STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. SUPERIOR COURT

STATE OF RHODE ISLAND)

VS.) P3/11-2685

JOHN LEIDECKER)

HEARD BEFORE THE HONORABLE SUSAN E. McGUIRL

DECISION

WEDNESDAY, JULY 30, 2014

APPEARANCES:

CAROLE McLAUGHLIN, SPECIAL ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF ATTORNEY GENERAL. . . .FOR THE STATE

ROBERT MANN, ESQUIRE. . . . . .FOR THE DEFENDANT

Kristen Turner, RPR

Court Reporter

WEDNESDAY, JULY 30, 2014

MORNING SESSION

THE CLERK: Judge, the matter before the Court at the time would be State of Rhode Island vs. John Leidecker, P3/2011-2685, scheduled for a decision.

Will counsel please identify themselves?

MS. McLAUGHLIN: Carole McLaughlin on behalf of the State of Rhode Island.

MR. MANN: Robert Mann for Mr. Leidecker.

THE CLERK: Will you please stand and state your name?

THE DEFENDANT: John Leidecker.

THE CLERK: Date of birth?

THE DEFENDANT: August 19, 1956.

THE COURT: All right, counsel, I've received memorandum. We've had conferences on this case. Is there anything you want to add at this point?

MR. MANN: No, your Honor.

MS. McLAUGHLIN: No, your Honor.

THE COURT: Thank you.

The matter is here on Mr. Leidecker's appeal of a decision from District Court for conviction for cyberstalking and cyberharassment of Rhode Island General Laws 11-52-4.2.

Appellant now argues the charges should be dismissed

on statutory grounds. The State, obviously, is opposing that and the Court has received memorandums, transcripts of the District Court hearing, and, as I indicated, both parties have provided the Court with extensive memorandum on the facts, the issues in this case and some constitutional cases also.

As I indicated, for the travel of the case, the Appellant filed an appeal seeking to overrule the District Court's decision that Appellant violated the cited statute, 11-52-4.2. Appellant, as I understand, is employed by the National Education Association of Rhode Island, NEARI, as a business agent negotiating contracts for teachers in various cities and towns in the state.

Douglas Gablinske -- am I saying that correctly?

MS. McLAUGHLIN: Yes.

THE COURT: -- Appellee, was the State Representative at the time in question running for reelection. I believe he had been elected State Representative for the District 68 since January of 2007 until January of 2011. He had served two terms.

In September of 2010 he was involved in an intense election for the primary, then a write-in campaign, I believe, where he ultimately lost that reelection campaign.

The Appellant in the District Court concedes he

often sent e-mails to Appellee. I believe he was a member of the General Assembly, still serving out his term at the time he was receiving those e-mails. The e-mails were sent from a time period of September 10, 2010 to September 24, 2010, and I believe the election -- the primary election was right in the middle of that, on September 14th.

Now, as I understand it, there were two methods by which the Appellant would create fake e-mails and send them to the Appellee. He concedes he intentionally basically concocted a fake e-mail address and sent messages using the alias of "Walter Flatus" to the Appellee, Douglas Gablinski, which is actually spelled with an "e", the last letter of that word. He then sent self-drafted e-mails with a fake g-mail address concocted by the appellant, "DouglasGablinski@gmail.com," to the Appellee that were signed under the alias of Douglas Gablinski. But Gablinski, for that matter, was spelled with an "i", addressed to "Walter Flatus."

So, he concocted this correspondence back and forth between these individuals, basically fake issues, fake names and addresses on both occasions.

The appellant sent appellee's responses back to appellee's -- back to the appellee's responses to old e-mails back to the Appellee.

Both Walter Flatus and Douglas Gablinski, with an "i," are fictitious individuals created by the defendant.

The Appellee, my understanding, and I believe the District Court transcript reveals, had no g-mail address at that time. The e-mails were sent prior to the primary elections for State Representative in September and during the State's write-in campaign, just during that period of time, just during the primary election and after that when the Appellee had begun a write-in campaign.

