No. 15-113098-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

NAVID YEASIN,

PETITIONER - APPELLEE/CROSS APPELLANT,

V.

THE UNIVERSITY OF KANSAS,

RESPONDENT - APPELLANT/CROSS APPELLEE.

BRIEF OF RESPONDENT - APPELLANT/CROSS-APPELLEE

Appeal from the District Court of Douglas County
The Honorable Robert W. Fairchild, District Judge
District Court Case No. 14CV102

Sara L. Trower, Ks. # 21514
Associate General Counsel and
Special Assistant Attorney
General
245 Strong Hall
1450 Jayhawk Blvd.
Lawrence, KS 66045
Tel: 785-864-3276
Fax: 785-846-4617
e-mail: strower@ku.edu

Attorney for Respondent -
Appellant/Cross Appellee
University of Kansas

Oral Argument – 20 minutes

Table of Contents

NATURE OF THE CASE

This arises out of a petition for review challenging the University's disciplinary expulsion of Mr. Yeasin for his violent abuse and sexual harassment of student Ms. W. and his violation of the University's "No Contact" order prohibiting him from further contact, retaliation and harassment of her.

The University, in order to fulfill its statutory mission as a center for learning, scholarship, and creative endeavor and comply with the obligations imposed on it under *Title IX of the Education Amendments of 1972*, 20 U.S.C. § 1681, *et. seq.*, must be able to effectively discipline students. Regardless of the locus of Mr. Yeasin's, everyday as a student Ms. W. carries with her the effects of his violence against her and harassment of her. Consequently, if the University is to ensure her access to an educational opportunity free of violence, harassment, and retaliation, it must hold Mr. Yeasin accountable for his acts.

On Mr. Yeasin's Petition for Judicial Review, the District Court erroneously concluded that the University's decision to expel Mr. Yeasin was not supported by substantial evidence and that the University had erroneously interpreted its *Code of Student Rights and Responsibilities* because the Court concluded that the *Student Code* applies only to student conduct that occurs on campus or at campus related activities.

STATEMENT OF ISSUES

Issue I: The University is not limited to disciplining students for conduct that occurs only on campus or at University-sponsored events under the *Student Code* because the disjunctive clause "or as otherwise required by federal, state, or local law" extends the University's jurisdiction to other conduct besides on campus conduct or conduct that occurs at University-sponsored events.

Cases

Statutes

Issue II: The University's Expulsion Decision was supported by Substantial Evidence.

Cases

Statutes

STATEMENT OF FACTS

This case involves the University's disciplinary expulsion of Mr. Yeasin for his violent abuse and sexual harassment of Ms. W. and his violation of the University's "No Contact" order directing him to refrain from further contact, harassment and retaliation.

A. *Student Code* Provisions

The University's *Code of Student Rights and Responsibilities* (hereafter *Student Code*) "outlines . . . the standards of conduct expected within the University of Kansas community." [R. 3:488][1] The *Student Code* advises students that they, as members of a community, are expected "to adhere to all published rules, regulations and policies," and that failure to do so "may subject a student to disciplinary action." [R. 3:489] Recognized rights of students include "the right . . . to be free from harassment or discrimination based on . . . sex . . . University policies on Sexual Harassment . . . provide guidance and explain these rights." [R. 3:490]. The Director of Institutional Opportunity and Access (hereafter IOA) is designated to handle inquiries regarding the University's non-discrimination policies.

The *Student Code* provides that "[s]tudents will be exempt from disciplinary action that affects their status as students except for . . . violation of a published Student Senate, University Senate, University or Regents rule

[1] Record references are formatted as volume number:page number(s)

or regulation." [R. 3:490] The *Student Code* defines "Student" as anyone "enrolled full time or part time, pursuing undergraduate, graduate or professional studies. . . ." [R. 3:491]

The *Student Code* provides that campus discussion and expression is subject "to requirements for the maintenance of order." [R. 3:493] Specifically, the "University retains the right to assure the safety of individuals . . . and the continuity of the educational process." [R.3:495]

Article 20 of the *Student Code* provides:

> The University may not institute disciplinary proceedings unless the alleged violation(s) giving rise to the disciplinary action occurs on University premises or at University sponsored or supervised events, *or as otherwise required by federal, state or local law.* (emphasis added).

