

Stalking Protective Orders (SPOs): Getting Them And Getting Rid of Them

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1. Statutory Authority: ORS 163.730-163.753; ORS 30.866.

2. Elements of Claim:

- Within the prior two years;
- Respondent intentionally, knowingly, or recklessly;
- Engaged in repeated (two or more) and unwanted contacts:
 - Must cause Petitioner reasonable apprehension about his/her personal safety or safety of immediate family or household. Personal safety relates to physical safety (Delgado v. Souders, 334 OR 122, 150-151 (2002)).
 - With Petitioner or a member of Petitioner's immediate family or household;
 - Alarming or coercing the other person:
 - Contacts must be subjectively unwanted;
 - Must be objectively reasonable for Petitioner to be alarmed or coerced by the contacts.
- To summarize from Delgado v. Souders, 334 OR 122, 133 (2002):

Applying those definitions to ORS 30.866(1)(a), we conclude that ORS 161.085(7) requires that a defendant act with a conscious objective to engage in repeated and unwanted contact with the other person; ORS 161.085(8) requires that a defendant act with an awareness that he or she is engaging in repeated and unwanted contact with that person; and ORS 161.085(9) requires that a defendant be aware of and then consciously disregard a substantial and unjustifiable risk that he or she is engaging in repeated and unwanted contact with that person, and the risk must be of such a degree that a reasonable person would not have disregarded it. Stated differently, at a minimum (that is, in the case of "recklessly"), a defendant subjectively must be aware of a substantial and unjustifiable risk that the contacts in question are repeated and unwanted by the recipient, and then consciously and unreasonably disregard that risk.

That, in turn, demonstrates that ORS 30.866(1)(a) speaks to a defendant's mental state and actions with regard to a particular person--in other words, a defendant at least recklessly must direct his or her repeated and unwanted contacts toward a targeted, particular person. By contrast, a defendant who intentionally, knowingly, or recklessly places himself or herself in a particular location without any awareness of a substantial and unjustifiable risk that the contacts in question are repeated and unwanted by a particular person cannot be said to have acted with the minimal requisite mental state in respect of "contact[ing]" that person.

3. Certain Activities Excluded From Breach of SPO. ORS 163.755 lists a number of exemptions for which

an SPO may not be issued, including labor activities and persons in the criminal justice system against law enforcement officers. However, see *State v. Borowski*, 231 Or App 511 (2009) where the Court of Appeals voided ORS 164.887 (interference with agriculture operations) under the equal protection clause to the United States Constitution, based upon a similar exemption for activities connected with a “labor dispute.” The court held that the equal protection clause was violated because the statute “creates a distinction (exemption) for labor protest activities, that has no bearing on any legitimate governmental interests.” *Id.* At 524. The court in *Borowski* declined the option to save the statute by excising the labor exemption, asserting that that would have been contrary to legislative intent.

4. Higher Burden for Speech-Based Contacts. *State v. Rangel*, 328 OR 294, 302-04 (1999).

Where the unwanted contacts are speech based (including writings), such contacts must:

- Instill in the recipient a fear of imminent, serious, and personal violence;
- Express authors intention that the threat will be executed and author has the ability to execute;
- Be unequivocal;
- Be objectively likely to be followed by unlawful acts.

[Where there are both speech and non-speech based contacts, the speech-based contacts can “provide context for *** other, non-communicative contacts” and bolster a petitioner’s claim for a SPO. *Wood v. Trow*, 228 Or App 600, 606 (2009).]

5. Getting a Stalking Order - Two Paths:

- ORS 30.866 - ex parte application to Court (like FAPAs);
- ORS 163.744 - via law enforcement agency (complaint form - see ORS 163.735).

6. Hearing and Relief:

- Evidentiary standard is preponderance of the evidence. Burden on Petitioner.
- The facts alleged in the Stalking Petition are not evidence. *Jones v. Lindsey*, 193 Or App 674, 677 (2004).
- Court may enter temporary order pending further proceedings or protective order of unlimited duration. Court may order:
 - No or limited contact;
 - Mental health evaluation;
 - Initiate civil commitment procedures;
 - Disqualify Respondent from receiving handgun license or lead to revocation of such license;
 - Other relief. Petitioner may also recover special and general (economic and non-economic) damages, including damages for emotional distress; punitive damages; and reasonable attorneys fees and costs (ORS 30.866(4)). (Query: Attorney fees provide for Petitioners only - Would court make the right reciprocal for a prevailing Respondent?)

7. Terminating SPOs. *Edwards v. Biehler*, 203 Or App 271 (2005). Upon application of Respondent and

hearing, Court may terminate a stalking protective order when the bases for issuing the order are no longer present. Court to determine whether Petitioner continues to suffer “reasonable apprehension” due to past acts of Respondent. Similar to FAPA renewal standards. [Biehler specifically references SPOs issued under ORS 163.738. However, there is no reason to believe that the same avenue for relief would not be available under ORS 30.866.]

