APPELLATE COURT

STATE OF CONNECTICUT

NO. A.C. 38043

STACY BERNSTEIN,

PLAINTIFF-APPELLEE,

- VS -

ROBERT SERAFINOWICZ,

DEFENDANT-APPELLANT.

On Appeal From The Superior Court
For The Judicial District Of Waterbury
(Hon. Wilson J. Trombley, J.T.R.)

BRIEF OF DEFENDANT-APPELLANT

JOHN R. WILLIAMS
51 Elm Street
New Haven, CT 06510
203-562-9931
Fax: 203-776-9494
jrw@johnrwilliams.com
Attorney for Appellant

To Be Argued By:
JOHN R. WILLIAMS, ESQ.

TABLE OF CONTENTS

	Page
ISSUES PRESENTED	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
ARGUMENT	3
I STANDARD OF REVIEW	3
II THE DEFENDANT'S CONDUCT, UPON WHICH THE COURT BASED ITS JUDGMENT IN THIS CASE, WAS PROTECTED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND BY ARTICLE FIRST, SECTIONS 3, 4 AND 5, OF THE CONNECTICUT CONSTITUTION	4
III THE COURT ABUSED ITS DISCRETION IN FINDING THAT THE DEFENDANT ENGAGED IN CONDUCT CONSTITUTING STALKING IN THE SECOND DEGREE	8
CONCLUSION	10
CERTIFICATION OF SECTION 67-2 COMPLIANCE	11

ISSUES PRESENTED

1 Was the defendant's conduct protected by the First Amendment to the United States Constitution and by Article First, Sections 3, 4 and 14, of the Connecticut Constitution?

2 Did the court abuse its discretion in finding that the defendant had engaged in conduct constituting stalking in the second degree?

TABLE OF AUTHORITIES

Page

Brown v. Disciplinary Committee of Edgerton Volunteer Fire Dept., 97 F.3d 969 (7th Cir. 1996) 5

Brown v. K.N.D. Corporation & Wilbur Smith, 205 Conn. 8, 529 A.2d 1292 (1987) 4

Carusillo v. Associated Women's Health Specialists, P.C., 79 Conn. App. 649, 831 A.2d 255 (2003) 3

Chila v. Stuart, 81 Conn. App. 458, 840 A.2d 1176 (2004) 3

Cologne v. Westfarms Associates, 192 Conn. 46, 469 A.2d 1201 (1984) 7

Colson v. Grohman, 174 F.3d 498 (5th Cir. 1999) 5

Connick v. Myers, 461 U.S. 138 (1983) 5

Corbett v. Register Publishing Co., 33 Conn. Supp. 4, 356 A.2d 472 (1975) 4

Cotarelo v. Sleepy Hollow Police Dept., 460 F.3d 247 (2nd Cir. 2006) 6

Dishnow v. School Dist. of Rib Lake, 77 F.3d 194 (7th Cir. 1996) 5

Gorman-Bakos v. Cornell Cooperative Extension of Schnectady County, 252 F.3d 545 (2nd Cir. 2001) 5

Harman v. City of New York, 140 F.3d 111 (2nd Cir. 1998) 6

Hoover v. Radabaugh, 307 F.3d 460 (6th Cir. 2002) 6

In re Shaquanna M., 61 Conn. App. 592, 767 A.2d 144 (2001) 9

Johnson v. Ganim, 342 F.3d 105 (2nd Cir. 2003) 6

Johnson v. Multnomah County, 48 F.3d 420 (9th Cir.), *cert. denied*, 515 U.S. 1161 (1995) 5-6

Kelley v. Bonney, 221 Conn. 549, 606 A.2d 693 (1992) 4

Keyser v. Sacramento City Unified Sch. Dist., 238 F.3d 1132 (9th Cir. 2001) 5

Latino Officers Association, New York, Inc. v. The City of New York, 196 F.3d 458 (2nd Cir. 1999) 6