[R. 3:496] Article 20 was rewritten in its entirety in 2011 as part of the University's biennial review of the *Student Code*, adopted by the Student Senate on March 9, 2011, and approved by the Chancellor on July 31, 2011. [R. 5:802-803] This amendment specifically was intended to ensure that the University could address off-campus conduct. [R. 4:803; Vol. 6, Tr. Nov. 17, 2014 @ 9:9 – 10:6] Coincidentally, the U.S. Department of Education's Office of Civil Rights had issued its April 4, 2011, *Dear Colleague Letter on Sexual Assault.* [R. 4:802-803, Vol. 6, Tr. Nov. 17, 2014 @ 9:9 – 10:6]

Article 22 of the *Student Code* defines "Non-Academic Misconduct," stating:

> Students . . . are expected to conduct themselves as responsible members of the University community. While on University premises or at University sponsored or supervised events, students and organizations are subject to disciplinary action for violations of published policies, rules and regulations of the University and Regents, and for the following offenses:
>
> A. Offenses Against Persons
>
> An offense against a person is committed when a student:
>
> 1. Threatens the physical health, welfare, or safety of another person, places another person in serious bodily harm, or uses physical force in a manner that endangers the health, welfare or safety of another person; or willfully, maliciously and repeatedly follows or attempts to make unwanted contact, including but not limited to physical or electronic contact, with another person. This prohibition includes, but is not limited to, acts of sexual assault.

[R. 3:497] The clause "including but not limited to physical or electronic contact," was added in the 2011 biennial revisions to address the rise in cyber bullying. [R. 4:804; Vol. 6, Tr. Nov. 17, 2014 @ 9:9 – 10:6]

B. University Policy Prohibiting Sexual Harassment

Sexual harassment is prohibited at the University. The University's sexual harassment policy states that:

> Sexual harassment is a . . . violation of federal and state law. Specifically, sexual harassment is a form of illegal discrimination in violation of . . . Title IX of the Education Amendments of 1972, and the Kansas Acts Against Discrimination. University policy prohibits sexual harassment.

[R. 2:37]. The University further describes sexual harassment, in part, as:

> [C]onduct which includes physical contact, advances and comments made in person and/or by phone, text message, email

> or other electronic medium, that is unwelcome; based on sex or gender stereotypes; and is so severe, pervasive and objectively offensive that it interferes with a person's academic performance, employment or equal opportunity to participate in or benefit from University programs or activities. (See http://sexualharassment.ku.edu/Default.aspx for the full description.)

[R. 2:37]

C. Mr. Yeasin's Sexual Harassment and Abuse of Ms. W.

Navid Yeasin and Ms. W. met at the University during a shared class in Fall 2012, when she was a freshman and he a sophomore, and dated off and on from Fall 2012 through May 2013. [R. 2:55, 2:62-68]. Throughout the relationship Mr. Yeasin was abusive. [R. 2:61-84].

1. Summer 2013 Incidents

On May 24, 2013, while at Ms. W's home, Mr. Yeasin yelled at her for approximately three hours and told her she deserved a "slow and painful death." [R. 2:282] During the late/early morning hours of May 27-28, 2013, Mr. Yeasin refused to leave Ms. W's residence and threatened to kill himself, prompting a call to police. [R. 2:282].

In June 2013, both Mr. Yeasin and Ms. W. were enrolled for summer classes. On June 29, 2013, Mr. Yeasin picked up Ms. W. for a social outing. [R. 2:307] Mr. Yeasin became angry when he discovered text and Facebook messages between her and other men. [R. 2:263-265, 2:307] Mr. Yeasin

threatened that he was going to make Ms. W. pay for what she had done; called her a bitch, slut and whore; took her phone and refused to give it back; physically restrained Ms. W. and drove around to prevent Ms. W. from escaping his car. [R. 2:263-265, 2:307] Mr. Yeasin refused Ms. W.'s pleas to return her phone and let her out of the car, even when she was crying and expressed how afraid she was. [R. 2:263-265, 2:308] Mr. Yeasin told her: "'I want everyone to see what a horrible person you really are,'" and he threatened to "make it so that [Ms. W.] wouldn't be welcome to any of the universities in Kansas." [R. 2:263-265, 2:308-309] Mr. Yeasin told her he would "'reveal to everyone what you [Ms. W.] really are.'" [R. 2:263-265, 2:308-309]

