



DOMESTIC VIOLENCE: STALKING LEGAL OUTLINE (MARCH 2017)

A. DEFINITIONS

1. **Stalking** occurs when a person willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person. Stalking is a misdemeanor of the first degree. § 784.048(2).
 - a. “Harass” means to engage in a course of conduct directed at a specific person which causes substantial emotional distress to that person and serves no legitimate purpose. § 784.048(1)(a).
 - b. “Course of conduct” means a pattern of conduct composed of a series of acts over a period of time, however short, which evidences a continuity of purpose. The term does not include constitutionally protected activity such as picketing or other organized protests. § 784.048(1)(b).
 - c. “Credible threat” means a verbal or nonverbal threat, or a combination of the two, including threats delivered by electronic communication or implied by a pattern of conduct, which places the person who is the target of the threat in reasonable fear for his or her safety or the safety of his or her family members or individuals closely associated with the person, and which is made with the apparent ability to carry out the threat to cause such harm. It is not necessary to prove that the person making the threat had the intent to actually carry out the threat. The present incarceration of the person making the threat is not a bar to prosecution under this section. § 784.048(1)(c).
2. **Aggravated stalking** is a third degree felony and occurs when:
 - a. A person willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person and makes a credible threat to that person. § 784.048(3).
 - b. A person who, after an injunction for protection against repeat violence, sexual violence, or dating violence pursuant to s. 784.046, or an injunction for protection against domestic violence pursuant to s. 741.30, or after any other court-imposed prohibition of conduct toward the subject person or that person's property, knowingly, willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person. § 784.048(4).

- c. A person willfully, maliciously, and repeatedly follows, harasses, or cyberstalks a child under 16 years of age. § 784.048(5).
 - d. A person who, after having been sentenced for a violation of §§ 794.011, 800.04, or 847.0135(5) and prohibited from contacting the victim of the offense under § 921.244, willfully, maliciously, and repeatedly follows, harasses, or cyberstalks the victim. § 784.048(7).
3. **Cyberstalking** means to engage in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose. § 784.048(1)(d).
4. **Sexual cyber harassment**, found in § 784.049, makes it a misdemeanor of the first degree (punishable by up to a year in the local jail) to publish a sexually explicit image of a person that contains or conveys the personal identification information of the depicted person to an internet website without the person’s consent, for no legitimate purpose, and with the intent of causing emotional distress. The law defines “sexual explicit image” as any image depicting a person engaged in sexual conduct. The crime is a misdemeanor, however, if a person has a prior conviction for the same crime and commits a second or subsequent crime, the crime is a felony. The new law allows a law enforcement officer to arrest, without an arrest warrant, any person that he or she has probable cause to believe has violated the law. The statute also provides that the victim may initiate a civil action against a person who violates this law and such civil action may include an injunction and monetary damages.

B. ELEMENTS REQUIRED:

1. **The Statute requires two or more instances of stalking:**
- a. Over a period of 4 months, the respondent repeatedly emailed and sent gifts to the petitioner, followed by a long letter that, due to the content, prompted her to file for an injunction against stalking which was granted by the court. The respondent appealed and the appellate court reversed the ruling. Although the court found that the letter would have caused a reasonable person to suffer the “substantial emotional distress” required by statute, there was no second incident of stalking that supported the issuance of the final injunction. Laseringo v. Gerhardt, 154 So. 3d 520 (Fla. 5th DCA 2015).
 - b. A former wife received an injunction for protection against stalking against her former husband and the former husband appealed. The

court affirmed the injunction and found that there was sufficient evidence to show that the former husband's conduct constituted stalking. On three occasions, he had gone to the former wife's house at night, walked around her property, and shined a flashlight into the windows. Robertson v. Robertson, 164 So. 3d 87 (Fla 4th DCA 2015).

- c. The trial court ordered an injunction against stalking against the petitioner's sister's boyfriend, who appealed. Since the petitioner failed to prove repeated acts of harassment as the statute requires, the appellate court reversed. Carter v. Malken, 207 So. 3d 891 (Fla. 4th DCA 2017).