Lewis v. Cowen, 165 F.3d 154 (2nd Cir. 1999) 6

Malloy v. Town of Colchester, 85 Conn. App. 627, 858 A.2d 813 (2004) 3

Moriarity v. Lippe, 162 Conn. 371, 294 A.2d 326 (1972) 4

O'Briskie v. Berry, 95 Conn. App. 300, 897 A.2d 605 (2006) 3

Palomba v. Gray, 208 Conn. 21, 543 A.2d 1331 (1988) 3

Ryan v. Dionne, 28 Conn. Supp. 35, 248 A.2d 583 (1968) 4

Smart v. Corbitt, 126 Conn. App. 788, 14 A.3d 368 (2011) 4

State v. Geisler, 222 Conn. 672, 610 A.2d 1225 (1992) 7

State v. Linares, 232 Conn. 345, 655 A.2d 737 (1995) 7

Strada v. Connecticut Newspapers, Inc., 193 Conn. 313, 477 A.2d 1005 (1984) 4

Swank v. Smart, 898 F.2d 1247 (7th Cir. 1990) 5

Vasbinder v. Scott, 976 F.2d 118 (2nd Cir. 1992) 5

Weintraub v. Board of Education, 593 F.3d 196 (2nd Cir. 2010) 5

Woodcock v. Journal Publishing Company, Inc., 230 Conn. 525, 646 A.2d 92 (2009) 4

STATEMENT OF THE CASE

Public Act 14-217, which took effect on January 1, 2015, provides: "(a) Any person who has been the victim of sexual abuse, sexual assault or stalking, as described in sections 53a-181c, 53a-181d and 53a-181e of the general statutes, may make an application to the Superior Court for relief under this section, provided such person has not obtained any other court order of protection arising out of such abuse, assault or stalking and does not qualify to seek relief under section 46b-15 of the general statutes."

Section 53a-181d(b) of the General Statutes provides that "[a] person is guilty of stalking in the second degree when:

> (1) Such person knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person to fear for such person's physical safety or the physical safety of a third person; or
>
> (2) Such person intentionally, and for no legitimate purpose, engages in a course of conduct directed at a specific person that would cause a reasonable person to fear that such person's employment, business or career is threatened, where (A) such conduct consists of the actor telephoning to, appearing at or initiating communication or contact at such other person's place of employment or business, provided the actor was previously and clearly informed to cease such conduct, and (B) such conduct does not consist of constitutionally protected activity.

On March 27, 2015, the defendant applied in the Superior Court for the Waterbury Judicial District for a civil protection order pursuant to the aforesaid Public Act. (Appendix, pp. A-22 - A-25) On April 4, 2015, the plaintiff applied in the same court for a civil protection order against the defendant. (Appendix, pp. A-3 - A-4) After a two-day consolidated hearing on both applications, the court (Trombley, J.T.R.) On May 28, 2015, issued a protective order against the defendant which, in addition to standard orders,

prohibited the defendant from "posting any information, whether adverse or otherwise, pertaining to Bernstein on any website for any purpose." (Id., pp. A-5 - A-6)

In its memorandum of decision, the court found that the defendant is an attorney and the plaintiff is "his former friend and clinical forensic psychologist...." (Id., p. A-9) The court held "that there is reasonable grounds to believe that [the defendant] committed acts that constitute stalking in the second degree in violation of Section 53a-181d...." (Id., p. A-10) The court held that the defendant, "having no justification to do so, embarked upon a course of conduct, the purpose of which was to...adversely affect, if not destroy, [the plaintiff's] ability to make a living from his chosen profession as a clinical forensic psychologist, who specializes in threat assessments for government and corporate entities" and that "it was and is reasonable for [the plaintiff] to fear for his safety and that of his family." (Id., p. A-11) The court based its conclusions chiefly on its finding that the defendant had "communications with state and municipal officials...." (Id., p. A-12) The court held that the defendant in such writings had "questioned [the plaintiff's] fitness to serve as a commissioner on the Connecticut Board of Firearms Permit Examiners, a position to which he was appointed by the governor one year previous." (Id., p. A-15) The court also expressed concern that the defendant had "contacted officials employed by the school system where [the defendant's] son is in the fourth grade and where [he] is a member of that community's school safety board...warn[ing] the school official that [the plaintiff] was 'a danger to children.'" (Ibid.) Finally, the court supported its conclusions of law by the finding that the defendant "sent an e-mail to Commissioner Soberoff of the Los Angeles Police department" where the plaintiff in 2014 "was a guest speaker at a threat management conference" and made various allegations against the plaintiff which he