During the overnight hours following the incident, no fewer than eight messages were sent from Mr. Yeasin's phone to Ms. W. and received by her the following morning. Among these messages were the following:

> "Sorry didn't mean to call. Enjoy the rest of your life alone as a slut." [See hearing transcript, R. 2:155 line 13-20, Yeasin admits he sent this to Ms. W.]
>
> "I don't know what you did to put Navid into the hospital but if you ever hurt him again I will make sure you have to go to a hospital too." [Although this message is written in the third person, Mr. Yeasin admitted to sending this message during the hearing of the case. [R. 2:154 line 25 – 2:155 line 25]
>
> "Yes you are. You just done [sic] try to slit your thrat [sic] and have to go to the hospital for no reason. Tell us what you did or when we find out it will be a lot worse"

[R. 2:266-273].

Mr. Yeasin was arrested and charged with criminal restraint, battery, and criminal deprivation of property; he pleaded no contest to the charges and entered into a diversion agreement in August 2013. [R. 2:281, App. p. 16; Judicial notice of *State v. Yeasin*, Johnson County District Court Case No. 13DV00797].

In her victim statement, Ms. W. reported having bad anxiety, depression, insomnia, nightmares, and requiring medication and therapy as a result of her encounters with Mr. Yeasin. [R. 2:278] She also said: "I am still very scared of attending and living at the same university as Navid Yeasin," and she noted that Mr. Yeasin was continuing to harass and disparage her by posting statements about her on Twitter. [R. 2:278].

On July 25, 2013, the Johnson County District Court entered a Final Order of Protection from Abuse against Mr. Yeasin which, among other things, ordered that Mr. Yeasin: "not abuse, molest, or interfere with the privacy or rights [of Ms. W.] wherever [she] might be, not contact [her] either directly or indirectly, and not direct or request another to contact [her], either directly or indirectly. [R. 2:287].

On June 24, 2014, the Johnson County District Attorney filed its Motion to Revoke Diversion, outlining Mr. Yeasin's failures to comply with the diversion agreement. [R. 4:656-657] On September 25, 2014, Mr. Yeasin stipulated to violating the terms of his probation and the diversion was

revoked. [App. p. 16, Judicial notice of *State v. Yeasin*, Johnson County District Court Case No. 13DV00797].

2. Ms. W. Complains to KU about Mr. Yeasin's Harassment and Abuse

On August 5, 2013, Ms. W. contacted the University's Office of Student Affairs because she was concerned about Mr. Yeasin's harassment and abuse of her and her safety on returning to the University, and Student Affairs directed her to the Office of Institutional Opportunity and Access (IOA). [R. 2:237, 2:301]

On August 8, 2013, Ms. W. met with IOA and alleged that Mr. Yeasin sexually harassed her by restraining her in his car, posting derogatory comments about her on social media, threatening suicide, and controlling her actions and communications. [R. 2:55-63]. IOA determined there was sufficient information to open an investigation and did so the same day. [R. 2:220].

On August 13, 2013, IOA contacted Mr. Yeasin, who agreed to meet on August 14, 2013. [R. 2:64]. During that meeting, IOA informed Mr. Yeasin of his rights in the investigation, including, his rights to present written/verbal evidence, identify witnesses, submit supporting documentation, provide witness statements, be represented, etc. [R. 2:311] Mr. Yeasin was also informed of the University's policy prohibiting retaliation. *Id.* That same day, IOA issued a "No Contact" directive to Mr. Yeasin, which stated:

> You are to refrain from any attempts to contact Ms. W. personally or through any other person. You are hereby informed that 'no contact' means that you understand you are prohibited from

> initiating or contributing through third-parties, to any physical, verbal, electronic, or written communication with A.W., her family, her friends or her associates. This includes a prohibition from interfering with her personal possessions. . . Moreover, retaliation against any persons who may pursue or participate in a University investigation, whether by you directly or by your associates, is a violation of University policy. A violation of this ruling could result in . . . further conduct sanctioning; including, but not limited to, suspension and expulsion from the University.

