car, following officers leaving the station in their personal cars, photographing officers in the course of performing their duties, picketing, demonstrating, encouraging neighbors to make personnel complaints, and assisting them in completing and filing the personnel complaints, and numerous other lesser similar annoyances. The effect upon an officer's career of numerous personnel complaints is well-known to Andrade, who also knows that refusing to be interviewed on any of the complaints she files will log-jam the system, and eventually drive Hollenbeck-gang officers to seek to transfer to other assignments.

In court, Judge Haley Fromholz took a decidedly dim view of the plaintiff-officers' case. The six plaintiffs arrived at court prepared to testify regarding their own experiences with Andrade. We had three additional Department witnesses lined up to testify to important supporting facts.

Lieutenant Bea Girmala, Sergeant Ray Castro and Sergeant Hugo Gutierrez were prepared to chronicle the Andrade's refusal to be interviewed about the personnel complaints, and what the effect of her refusal would be on an investigation. These witnesses, as well as Sergeant Morrisseau, would have testified that when a complainant refuses to be interviewed to follow up on a personnel complaint, the complaint remains pending and unresolved indefinitely, where it hangs like a cloud over the officer's career advancement. The pending personnel complaint counts against the officer at the time of consideration for annual evaluation or promotion. The Department keeps track of the statistical number of personnel complaints against an officer, and that statistic can hurt an officer's chance for promotion without regard to the lack of merit in the complaint, and the complainant's own efforts to impede prompt resolution of the complaints.

The plaintiffs also sought to give in-person testimony, to support their claims on several important elements. The plaintiffs would have given detailed and dramatic testimony concerning emotional distress caused by Andrade's stalking behavior and by the knowledge that the safety of the officers' families was also imperiled by Andrade's course of conduct. The plaintiffs would have also given updates on the ongoing nature of the Andrade's harassing activities. The update testimony would have been an important ingredient in overcoming any constitutional protection that may have been granted for the personnel complaints, and in bringing the conduct current as necessary to avoid mootness in an injunction case.

Judge Fromholz, however, refused to allow any witness testimony. He ruled that most of the conduct alleged in the declarations, especially the filing of personnel complaints, was protected speech under the First Amendment. Even though there is no language excluding police officers as a class from the benefit of the statute, Judge Fromholz reasoned that §527.6 does not seem intended for the protection of police officers. Judge Fromholz opined that he believed the power to arrest Andrade for resisting a police officer on duty under Penal Code section 148 was sufficient protection of police interests. Having found these several barriers to our case, Judge Fromholz stated he did not see how live testimony could overcome them, especially the First Amendment issue. Judge Fromholz denied the injunction, and ruled that the live testimony that was offered would be excluded on the basis that regardless what the testimony would be, the evidence did not meet the test of showing conduct that had no legitimate purpose, since most of the conduct was constitutionally protected free speech.

The officers appealed. Based on precedents we cited at trial and on appeal, the Court of Appeal held that the trial court in an action under §527.6 must hear proffered relevant live testimony, and that it erred in refusing to do so here. On the substance of the action, the Court of Appeal found, "the pleading does allege courses of conduct, some of which may avoid First Amendment protection, evidencing a continuity of purpose, which served no legitimate purpose and which seriously alarmed, annoyed or harassed the individual petitioners." *Morrisseau v.*

Andrade, Second Appellate District docket no. B172407, filed January 19, 2005, slip opn. at 15-16. The Court ruled, "These allegations fall directly within the language of section 527.6." *Id.* at p. 16. Remanding for trial, the Court recognized that "Whether the courses of conduct alleged are privileged under the First Amendment is certainly a significant issue to be addressed, but only after evidence has been received." *Id.* at p. 16.

The rule for you emerging from this opinion is that you may be entitled to a restraining order or injunction against any individual who engages in a harassing course of conduct against you, even while you are on duty and in the course and scope of your employment. Such a course of conduct would include acts that impede the performance of your duty in ways that, while they may fall short of a criminal violation, nevertheless threaten your emotional well-being, or cause you to fear for the safety of yourself or your family, or unnecessarily jeopardize your ability to protect the public safety, or unduly penalize you in your career advancement, or result in other highly undesirable manifestations. If you find yourself being subjected to stalking or other conduct that resembles the conduct of Andrade in this case, you should keep very detailed documentation of the conduct, as well as documenting your own reactions to it and the reactions of anyone affected by it. There is no certainty that an injunction will result from any given set of facts, but now that we have started down this road, it makes sense to test any set of facts that seems to fit within the bounds of the appellate opinion, and in that way, discover the boundaries and extent to

which the civil harassment statute may be counted as another weapon in the police officer's arsenal.

Notes:

1. Michael P. Stone is the firm's founding partner and principal shareholder. He has practiced almost exclusively in police law and litigation for 26 years, following 13 years as a police officer, supervisor and police attorney.

2. Marc J. Berger has been associated with Michael P. Stone since 1986, and is the firm's senior motion, writ and appeal specialist. Mr. Berger handled this appeal.