"advised" Soberoff to consider "if you plan on asking him to speak at your conference again." (Id., p. A-16) The defendant subsequently contacted Soberoff a second time "as a great matter of public concern" and asserting that "this man has no business advising public agencies such as police departments." (Id., p. A-17)

ARGUMENT

I STANDARD OF REVIEW

The standard of appellate review in any challenge to a verdict after trial is abuse of discretion. "Our review...involves a determination of whether the trial court abused its discretion, according great weight to the action of the trial court and indulging every reasonable presumption in favor of its correctness...since the trial judge has had the...opportunity...to view the witnesses, to assess their credibility and to determine the weight that should be given to their evidence." Palomba v. Gray, 208 Conn. 21, 24-25, 543 A.2d 1331 (1988); O'Briskie v. Berry, 95 Conn. App. 300, 305-06, 897 A.2d 605 (2006). *Cf., e.g.,* Malloy v. Town of Colchester, 85 Conn. App. 627, 858 A.2d 813 (2004); Chila v. Stuart, 81 Conn. App. 458, 840 A.2d 1176 (2004); Carusillo v. Associated Women's Health Specialists, P.C., 79 Conn. App. 649, 831 A.2d 255 (2003). "There is no hard and fast rule by which an abuse of discretion may be determined but, in general, for an exercise of discretion not to amount to an abuse, it must be legally sound and there must be an honest attempt by the court to do what is right and equitable under the circumstances of the law,

without the dictates of whim or caprice." Smart v. Corbitt, 126 Conn. App. 788, 796, 14 A.3d 368 (2011).

II THE DEFENDANT'S CONDUCT, UPON WHICH THE COURT BASED ITS JUDGMENT IN THIS CASE, WAS PROTECTED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND BY ARTICLE FIRST, SECTIONS 3, 4 AND 5, OF THE CONNECTICUT CONSTITUTION

The plaintiff was a public official engaged in activities of public concern at the time of each of the defendant's actions underlying the court's ruling against him. The plaintiff was a gubernatorial appointee to the Connecticut Board of Firearms Permit Examiners. The plaintiff was an appointed member of the Westport School Safety Board. And the plaintiff was an invited speaker at a threat management conference sponsored and conducted by the Los Angeles Police Department. *E.g.*, Moriarity v. Lippe, 162 Conn. 371, 294 A.2d 326 (1972) (municipal police officer); Corbett v. Register Publishing Co., 33 Conn. Supp. 4, 356 A.2d 472 (1975); Ryan v. Dionne, 28 Conn. Supp. 35, 248 A.2d 583 (1968) (municipal tax collector); Brown v. K.N.D. Corporation & Wilbur Smith, 205 Conn. 8, 529 A.2d 1292 (1987) (assistant city manager); Strada v. Connecticut Newspapers, Inc., 193 Conn. 313, 477 A.2d 1005 (1984) (former state senator); Woodcock v. Journal Publishing Company, Inc., 230 Conn. 525, 646 A.2d 92 (2009) (member of municipal zoning and planning commission); Kelley v. Bonney, 221 Conn. 549, 606 A.2d 693 (1992) (public school teacher). According to the findings of the trial court in this case, the defendant's actions expressly targeted these public activities and the plaintiff's participation in them.

"[T]he right to complain both to an elected public official and to an independent state

agency is guaranteed to any citizen in a democratic society regardless of his status...." Weintraub v. Board of Education, 593 F.3d 196, 204 (2nd Cir. 2010).