[R. 2:312]

IOA determined that a "No Contact" letter was necessary because Mr. Yeasin had engaged in abusive and threatening behavior that made Ms. W. afraid to be on campus, and he had continued to post messages regarding Ms. W., which were causing her further distress and fear. [R. 2:69] The fact that the Johnson County District Court had issued an Order of Protection from Abuse also influenced IOA's decision to issue the "No Contact" letter. [R. 2:220-221].

After his arrest and in the months that followed, Mr. Yeasin posted the messages below on Twitter. [R. 2:219-220] These posts are not an exhaustive list of all of Mr. Yeasin's, but are simply those of which the University is aware [*Id.*]:

> "Honey, just accept it already. You're a slut with major daddy problems. #butseriously" (11:01 p.m., July 10, 2013) [R. 2:174 line 15-22, where Yeasin admitted at the conduct hearing that this tweet was about Ms. W.];
>
> "hahahaha I swear, my life should be a freaking soap opera. #dramafilled #gspstruggles" (11:47 a.m., July 25, 2013);
>
> "Guys, word of advice. Don't date a whore. #onceawhorealwaysawhore" (date/time unknown) [R. 2:174 line

6-14, where Yeasin admitted at the conduct hearing that this tweet was about his relationship with Ms. W.];

"Ha, you were the last person I would expect to run into. #fuckthis" (date/time unknown);

"Feels great to have my bestfriend back and to learn the truth. #hoesneverchange" (date/time unknown);

"Yes @debstep5 she actually did that O.o #crazyex" (date/time unknown);

"On the brightside you won't have mutated kids. #goodriddens" (August 8, 2013) [R. 2:175 line 4-10, where Yeasin admitted this tweet was about Ms. W.];

"Jesus Navid, how is it that you always end up dating the psycho bitches?" #butreallyguys (6:53 p.m., August 14, 2013);

"Oh right, negative boob job. I remember her." (12:19 a.m., August 15, 2013);

"If I could say one thing to you it would probably be 'Go fuck yourself you piece of shit." #butseriouslygofuckyourself #crazyassex (11:12 p.m., August 23, 2013) [R. 2:141 line 8-15, where Yeasin admitted the tweet was about Ms. W. stating: "I do acknowledge that the crazy ass ex, I mean, as we established before, is about her."];

"Lol, she goes up to my friends and hugs them and then unfriends them on Facebook." #psycho #lolwhat (1:56 a.m., September 5, 2013);

"lol you're so obsessed with me you gotta creep on me using your friends accounts #crazybitch (12:02 p.m., September 7, 2013);

"30 Reasons to Love Natural Breasts totalfratmove.com/30-reasons-to-... via @totalfrat move #doublenegativeboobjob" (September 13, 2013);

"At least I'm proportionate." #NDB #boobs @MorganLCox ((10:27 a.m., October 23, 2013).

[R. 2:290-300].

On September 6, 2013, IOA e-mailed Mr. Yeasin regarding a message posted by him about Ms. W. on Twitter after the date he received the "No Contact" directive. [R. 2:317] Specifically, on August 23, 2013, Mr. Yeasin wrote "If I could say one thing to you it would probably be 'Go fuck yourself you piece of shit.' #butseriouslygofuckyourself #crazyassex." [R. 2:317, 2:296] During the conduct hearing, Mr. Yeasin admitted that this tweet and any others referencing #crazyex or #crazyassex pertained to Ms. W. R. 2:141 line 8-15 "I do acknowledge that the crazy ass ex, I mean, as we established before, is about her."].

IOA instructed Mr. Yeasin that even though the tweet did not identify Ms. W. by name, the tweet was a form of indirect communication in violation of the "No Contact" directive. [R. 2:317, R 2:134 line 13-19, 2:110 line 8-12] IOA further directed Mr. Yeasin that "[g]oing forward, if you make any reference regarding Ms. W., directly or indirectly, on any type of social media or other communication outlet, you will be immediately referred to the Student Conduct Officer for possible sanctions which may result in expulsion from the University." [R. 2:317, R 2:134 line 13-19, 2:110 line 8-12]

In the week that followed the clarifying directive given him by IOA, Mr. Yeasin tweeted the following statements: 1) September 7, 2013—"lol you're so obsessed with me you gotta creep on me using your friends accounts #crazybitch;" 2) September 13, 2013—"30 Reasons to Love Natural Breasts, totalfratmove.com/30-reasons-to-.via@totalfratmove#doublenegativeboobjob." [R. 2:298-299].