Appellant sent approximately 12 e-mails to Appellee. According to the notes, it appears there were notes, but part of them were a chain of forwarded e-mails. So, it looks like there were seven different e-mails in total, and yet five of them were resent as part of this chain e-mail. The e-mails were primarily focused, as I understand it, on appellee's vote on putting tolls on Mount Hope Bridge and pertained to his campaign election.

The appellant circulated these e-mails to his colleagues at NEARI, who did not live in the district upon which it would be voted from.

After losing the election, the primary election, on September 14, the Appellee did a write-in campaign. During that time, the Appellant agrees and concedes he erected two signs in the name of Walter Flatus on the

street of which Appellee resides, and alleges he did it as a parody. And it referenced the appellee's write-in campaign, signed "The Winds of Change for District 68, Vote" one-one or "11, Flatus, Write or Wrong," "write" spelled w-r-i-t-e.

The Appellant indicates in his testimony that the signs read "Write a Wrong" as opposed to "Write or Wrong." The defendant alleges that he placed the signs as a parody.

Now, going back into some history between the parties, and without referencing or citing each of the e-mails, the e-mails are somewhat confusing. I would not say they were threatening, without being an actual perhaps party to any issues that were going on. They are kind of hard to place. I think it would be fair to say they were annoying but confusing I think is a fair characterization of it.

Prior to all this happening, in September of 2010, again, as I understand, and about a year before that, the Appellant had sent a letter to Mr. Gablinske about a union issue in which, apparently, the School Committee had agreed upon a contract. And there was some issue about who should get credit for that. And the e-mails at that time were directed to that issue. And there's also an issue that came up during that period of time about

the Mount Hope Bridge tolls as well as another issue with respect to the appellee's position with school funding. So, all those issues were in May at the same time.

The union controls the Mount Hope Bridge tolls and the school funding formulas and legislation. The Appellee admitted at some point that he had referred to the unions as "pigs at the trough had gone too far" and the Appellant suggests that the Appellee's reference to the unions as "pigs" motivated the Appellant to create this fictitious character Walter Flatus and Douglas Gablinski, with an "i," to show he was being dismissive and rude. He also indicated that he opposed the political and legislative position with respect to a funding formula for the teachers that was apparently being voted on or discussed at that point, and, clearly, was opposed to what he considered to be Mr. Gablinski's disdain for the unions and the people that Mr. Leidecker represented as part of his job.

So, in any event, these are the e-mails going back and forth. The Appellant clearly testified in District Court that he suffered from sleeplessness, nervousness, nauseated stomach and was just physically and emotionally worn out from what happened to him with the e-mails and signs.

The Appellant's position is they were a parody and

not for the sole purpose of harassing Gablinske and that the e-mails were not threatening. The State argues that the e-mails were sent for the sole purpose of threatening, and a reasonable person would be in emotional distress after receiving them.

On a Motion to Dismiss for failure to state a claim upon which relief can be granted, this Court must examine "the allegations contained in the plaintiff's complaint, assumes them to be true, and view them in the light most favorable to the plaintiff." That is from **Builder Specialty Company vs. Goulet**, 639 A2d 59, 1994 case. Under Rule 12(b)6, "A motion should be granted when it is clear beyond a reasonable doubt that a plaintiff would be entitled to relief."

So, the issue before the Court today seems to be a question of first impression in the jurisdiction, and that is whether the contents of e-mails in this particular case and these facts rise to the level of cyberstalking and cyberharassing such as they violate General Laws 11-52-4.2.

The State argues that the Appellant violated the statute and Motion to Dismiss should be denied and the case should go forward to trial.

The Appellant maintains that the e-mails were parody and protected under the First Amendment and not subject

to the very strict definition of harassing in the statute.

To throw another issue into this somewhat complicated case, we also have an issue where we have the e-mails that were sent back and forth, now we know who they were sent from and who they were sent to. Everything was done with fictitious names at the time, and that raises an issue as to whether or not the statute even applies to this case or whether different legislation should be drafted, or, in any event, whether this statute applies to this situation.