2. "Harassing" must cause emotional distress:

- a. The respondent appealed an order of protection against stalking entered on behalf of his former girl-friend. The appellate court reversed and found that the incidents described by the victim would not have caused a reasonable person to suffer substantial emotional distress. Plummer v. Forget, 164 So. 3d 109 (Fla. 5th DCA 2015).
- b. The respondent appealed from an injunction for protection against stalking which prohibited her from seeing her daughter. The petitioner and respondent were a same sex couple married in Vermont and the petitioner became pregnant through alternative methods. The couple raised the daughter together until they separated. The respondent visited the child until the petitioner began prohibiting visitation. Respondent then tried to text and contact the child asking for visitation. Since none of the messages were threatening and served a legitimate purpose of arranging visitation, and since they did not cause emotional distress, the court reversed and vacated the injunction. Lippens v. Powers, 179 So. 3d 374 (Fla. 5th DCA 2015).
- c. Courts apply a reasonable person standard, not a subjective standard, to determine whether an incident causes substantial emotional distress. The petitioner was granted a four-year injunction for protection against stalking after a neighbor harassed her on several occasions. The neighbor appealed. Due to the substantial discrepancies between the testimony and the allegations in the petition, as well as the general lack of evidence, the court reversed the injunction. Richards v. Gonzalez, 178 So. 3d 451 (Fla. 3d DCA 2015).
- d. The trial court issued a stalking injunction after the respondent made derogatory comments, followed the petitioner with his car after work, and made a flyer with negative comments about the petitioner and passed it out in the petitioner's neighborhood. The appellant appealed the stalking injunction entered against him and claimed that the trial

court erred in entering the injunction because there was insufficient evidence of a course of conduct to support a finding of stalking, and that the conditions imposed by the trial court as part of the injunction were overly broad and thus unconstitutional as a restriction on the appellant's freedom of speech. The court affirmed the stalking injunction and noted that the flyer may not have been a true threat of violence, but was distributed to harass the victim and sought to invade the victim's privacy, thus the flyer was not speech protected by the First Amendment. Thoma v. O'Neal, 180 So. 3d 1157 (Fla. 4th DCA 2015).

- e. The respondent appealed an injunction for protection against stalking that prohibited her from contacting the petitioner. Since there was no evidence that the conduct in question caused the petitioner substantial emotional distress under § 784.048(1)(a), the court reversed and remanded the case. Roach v. Brower, 180 So. 3d 1142 (Fla. 2d DCA 2015).
- f. Neighbors filed petitions for injunctions for protection against stalking against each other and the court issued both injunctions. One neighbor appealed, stating that the evidence was insufficient to establish that appealing neighbor followed or harassed the other neighbor. The appellate court reversed, noting that there was not competent, substantial evidence to support the injunction. The behavior described during the hearing did not constitute following or harassment as described in the statute. Further, the evidence that was admitted was based upon hearsay and speculation. Klemple v. Gagliano, 197 So. 3d 1283 (Fla. 4th DCA 2016).

3. Cannot be overbroad:

- a. The respondent claimed that the petitioner, a police officer, cut him off in traffic, so he followed the police officer into the neighborhood where they both lived and complained to the officer about his driving. The officer then gave the respondent a ticket for driving without a seatbelt, which the respondent denied. The respondent then sent several letters to the officer's boss, other public officials, and to the officer's home address, complaining about his mistreatment, and also posted the officer's picture on the internet with a complaint. The officer petitioned for an injunction against stalking, which was issued and prohibited the respondent from coming within 500 feet of the officer's residence, from posting anything on the internet regarding the officer, and from defacing or destroying the officer's personal property. While the appellate court upheld the injunction, it also stated that the injunction was overly broad since the first amendment protects the respondent's right to criticize public officials, and struck the provision which interfered with the

respondent's freedom of speech. Neptune v. Lanoue, 178 So. 3d 520 (Fla. 4th DCA 2015).

- b. A neighbor received a stalking injunction against the other neighbor that included a provision that provided: "The Respondent may travel on his driveway to enter and leave his property but may not linger on his driveway. The Respondent is permitted to continue to live in his home but shall have no contact w/the Petitioner." The injunction also required the respondent to remove the cameras bordering the neighbor's property within ten days and allowed the respondent to be on his driveway for that ten-day period in order to comply with the injunction. The appellate court affirmed the injunction, but reversed the portion of the order that required the respondent to stay off of his driveway. The court ruled that this provision was overbroad because it included both behavior that could constitute stalking, and legal behavior that should have been permitted. Smith v. Wiker, 192 So. 3d 603 (Fla. 2d DCA 2016).