The cruelty of Mr. Yeasin's harassment of Ms. W. is understood as even more abusive in light of the fact that she has a genetic condition that resulted in her obtaining reconstructive breast surgery in May 2013. [R. 2:67, R. 2:101 line 19-25] This condition and the associated surgery were known to Mr. Yeasin. [R. 2:53, 2:67]. As a result, Mr. Yeasin and his friends referred to Ms. W. as "negative double boob job," "negative boob job" or "NDB". [2:298-299; 2:175 line 4-10]

IOA met with Mr. Yeasin again on September 17, 2013, for approximately one and one half hours. [R. 2:318-319] IOA again reiterated to Mr. Yeasin that indirect communications about Ms. W. on Twitter were a violation of the "No Contact" directive. [R. 2:319] Mr. Yeasin acknowledged understanding the "No Contact" directive, including the prohibition on indirect contact, and stated that "the twitter thing was a lapse on my part." [R. 2:319] He further expressed that he had not intended the tweet to reach Ms. W., and that it had not occurred to him that his tweet might reach her. [R. 2:319].

Yeasin said he would not tweet anything else that could appear to be directed at Ms. W. [R. 2:69, 2:319]

Yeasin claimed that the September 7, 2013 tweet was not a reference to Ms. W., but was a reference to an ex-girlfriend from high school who said bad things about him and his arrest to an old friend he ran into that day. [R. 2:319] Yeasin also claimed that the September 13, 2013, tweet was not about Ms. W. (or her medical issues or surgery), and was instead a response to a satirical article on the Internet that prompted a joke by Mr. Yeasin's friend that he repeated in the Tweet. [R. 2:69-70, 2:319-320] IOA determined that Mr. Yeasin's explanation was not credible and that the "#doublenegativeboobjob" tweet did, in fact, reference Ms. W. [R. 2:138 line 15 – 2:139 line 14]. In the subsequent Student Conduct Hearing, Mr. Yeasin admitted that the September 13, 2013 tweet was about Ms. W. [R. 2:140 line 7 - 2:142 line 5].

IOA concluded its investigation and issued a report to Tammara Durham, Vice Provost for Student Affairs, on October 7, 2013. [R. 2:236-260] IOA concluded that the preponderance of the evidence showed that Mr. Yeasin had violated the University's Sexual Harassment policy and he had knowingly and purposefully violated the "No Contact" directive. [R. 2:257-260] IOA communicated the findings and recommendations to Mr. Yeasin the same day and reiterated to him that the "No Contact" directive remained in effect. [R. 2:322-324]

3. Student Conduct Hearing and Vice Provost Decision to Expel

On October 18, 2013, the Vice Provost for Student Affairs (VPSA) issued a Formal Hearing Notification to Mr. Yeasin. [R. 2:325-328] This letter informed Mr. Yeasin of the basis for the proposed disciplinary action, including his physically restraining Ms. W. in his car, yelling and calling Ms. W. demeaning names, threatening suicide when Ms. W. tried to break up with him, repeatedly posting demeaning tweets referencing Ms. W., and directing electronic communications to Ms. W. after the August 14, 2013 "No Contact" directive. [R. 2:325-328]

The hearing notice further noted that, "[w]hile some of these actions have occurred off campus, the record demonstrates the relationship and behavior has had on-campus affects for [Ms. W.]." [R. 2:326] The hearing notice identified both the Code of Student Rights and Responsibilities and the Student Non-Academic Conduct Procedures as applicable. [R. 2:326] It also reiterated the directive not to contact Ms. W. and to refrain from retaliations against her. [R. 2:327].

The student conduct hearing was held on November 4, 2013. [R. 2:85] The University, along with Ms. W., served as complainant and offered testimony and evidence from Ms. W.; Jane McQueeny, IOA Executive Director; Jennifer Brooks, IOA Investigator; and Steve Steinhilber, IOA Investigator. [R. 2:85-189, hearing transcript] Mr. Yeasin was the respondent; he cross-examined the witnesses and testified on his own behalf. [R 2:85-189]

The Formal Panel Hearing file, comprised of 39 pages of documents, and 4 pages of documents discussed and read at the hearing were entered into the record. [R. 2:331-373] This file is comprised of the documents submitted by each party, in accordance with the procedures, and made available to both parties to review prior to the hearing, although Mr. Yeasin neither contributed to the file nor availed himself of the opportunity to review it in advance of the hearing. [R. 2:331-373]