Under 11-52-4.2, it defines cyberstalking and cyberharassment as a very detailed statute which indicates in Paragraph (a) "Whoever transmits any communication by computer or other electronic device to any person or causes any person to be contacted for the sole purpose of harassing that person or his or her family." Now, it goes on to say, "For the purposes of this section 'harassing' means any knowing and willful course of conduct directed at a specific person which seriously alarms, annoys or bothers a person and which serves no legitimate purpose. The 'course of conduct' is defined and must be a kind of conduct that would cause a reasonable person to suffer substantial emotional distress or be in fear of bodily injury. 'Course of

conduct' also means a pattern of conduct composed of a series of acts evidencing a continuity of purpose." And the final sentence of the paragraph says, "Constitutionally protected activity is not included within the meaning of 'course of conduct.'"

It seems to me the statute is very clear and unambiguous, and, therefore, the Court must interpret the statute literally and give the words of the statute their plain and ordinary meaning. In this case the statute sets out certain elements that need to be met. First, we have the issue of the contact communication must be for the sole purpose of harassing a person or their family. 'Harassing' means knowing and willful conduct directed at a specific person which bothers a person and serves no legitimate purpose. And then we have the course of conduct must be of a kind that would cause a reasonable person to suffer substantial emotional distress. So, we have somewhat of an objective standard, and it has to be over a period of time to show some type of continued purpose.

So, let's go through each of those issues or definitions, first, one at a time. The Appellant's intent, according to him, in sending those e-mails, according to the statute, "must be solely to harass the victim under the statute." And "solely" means that is

the sole purpose.

Now, we've had other cases that have talked about this definition and what it means, not necessarily from Rhode Island, but the statute is virtually identical to other state's statutes, similar to many statutes in other states which seem to have been adopted around the same time, **Commonwealth vs. Strahan** at 570 N.E.2d 1041, 1991 case. The Court found, "When the defendant made frequent calls to his ex-girlfriend, his sole purpose was not to harass the individual." The Court said that, "Nothing in the evidence furnished a basis for concluding that the defendant was not motivated in part to establish a relationship or re-establish a relationship with the ex-girlfriend based on their long on-and-off again relationship where the defendant would typically engage in behaviors, such as that which was designed to change the mind such as frequent phone calls to her. Therefore, in that situation on those facts, the Court found the defendant's conduct did not meet the statutory guidelines under the statute."

Similarly, in a Federal case, **U.S. vs. Darsey**, 342 F.Supp. 311, Pennsylvania case, the defendant repeatedly made sometimes abusive phone calls to his former mother-in-law and was tried under a similar federal law about harassing phone calls. The federal law, like the

Florida law just mentioned before, requires proof that the calls were made solely to harass. The **Darsey** court found the defendant not guilty. In that case they noted the calls contained inquiries about the son's whereabouts and well-being and sometimes civil, sometimes not. Although the defendant's behavior was described by the Court to be not always "prudent, reasonable or above reproach," and an element of harassment did motivate the calls. The Court was "not convinced that any of the phone calls in question were made to solely harass."

In **State vs. Patterson** the Court noted that when the statute uses words like "solely to harass," the General Assembly attempted a desire to dilute the statute in order to make it a crime to institute repeated calls with intent mixed with harassment, it would have been a simple matter to have done so and have deleted the word "solely." And it goes on to say, "The Courts, determining the meaning and application of statutes, are obligated to take the words in the plain and ordinary and usual sense. Consequently, we have no leave to ignore, alter or corrupt the ordinary, usual and plain meaning of the word 'solely', neither may we cripple the word with strained wrenchings at its well-understood import."

The Rhode Island statute here as well as the cases cited from Minnesota and Florida Federal Court and

Pennsylvania is similar in that they use the language of "the sole purpose of the statute." And as you see from some of those other cases, the Courts have been pretty clear that they should follow the actual language of the statute which talks about the sole purpose. And not -- that is not the Court's role to pass legislation and determine what conduct is unreasonable, what conduct is criminal. The General Assembly has passed laws to that effect, and they very carefully put that language in there. And assuming that they did that for a reason, and the Court is constrained to follow that language. So, we have to look at the language we have here and look at the facts we have here in the case.

Is it reasonable to interpret the sole purpose of the e-mails that we have reviewed here, the sole purpose of the e-mails being to harass that person, again, the harassment being a knowing, willful course of conduct designed and directed at a specific person which seriously alarms, annoys or bothers a person.