The defendant's statements unquestionably related to matters of public concern within the meaning of both federal and state constitutions. "[C]riticism of public officials lies at the very core of speech protected by the First Amendment." Colson v. Grohman, 174 F.3d 498, 507 (5th Cir. 1999). "[W]hen the Supreme Court in its cases establishing and bounding the rights of public employees to exercise free speech limited those rights to speech on matters of 'public concern,' they did not mean matters of transcendent importance, such as the origins of the universe or the merits of constitutional monarchy; they meant matters in which the public might be interested, as distinct from wholly personal grievances -- which whether or not protected by the First Amendment are too remote from its central concerns to justify judicial interference with the employment relation, Connick v. Myers, 461 U.S. 138, 147 (1983) -- and casual chit-chat, which is not protected by the First Amendment at all. Swank v. Smart, 898 F.2d 1247, 1251 (7th Cir. 1990)." Dishnow v. School Dist. of Rib Lake, 77 F.3d 194, 197 (7th Cir. 1996) (Posner, C.J.). Thus, the plaintiff in Brown v. Disciplinary Committee of Edgerton Volunteer Fire Dept., 97 F.3d 969 (7th Cir. 1996), engaged in protected free speech when he publicly criticized a decision to change the name of the "Edgerton Fire Department" to "Edgerton Fire District." Complaints "relating to...alleged mismanagement of government funds and violations of [the agency's] bylaws...are clearly matters of public concern." Gorman-Bakos v. Cornell Cooperative Extension of Schnectady County, 252 F.3d 545, 553 n. 4 (2nd Cir. 2001). *Cf.*, Vasbinder v. Scott, 976 F.2d 118, 119-20 (2nd Cir. 1992); Keyser v. Sacramento City Unified Sch. Dist., 238 F.3d 1132, 1137 (9th Cir. 2001); Johnson v. Multnomah County, 48

F.3d 420, 425 (9th Cir.), *cert. denied*, 515 U.S. 1161 (1995). "'[D]iscussion regarding current government policies and activities is perhaps the paradigmatic matter of public concern.' Harman v. City of New York, 140 F.3d 111, 118 (2nd Cir. 1998)....'[C]ommentary on the fact that there is strong evidence implicating a government official in criminal activity goes to the very core of matters of public concern.'" Johnson v. Ganim, 342 F.3d 105, 112-13 (2nd Cir. 2003), quoting Lewis v. Cowen, 165 F.3d 154, 164 (2nd Cir. 1999). "[P]laintiffs' interest in communicating ethnic pride as members of the NYPD is not necessarily a matter only of private concern. A statement is of public concern if, in light of 'the content, form and context of [that] statement, as revealed by the whole record,' it can be 'fairly considered as relating to any matter of political, social, or other concern to the community.'...The parades in which plaintiffs seek to march...are *themselves* about ethnic pride and celebrating ethnic participation in the civic life of New York City." Latino Officers Association, New York, Inc. v. The City of New York, 196 F.3d 458, 466 (2nd Cir. 1999). "Generally, speech on 'any matter of political, social, or other concern to the community is protected by the First Amendment.'" Cotarelo v. Sleepy Hollow Police Dept., 460 F.3d 247, 252 (2nd Cir. 2006) (Winter, J.). "When an institution oversees some aspect of public safety, the correct operation of that institution is a matter of public concern." Hoover v. Radabaugh, 307 F.3d 460, 466 (6th Cir. 2002) (Boggs, J.).

While the cases discussed above arose under the First Amendment to the federal constitution, Sections 3, 4 and 14 of the Connecticut Constitution provide even greater protection to the speech of the defendant here. "[W]e acknowledge that federal constitutional law sets minimum national standards for individual rights and that states may afford individuals greater protections under their own state constitutions....Although we

often look to the United States Supreme Court precedent when construing related provisions in our state constitution, we may determine that athe protections afforded to the citizens of this state by our own constitution go beyond those provided by the federal constitution...." State v. Linares, 232 Conn. 345, 378-79, 655 A.2d 737 (1995). *See* State v. Geisler, 222 Conn. 672, 685, 610 A.2d 1225 (1992).

Section 4 of Article First of the Connecticut Constitution obviously goes far beyond the negative protections afforded by the First Amendment, in creating an affirmative right for every citizen: "Every citizen may freely speak, write and publish his sentiments on all subjects...." As the *Linares* court held, the addition of the words "publish" and "on all subjects" have special significance and demonstrate the broadly expansive nature of the free speech rights of Connecticut citizens. Those rights are particularly important when applied, as here, to attacks on the suitability for public office or employment of persons who are public figures; and even more so when, as here, the court has expressly imposed a prior restraint upon such speech upon pain of both criminal and civil prosecution. The *Linares* court held that the "historical background" to the enactment of the Connecticut Constitution "indicates that the framers of our constitution contemplated vibrant public speech, and a minimum of governmental interference...." 232 Conn. at 386. *See* Cologne v. Westfarms Associates, 192 Conn. 46, 60-62, 469 A.2d 1201 (1984).