Even though Mr. Yeasin had explicitly stated to IOA in his September 17, 2013, meeting that he would not tweet anything else that could be perceived as referencing Ms. W., and that he recognized that doing so was a violation of the "No Contact" directive, Mr. Yeasin tweeted: "'At least I'm proportionate' #NBD #boobs @MorganLCox" on October 23, 2013. [R. 2:176 line 2-5, R. 2:371] This tweet was posted not only after extensive discussions with IOA, but also after the VPSA's clear instruction reiterating the "No Contact" directive and also instructing Mr. Yeasin to refrain from retaliation included in the October 28, 2013, hearing notice. [R. 2:327]

When questioned at hearing why he would tweet this message after the no contact order and understanding the instruction not to comment on Ms. W., Mr. Yeasin cavalierly responded: "That's something I didn't think twice about. I mean a lot of my tweets I didn't think twice about." [R. 2:146 line 4-14] During the Student Conduct Hearing, the hearing panel asked Mr. Yeasin why, after being explicitly instructed twice by IOA not to tweet about Ms. W., he still did

so. [R. 2:149 line 11-15] Mr. Yeasin attributed his conduct to a lapse of judgment, and stated "if I didn't have poor judgment, I wouldn't be here right now." [R. 2:149 line – 2:150 line 2]

At the hearing, Mr. Yeasin admitted that he made the following tweets about Ms. W.:

> "Honey, just accept it already. You're a slut with major daddy problems. #butseriously" (11:01 p.m., July 10, 2013) [R. 2:177 line 15-22];
>
> "Guys, word of advice. Don't date a whore. #onceawhorealwaysawhore" (date/time unknown) [R. 2:174 line 6-14];
>
> "If I could say one thing to you it would probably be 'Go fuck yourself you piece of shit.' #butseriouslygofuckyourself #crazyassex." [R. 2:141 line 8-10 "I do acknowledge that the crazy ass ex, I mean, as we established before, is about her."];
>
> "On the brightside you won't have mutated kids. #goodriddens" (August 8, 2013) [R: 175: line 1-10];
>
> September 7, 2013—"lol you're so obsessed with me you gotta creep on me using your friends accounts #crazybitch" [R. 2:141 line 8-10 "I do acknowledge that the crazy ass ex, I mean, as we established before, is about her."]
>
> September 13, 2013 – "30 Reasons to Love Natural Breasts totalfratmove.com/30-reasons-to-...via@totalfratmove #doublenegativeboobjob" [R. 2:138 line 15 – 2:139 line 14]

At the hearing, Mr. Yeasin admitted he violated the University's no contact order. [R. 2:186 line 11-12]. At the hearing, Mr. Yeasin was asked to put himself in Ms. W.'s place and consider his conduct toward her, and he was

asked whether he could understand why someone in her position might have ongoing concerns about her safety in relation to him. Mr. Yeasin admitted: "Yeah, I can see that." [R. 2:176 line 24 – 2:177 line 14]

Mr. Yeasin acknowledged that the University's procedures are educational and are intended to protect the educational environment both for Ms. W. and for him: "I mean, whatever consequences you guys do, I mean, I understand it's in order to keep safety of both her and I guess, you know, from me doing anything that might get me in more legal trouble. I mean, as you said, this is a learning experience and, I mean, obviously I'm learning things I didn't know before from all that's happened, so I mean I guess moving forward either way what happens, I mean, have to move forward and learn from this and whatever you guys' decision is, I guess that's all." [R. 2:187 line 17 – 2:188 line 2]

Jennifer Brooks, IOA investigator, testified that she sent Mr. Yeasin an e-mail on September 6, 2013 addressing his August 23, 2013, tweet, and reaffirming the "no contact" order advising him that further tweeting regarding Ms. W. would violate the "no contact" order. [R. 2:112 line 19 - 2:113 line 9, 2:317]. Ms. Brooks testified that following her September 6, 2013, e-mail communication reaffirming the "no contact" order, Mr. Yeasin then tweeted "#lol you're so obsessed with me you gotta creep on me using your friends accounts #crazybitch" 12:02 p.m. – 7 Sep 13. [R. 2:113 line 3-9, 2:298] Ms. Brooks testified Mr. Yeasin's conduct appeared to be escalating, which was a

concern for IOA since it had made the "no contact" order really clear to him. [R. 2:113 line 22 – 2:114 line 5]