You could argue that the purpose of the e-mails was to obtain information about the representative's political stand with respect to the toll issue. You could argue the signs and all the e-mails were pertaining to political campaigns and political issues which the Appellant was running, and, clearly, I don't think

anybody argues the e-mails were not threatening in any way. The e-mails apparently were sent to merely annoy the State Representative and obtain information about an issue with respect to the Mount Hope bridge tolls during a political campaign when the Appellant was running for re-election. During a campaign I assume a candidate can expect and does receive communication and criticism, I assume annoying at times from constituents and voters who have an interest in the outcome of the election.

I think when you look at the facts of this case and you look at the circumstances in which these e-mails came out, it is difficult to determine that they were sent for the sole purpose of harassing the Appellee. They may have annoyed him, they may have bothered him, he may not have liked it. That's not what the statute references, in my opinion.

We also have to deal with the issue of a reasonable person. The statute talks about the e-mails were directed to a specific person and were annoying and bothered that person, but it also talks about "the course of conduct must be that would cause a reasonable person to suffer substantial emotional distress or be in fear of bodily harm." So, we have to look at it from a reasonable person standard when we look at what information was in there, and whether that would be

considered harassment. And I think in this case we're looking at a reasonable person that is actually a public figure. A reasonable person standard would be that who is running in a political campaign and a reasonable standard would have to apply to somebody in which these issues were so-called hot issues at the time or issues that were being discussed both in the General Assembly and in the course of the political campaign.

Now, clearly, the Appellee indicated he was upset, he lost sleep, he was nervous, he was just basically emotionally worn down about what was happening to him. The Court has no reason to disbelieve him and accepts it, but I think, again, the standard would be a reasonable person may be annoyed, but may not be likely to suffer a substantial emotional distress because of these e-mails and because of the issues that were being raised in them, and that individual or reasonable person being in the process of a political campaign and running for political office in which all of those topics would be referenced and were topics being discussed both on the campaign trail and in the actual job itself of the General Assembly.

I would assume, and never having done it myself, keeping in mind any person that subjects themselves to that type of political activity becomes a public person

and does expect to have some criticism and some annoying references being made to him or her during the course of their campaigns, and the question is: is that criminal conduct, and does this particular statute outlaw that kind of conduct.

The Court does not have any issue with the course of conduct requirement in the statute. I think the number of e-mails over the course of time in my mind meets the element of the course of conduct in continuing activities. So, I do not have an issue of that element of the statute.

That gets us down to the last item of the statute that we have to deal with, and that is that there is no legitimate person -- no legitimate purpose to the communication, again, somewhat connected to the sole purpose issue, but really a separate issue, is there any legitimate purpose. And the statute is, again, "any legitimate purpose."

And, again, we look at the e-mails that were sent. Can we say looking at them there was absolutely no legitimate purpose under that that would be used by that? There were communications sent from one person to another, albeit with fictitious names, and they may have been unwelcome communication, but are they -- is it communication that had some purpose and some legitimate

purpose? If we were not in a situation where we had these topics being discussed publicly by public figures, we may have a different standard here, but you have, again, three topics that I know about that came into place with these e-mails: the tolls, teacher contract/union contracts and the school funding. All of those, again, were topics being discussed -- political legislative topics, public policies being discussed and part of the General Assembly's work, but also part of the political campaign.

Does anyone have the right to comment on that and send communication on that? I think they probably do. And is that a legitimate purpose? I think it probably is. Is it necessarily a constructive way of doing it? My opinion, probably not. But especially when we're hiding behind some fictitious names, but is it legitimate. This Court cannot say it's not based on the circumstances of the case.

So, on each of those issues and definitions that must be met under the statute, I think the State has issues on the sole purpose, no legitimate purpose and the reasonable person standard. However, in addition to all of that, the statute gives it protection to speech that is protected by our constitution. And if you look at the type of language here, the Courts, in a number of

different topics, the Courts have protected First Amendment speech when it is connected with political speech, even when the subject or manner of expression is uncomfortable, conventional religious beliefs or political attitudes or uncomfortable standards. There's any number of cases. I'll cite the **Watchtower Bible vs. Village of Stratton**, 536 U.S. 150, or **U.S. vs. Stevens**, 130 S.Ct. 1577.