There is no prescribed time period which must pass in order for a respondent to seek to terminate an SPO but in *Stuart v. Morris*, 231 Or App 26 (2009), the Court held that the mere passage of 5 months after Respondent’s first motion to terminate an SPO was insufficient. The Court noted it is Respondent’s burden to meet the burden of persuasion on a motion to terminate. In *Stuart*, on the first and second motions to terminate, Respondent remained incarcerated but Petitioner continued to fear him. Petitioner testified that Respondent’s friends had threatened her since his incarceration.

CASE LAW - INTRODUCTION

The following case law review and analysis is not exhaustive. However, it indicates quite clearly the Court of Appeals’ exacting analysis of SPOs. The Court has repeatedly struck down SPOs, even where the underlying conduct was obnoxious, offensive, or socially inappropriate. The Court requires strict adherence to the elements required to sustain a stalking order, including the subjective and objective elements. The Court is particularly exacting when expressive conduct forms the basis of the stalking conduct.

CASE LAW REVIEW

Stalking Protective Orders Reversed on Appeal:

Edwards v. Lostrom, 224 Or App 253 (2008). SPO prohibits contact with granddaughter. Petitioner fails to demonstrate Respondent’s required mental state. No evidence that Respondent was told his contact with Granddaughter was unwelcome. No evidence that Respondent knew that contact was unwelcome.

Farris v. Johnson, 222 Or App 377 (2008). Respondent driving past Petitioner’s home and coming into Petitioner’s visual presence insufficient to show unwanted contact. Encounter with Petitioner’s husband outside courtroom at temporary SPO hearing insufficient where no evidence Petitioner was aware of such contact.

Goodness v. Beckham, 224 Or App 565 (2008). Ex-spouses. E-mail correspondence is expressive contact. Only one physical contact insufficient to meet two or more standard. While third party contacts can be considered, Respondent’s contacts to Eugene police not imputed to Respondent as prohibited physical contacts.

Lopus v. Glover, 149 Or App 482 (2004). Insufficient evidence of more than one unwanted contact or that any contact caused Respondent reasonable apprehension of physical harm.

Magyar v. Weinstein, 211 Or App 86 (2007). Threatening statements made not to Petitioner but to Respondent’s sister. Such comments could not be reason for Petitioner to fear for “his personal safety.” Other contacts insufficient to show reasonable fear of personal safety.

Michieli v. Morgan, 192 Or App 550 (2004). Respondent’s contacts are purely expressive. Insufficient evidence to meet additional proof requirements required by *State v. Rangel*, supra.

Osborne v. Fadden, 225 OR 431 (2008). While evidence showed existence of civil conspiracy by Respondents (Husband and Wife) against Petitioners (Husband and Wife - (Wife was Respondent/Husband's ex) none of the e-mails and phone calls by Respondents caused Petitioners reasonable apprehension of personal safety. Among other things, Respondents signed Petitioners up for magazine subscriptions, music services, and made e-mails to Petitioners' employer seeking to get one of the Petitioners fired. This conduct supported the civil conspiracy but not stalking.

Ross v. Holt, 224 Or App 405 (2008). Unmarried parents. Phone calls and conversations insufficient to show imminent fear of serious violence, although one contact included a threat to take the children. Court construed the threat as Respondent's intention to seek legal custody. "Respondent had no history of violence or any activity or trait that would cause a reasonable person in Petitioner's situation to be alarmed by his coming into the presence of her or her children***." Id at 410 [suggests that the Court may be forced to accept character evidence regarding Respondent's history of non-violent behavior.]

Sparks v. Deveny, 221 Or App 283 (2008). Respondent e-mailed contacts to Petitioner's ex-husband; showed up at gym where Petitioner exercised; attended her exercise classes, sent Christmas cards and correspondence, and made phone calls. Contacts were "boorish, obsessive, and troubling" but did not amount to a fear of imminent and serious personal violence as required by Rangel. Non-expressive contacts also do not meet personal safety threshold.

Valerio v. Valerio, 224 Or App 265 (2008). Daughter/Stepmother. Yelling incident at coffee shop amounts to expressive conduct insufficient to meet Rangel standard.

Cases Upholding SPOs:

Boyd v. Essin, 170 Or App 509 (2000). A mix of expressive and non-expressive contacts, but Court rules at least three non-expressive contacts were sufficient, including Respondent assaulting his son, driving by Petitioner's home multiple times per day, and watching Petitioner's home with binoculars. As to the latter, although not falling within specific stalking acts (ORS 163.730 (3)), "It shows an unwanted relationship or association between Petitioner and Respondent, and it is precisely the kind of contact the statute was intended to prevent." Id at 517. Although Petitioner did not expressly say that she was subjectively alarmed, Court may infer such subjective state from her testimony, the nature of Respondent's contacts, and his history of assaultive behavior toward Petitioner. Judge Armstrong, in dissent, questions the majority inferring the element of subjective alarm.