Steve Steinhilber, IOA investigator, and Jane McQueeny, Director IOA, met with Mr. Yeasin on September 17, 2013, regarding Mr. Yeasin's continued tweeting about Ms. W. [R. 2:125 line 13 – 2:127 line 8, 2:318-322] They advised Mr. Yeasin that his tweets potentially violated the Johnson County District Court's final order of protection and violated the University's "no contact" order. [R. 2:125 line 13 – 2:126 line 9] In that meeting, Mr. Yeasin admitted that his tweet reference to "crazy ass ex" was a reference to Ms. W. [R. 2:126 line 16-18]

Jane McQueeny testified that the reason IOA met with Mr. Yeasin on September 17, 2013, was because his conduct appeared to be escalating and his conduct indicated he did not appreciate the no contact directives he had been given. [R. 2:134 line 13-19] Ms. McQueeny testified that in the September 17, 2013, meeting, Mr. Yeasin offered an explanation that the September 7, 2013, tweet was not about Ms. W., but Ms. McQueeny testified she did not find his explanation credible. [R. 2:134 line 23 – 2:135 line 11]

Ms. McQueeny testified that Mr. Yeasin offered an explanation that the negative boob job tweet he had sent was not related to Ms. W, but instead related to a fraternity brother seeing some satirical piece, which explanation Ms. McQueeny also found not credible. [R. 2:135 line 13-24] Ms. McQueeny testified that Mr. Yeasin had told Ms. W. in the summer that he would ruin

her reputation on campus; therefore, IOA viewed the tweets as consistent with that previous threat. [R. 2:136 line 21-25, 2:137 line 7-14]

Ms. McQueeny, explained that tweets like those sent by Mr. Yeasin in this case are a form of sexual harassment, and IOA felt that Mr. Yeasin's continued conduct, despite being advised to cease and desist in the harassment, was making it difficult for Ms. W. on campus. [R. 2:136 line 7-25]

Ms. McQueeny testified that IOA found many of the statements that Mr. Yeasin made to IOA inconsistent, and when considered with the totality of the circumstances, it was IOA's conclusion that he was not credible. [R. 2:138 line15-22] In contrast to Mr. Yeasin, Ms. McQueeny testified that Ms. W.'s statements proved accurate and IOA concluded that she was credible. [R. 2:139 line 8-14]

Ms. W. is majoring in secondary education and is on schedule to graduate in Spring 2016. [R. 2:105 line 17-24] Ms. W. explained that she had a genetic deformity that required surgical correction, and that she believed the tweet's reference to negative double boob job had to have been in reference to her because Mr. Yeasin knew about her surgery and they did not know anyone else who had a similar issue. [R. 2:101 line 6 – 2:102 line 7]

Ms. W. explained that the Johnson County District Court final order of protection from abuse entered July 25, 2013, included a prohibition that Mr. Yeasin would not have any contact with Ms. W. either directly or indirectly through others. [R. 2:104 line 1-15; R. 2:287].

Ms. W. submitted a written statement at hearing [R. 2:83-84, 2:96 line 18 - 2:101 line 4], and also testified. Ms. W's written submission, in part, stated:

> The long-lasting consequences of what occurred this summer have continued to be an issue for me. What happened has definitely created a great deal of emotional turmoil for me, even after returning to KU.
>
> . . . .
>
> Most importantly, I see how this situation has affected my grades. This summer, I struggled to pass my summer classes because of the emotional toll all of this had taken on me. Now, I still feel as though the worry and stress caused by his presence, the harassment from him on social media and from others has affected how I have performed academically. I am trying to move beyond what has happened, but the continued backlash from Navid Yeasin has made this nearly impossible for me to accomplish this.
>
> . . . .
>
> More than anything, I want peace. I want to feel at peace in my mind and with my safety. I do not want to have to transfer and I do not want to continue being a victim of harassment. I have been affected by this very abusive relationship with Navid Yeasin and I wish to live my life happily now without the lingering effects that have proven to continue because of him.