The judgment from which the defendant appeals in this case is expressly based upon the defendant's engagement in activities protected by his state and federal free speech rights and not only does it violate these constitutional commands by doing so but goes farther and imposes prior restraint upon continuing to engage in such rights. As such, the judgment here is intolerable in a free society and must be reversed.

III THE COURT ABUSED ITS DISCRETION IN FINDING THAT THE DEFENDANT ENGAGED IN CONDUCT CONSTITUTING STALKING IN THE SECOND DEGREE

The judgment in this case is based solely upon a finding that the defendant engaged in stalking in the second degree in violation of General Statutes Section 53a-181d(b). The court found that the defendant's conduct violated both subsection (1) and subsection (2) of that statute.

The first subsection relates to circumstances in which the defendant's conduct "would cause a reasonable person to fear for such person's physical safety or the physical safety of a third person...." The court limited its findings in this regard to the conclusion that when the defendant complained to supervisory officials of the Westport Public Schools, where the plaintiff serves as an appointed member of the Westport School Safety Board, that the plaintiff was "a danger to children," the fact that the plaintiff has a child in that public school system was sufficient on these facts alone to cause a reasonable person to fear for the physical safety of that child. To articulate that proposition is to refute it. It is utterly irrational and the court offers no other basis for its conclusion that the defendant's conduct violated the first subsection of the stalking statute. There was not a scintilla of evidence presented to the court that the defendant is or ever has been physically dangerous to anyone.

The second subsection has two affirmative requirements. The first is that "such conduct consists of the actor telephoning to, appearing at or initiating communication or contact at such other person's place of employment or business...." There is no evidence in this case that the defendant ever did that. The second affirmative requirement is

"provided the actor was previously and clearly informed to cease such conduct...." While there was evidence that the defendant had been instructed to cease his verbal criticisms of the plaintiff, there was no evidence that he ever had been instructed to cease telephoning to, appearing at or initiating communication or contact at" the plaintiff's place of employment or business.

Moreover, as discussed in the previous portion of this brief, subsection (2) of the stalking statute expressly exempts "constitutionally protected activity." For the reasons stated above, virtually all of the defendant's activity fell within those constitutional protections.

A court abuses its discretion when it "has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors." In re Shaquanna M., 61 Conn. App. 592, 603, 767 A.2d 155 (2001). In this case, the holding that the defendant violated the first subsection of the stalking statute was entirely illogical and thus arbitrary; the holding that the defendant violated the second subsection of the stalking statute was based on improper and irrelevant factors, namely, the defendant's exercise of rights absolutely protected by state and federal constitutions.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted:

JOHN R. WILLIAMS (#67962)
51 Elm Street
New Haven, CT 06510
203-562-9931
Fax: 203-776-9494
jrw@johnrwilliams.com

Attorney for Appellant

CERTIFICATION OF SECTION 67-2 COMPLIANCE

The undersigned attorney hereby certifies pursuant to Connecticut Rule of Appellate Procedure § 67-2 that:

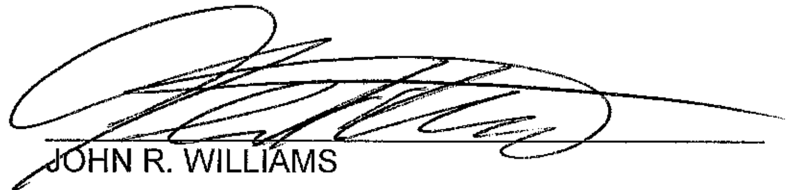
(1) The electronically submitted brief and appendix was delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address was provided, to wit: attycraigfishbein@yahoo.com; and

(2) The electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order, or case law; and

(3) A copy of the brief and appendix was sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7, to wit: Craig Fishbein, Esq., 100 South Main Street, Wallingford, CT 06492, and Hon. Wilson J. Trombley, Judge Trial Referee, 400 Grand Street, Waterbury, CT 06702; and

(4) The brief and appendix filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and

(5) The brief complies with all provisions of this rule.



JOHN R. WILLIAMS