Bryant v. Walker, 190 Or App 253 (2003). Respondent shopped at the department store where Petitioner worked at two or three times a week. Petitioner alleged that respondent would stare at her while he shopped, and he always purchased items at her check stand. Other precipitating events included one instance where Petitioner asked Respondent "what he was looking at" and a separate occasion where Petitioner saw Respondent drive by her home. On appeal, Respondent raised two issues. First, under ORS 163.738(2)(a)(B), he argued that he did not know his contact was "unwanted". The Court disagreed with Respondent, noting that Petitioner's statement asking the Respondent "what he was looking at" satisfied this standard. Second, the Court examined ORS 30.866(1)(b)'s requirement that the Petitioner's fear and alarm were "objectively reasonable for a person in [her] situation." The Court decided that her fear was objectively reasonable because the Respondent drove by her house, indicating he obtained personal information about her, and because she had information that, at some point in the past, Respondent had been accused of violence towards his ex-wife.

Pinkham v. Brubaker, 178 Or App 360 (2001). SPO prohibits contact with Petitioner's daughters. Respondent

is ex-boyfriend who recently moved out of Petitioner's home. Issue on appeal is whether Respondent's actions constitute two or more "unwanted contacts" sufficient to satisfy the Rangel standard. The Court cited several examples of these. First, the Court stated that driving the Petitioner's daughters from school to his house, without the Petitioner's knowledge is unwanted contact. Second, the Court mentioned that shredding the girl's dresses with scissors amounted to unwanted contact. Finally, the Court noted that the Respondent's contact was unwanted when he parked his car outside Petitioner's house and waited for Petitioner's daughters to return home from school.

Wood v. Trow, 228 Or App 600 (2009). Both speech based and non-speech based conduct supported the SPO, with speech based contact providing the contacts for the non-speech based contacts, including Respondent wandering in Petitioner's yard late at night with a knife and that Respondent had stolen mail from Petitioner's mailbox.

Other Cases:

Lomax v. Carr, 194 Or App 518 (2004). Respondent challenged the form of citation prescribed in ORS 163.744 as being inconsistent with the requirements of the ORCP. The court ruled, pursuant to ORCP 1A, that the rules of civil procedure do not apply where "a different procedure is specified by statute or rule." Since ORS Chapter 163 prescribed a different procedure for initiating actions, Respondent's ORCP challenge was denied. The case, however, was reversed, because the trial court prohibited a due process hearing on Respondent's challenge to the SPO. Note: ORCP 1A provides that the ORCP rules govern practice and procedure in all civil actions, "except where a different procedure is specified by statute or rule." Therefore, except for a few particulars, for example, the issuance of a stalking citation under ORS 163, as an alternative to a stalking complaint under ORS 30.866, the remainder of the ORCP rules should apply, including discovery, depositions, requests for findings of facts, etc.

Johnson v. McGrew, 137 Or App 55 (1995). An appeal of a trial court's SPO is not a criminal prosecution under the Oregon Constitution and Respondent is not entitled to court-appointed counsel. Although a Respondent may be arrested for violating an SPO, similar to an arrest for violation of a FAPA, that does not, in and of itself, render the case criminal and require the appointment of counsel.

State v. Rangel, 146 Or App 571 (1997). Defendant was charged with a stalking criminal offense. ORS 163.732. Defendant challenged the complaint, arguing that the stalking statute was over-broad, in violation of the Oregon Constitution's free speech provisions, Article 1, Section 8. By construing the statute narrowly, the statute was found constitutional. See State v. Rangel and expressive content standards above in paragraph 3.

Stuart v. Morris, 231 Or App 26 (2009). A time-lapse of 5 months after Respondent's first failed attempt to terminate an SPO was insufficient time (in the absence of new evidence) to justify termination of an SPO in a second attempt. Petitioner's original fear of Respondent, though jailed, from threats from Respondent's friends was sufficient to justify her reasonable fear.

PRACTICE SUGGESTIONS

- Request ORCP 62 findings of fact and conclusions of law.
- If challenging a SPO:
 - File notice of request for attorney fees citing ORS 30.866 (but note that statute provides expressly for Petitioners.
 - Pursue pre-hearing discovery, including requests for production of documents and depositions. (Get court

permission for in person contact at depositions.)

- When challenging an SPO, ensure that Petitioner's evidence conforms to the particulars of the petition or complaint.
- Consider, in dissolution and separation cases, stipulating to an order with appropriate restraint and no contact language pursuant to ORS 107.095(1)(c) and ORS 107.095(5) (permitting entry of the order into LEDS and NCIC), as an alternative to the SPO.