The Supreme Court has consistently classified emotionally disturbing or distressing as protected when the speech touches upon public concerns because "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate breathing space' to the freedoms protected by our First Amendment." That is **Boos vs. Barry**, 485 U.S. 312, 1988 case. Because the emotionally distressing speech was at a public space on a matter of public concern, the Court felt the speech was entitled to protection under the First Amendment; such speech cannot be restricted simply because it is upsetting or arouses contempt.

Also, as we know, the Courts have extended the First Amendment protection for our newest method of speaking, and that being the internet. Anything on line is equally protected under the First Amendment, again, whether it addresses uncomfortable expression touching on political

or religious matters. "There's no limit to the First Amendment, even though the communication may be on line." **Reno vs. American Civil Liberties Union**, 521 U.S. 844.

In addition to that, we have political campaigns, we know, "Signs pertaining to political campaigns erected in neighborhoods," the Courts have said, "are a form of freedom of expression and come under the Federal Constitution's First Amendment." **City of Ladue vs. Gilleo**, 512 U.S. 43. The Court in that case says, "Residential signs play an important part in the political campaign."

There are some limitations on free speech, as we know. There are certain classes of speech that remain unprotected under the ambit of the First Amendment. They include obscenity, defamation, fraud, incitement, true threats, and speech integral to criminal conduct.

There is no suggestions by anyone in this case the manner of speech we are talking about, e-mails, fell anywhere within those categories that are not protected by the First Amendment.

In a case in the First Circuit Court, 2014, **United States vs. Sayer**, the Court found the interstate stalking statute which prohibits a course of conduct done with "intent to kill, injure or place under surveillance with intent to kill, harass, intimidate or cause substantial

emotional distress" clearly targets conduct performed with serious criminal intent, not just speech that happened to cause annoyance or insult. In that case they indicate that that type of statute, clearly, conduct performed with criminal intent not just speech that caused annoying insults, the Court went on in that case and in another case to cite the proposition from **Madsen vs. Woman's Health Center** that, "The rule is that in public debate our citizens must tolerate insulting, and even outrageous speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."

Applying those cases to the facts we have here, it appears that the indictment or the criminal charges are directed at speech that is protected. I don't see any exemption from that protection by any of the recognized areas. This Appellee was a political figure active in the Rhode Island General Assembly and running for reelection. The topics being discussed policies and legislation, bridge tolls, union contracts, funding for public schools. I think that regardless of my thoughts as to whether or not the elements of the crime could be met, based on these facts, I think the speech that we have here is protected under the Constitution.

So, for all of those reasons that I've given, both

the definitions, and the elements of the statute and the constitutionally protected activity, the Court, I think, has no choice but to dismiss the complaint that we have here.

The Appellee, I certainly understand his concerns, and references, clearly, there was a concern about the fictitious e-mails being sent back and forth, but the Court is constrained and refined by the statute created by the General Assembly in looking at those definitions and the circumstances for which this case arose. The Court cannot find there was a criminal violation here. And whatever the language was at that point in time, short of being threatening or harming an individual, I think it is protected under the First Amendment to the United States.

So, counsel, I thank you for your help and support, and you can prepare an Order to that effect.

MR. MANN: Your Honor, I assume this resolves the restraining orders?

THE COURT: I'm sorry?

MR. MANN: I assume this will absolve the Restraining Orders, the No Contact Orders?

THE COURT: Let me see you for a minute.

(Bench conference out of the hearing of the reporter.)

THE COURT: My understanding any Restraining Orders

were part of this action. Once the case is dismissed, any other Orders or matters are resolved, including bail and Restraining Orders.

Clearly, if there is an issue with Restraining Orders, there is another method by which any individual can come to court seeking protection. And that's in the civil matter, another calendar, but that certainly can be done, if anyone wishes to do that. But I think any Order that was part of this criminal case, once the case is dismissed, the Order is vacated at that point.

MR. MANN: Thank you.

MS. McLAUGHLIN: Thank you, your Honor.

(Whereupon Court recessed at 2:58 p.m.).

R E C E S S