4. Due process required:

- a. Petitioner was awarded an injunction against stalking the respondent appealed. At a very brief hearing in which both parties appeared pro se, the respondent was not allowed an opportunity to present his case. The appellate court reversed because there was not competent and substantial evidence to support the stalking injunction since the petitioner did not show that respondent's behavior caused substantial emotional distress, and only described one incident rather than the requisite two. The court also noted that even if the evidence presented was sufficient, they would have still reversed because the trial court did not give the appellant a full hearing or an opportunity to present his case to satisfy due process. David v. Schack, 192 So. 3d 625 (Fla. 4th DCA 2016).
- b. A couple lived together for seven years before breaking up. The girlfriend filed a petition for protection against stalking after the boyfriend forced her out of their home and made over 200 harassing and threatening phone calls and text messages to both her and her family. The boyfriend tried to introduce copies of the texts and claimed they were well meaning, as well as a witness, but the court stated that the sheer number of texts and calls constituted stalking, and did not allow the copies into evidence. The judge did not allow the witness to testify, and the boyfriend appealed. The appellate court reversed and remanded since the boyfriend was not given due process at the hearing and could not present his defense. Ceelen v. Grant, ___ So. 3d ___, 2016 WL 4944103 (Fla. 2d DCA 2016).

5. Stalking can constitute an act of repeat violence.

The petitioner appealed after the circuit court denied her petition for an injunction for protection against repeat violence. At the hearing, the petitioner testified that the respondent choked her multiple times and left marks around her neck, then threatened to kill her. On a later date, she testified that the respondent again choked her and left marks, then threw her to the ground. The respondent called the petitioner 28 times on one occasion and about 30-40 times during the month. He also left pictures of her house, texted her, followed her when she was with co-workers, and threatened to slash her tires. She also testified that he blocked her from leaving work with her car, banged on her car doors and threatened her. The respondent did not appear at the hearing. The court denied the injunction, stating that there was no physical violence, but that the petitioner could re-file under a different form of petition, such as a stalking petition. The appellate court reversed, stating that the petitioner clearly established two incidents of violence as the statute required, when she testified about the two choking incidents. Austin v. Echemendia, 198 So. 3d 1058 (Fla. 4th DCA 2016).

6. Cyberstalking burden of proof not met:

- a. Two Facebook posts were not cyberstalking. The wife was granted an injunction for protection against domestic violence. The appellate court reversed and held that the husband's two posts on his own social media webpage did not amount to cyberstalking, and that the wife failed to establish that she had reasonable cause to believe she was in imminent danger of becoming a victim of domestic violence. The wife believed the husband's posts showed that he had hacked her Facebook account or had been spying on her, and she testified that someone had installed a keylogger on her computer that kept track of her computer use. However, there was no evidence that it was her husband that installed the keylogger. The court noted that the husband's posts did not meet the statutory definition of cyberstalking because the posts were not directed at a specific person; they were posted to the husband's page and the wife was not "tagged" or mentioned, nor were the posts directed to her in any obvious way. The court also noted that although the wife's assertions that the husband somehow "hacked" into her Facebook account were disconcerting, that behavior alone does not amount to cyberstalking because it is not an electronic communication. Horowitz v. Horowitz, 160 So. 3d 530 (Fla. 2d DCA 2015).
- b. Mr. Blum claimed that Mr. Scott sent out over 2200 emails that negatively affected his business, and the court entered an order prohibiting Mr. Scott from cyberstalking. Mr. Scott appealed, claiming

that the petitioner failed to meet his burden of proof, and that the order hindered his free speech. The appellate court did not discuss the First Amendment issue because they reversed, finding that Mr. Blum failed to meet his evidentiary burden. While the emails may have caused Mr. Blum some emotional distress or embarrassment, the appellate court found that they did not meet the definition of cyberstalking. Scott v. Blum, 191 So. 3d 502 (Fla. 2d DCA 2016).

- c. For cyberstalking, whether or not a communication causes substantial emotional distress should be narrowly construed and is governed by the reasonable person standard. In this case, the appellant appealed a non-final order denying his motion to dissolve an ex parte injunction prohibiting cyberstalking. Both parties have companies which produce holograms used in the music industry, and an argument and lawsuit arose regarding the right to show a hologram during a Music Awards show. The trial court granted the amended petition for protection that prohibited the appellee from communicating with the appellant or posting any information about him online, and ordering that he remove any materials he already had posted from the websites. The order was based upon various texts, emails, posts, and a fear of violence. The appellant claimed that the texts and posts were merely the result of a heated argument and didn't constitute cyberstalking, and were also a violation of his first amendment rights. The appellate court agreed and reversed the order that granted the injunction. The court stated that none of the communications should have caused substantial emotional distress and served a legitimate purpose, and therefore did not constitute cyberstalking. David v. Textor, 189 So. 3d 871 (Fla. 4th DCA 2016).