[R. 2:83-84]

Ms. W. testified that even after KU's issuance of the "No Contact" order and being warned about violating it via social media, Mr. Yeasin had continued to post negative comments about her that other people related to her and she viewed as "pure harassment . . . detrimental to her reputation as a student . . . on campus." [R. 2:96 line 24 – 2:97 line 7] As a result of Mr. Yeasin's influence on others on campus, had caused her to experience harassment by others such as his fraternity brothers who glared at her and remarked that she needed to leave because she wasn't wanted at that public place. [R. 2:97 line 10-16]

Similarly, Ms. W. testified that she was in an elevator going to class in Wescoe when she encountered Mr. Yeasin's friend "S," who proceeded to laugh at her in a demeaning manner in front of the other elevator passengers. [R. 2:97 line 17-23]. On October 31, 2013, Ms. W. was in a public place at a Halloween party when she heard people laughing at her and turned to see Mr. Yeasin with his friend "S." pointing at her and making fun of her in front of others. [R. 2:98 line 4-23] Ms. W. testified she felt terrified, threatened, and humiliated and that she suffered a panic attack. [R. 2:98 line 4-23].

Ms. W. testified that Mr. Yeasin made no effort to leave her presence when she saw him at the Halloween party pointing at her and making fun of her; and because she felt threatened, she had to leave the party. [R. 2:99 18-25].

Ms. W. testified that she is on anti-depressants to deal with the after effects of Mr. Yeasin's conduct, and that it has affected her daily activities of living - - she never leaves her sorority house alone, she has considered transferring to get away from him, and her academic performance has suffered. [R. 2:98 line 24 – 2:99 line 16]

At the conclusion of the hearing, the Hearing Panel deliberated and issued a written recommendation to the VPSA, finding:

> "1, In violation of Article 22, the behavior of Yeasin shows threats to the physical health, welfare and safety of W.
>
> a. Yeasin physically restrained W. in his car, yelled at her for hours and demonstrated hostile, controlling and unstable behavior, making W. afraid for her safety. W. repeatedly expressed during the time she was retrained in the car, 'I am scared. I am scared for my safety. [. . .] I do not feel safe." . . .

> b. Yeasin repeatedly followed and attempted to make unwanted contact, including but not limited to physical or electronic contact with W. via text message, twitter and in person after the no-contact order had been delivered to Yeasin, and after IOA had made clarification with Yeasin that any reference regarding W., directly or indirectly, was a violation of the no-contact order. . . .
>
> 2. In violation of the University's Sexual Harassment policy, the behavior of Yeasin is unwelcome, based upon sex or sex stereotypes, and are so severe, pervasive and objectively offensive that they have the purpose or effect of substantially interfering with W.'s academic performance or participation in the University's programs and activities. . . ."

[R. 2:374-377]

The Hearing Panel found that the evidence presented by the University and Ms. W. was uncontroverted by Mr. Yeasin. [R. 2:377]. The Hearing Panel found that "more likely than not Navid Yeasin violated Article 22, A and the University's Sexual Harassment Policy." [R. 2:377] The Panel recommended that Mr. Yeasin be expelled from the University. [R. 2:377].

4. Vice Provost Durham's Decision to Expel Mr. Yeasin

After consideration of the Hearing Panel's findings and recommendations and the evidence in the case, Vice Provost Tammara Durham expelled Mr. Yeasin and banned him from campus on November 13, 2013. [R. 2:378-381] In her decision letter, Vice Provost Durham found that Mr. Yeasin's conduct violated the University Sexual Harassment policy, the "No Contact" directive and clarifying letter, and that his severe, pervasive, and objectively offensive conduct created an imminent threat of danger to Ms. W. on campus and

unreasonably obstructed and interfered with her learning environment and equal opportunity to participate in and benefit from University programs and activities. [R. 2:380]

5. Mr. Yeasin's Trespass on University Property Violating the Sanction Banning him from Campus.

When expelled, Mr. Yeasin was banned from all property of the University of Kansas: "[y]ou are banned from entering onto the premises of the University of Kansas, effective immediately. If you violate this order, you will be subject to arrest for trespass..." [R. 2:380]. In violation that ban, Mr. Yeasin attended the men's basketball game on campus on January 5, 2014. [R. 2:310]

The KU Public Safety Office (PSO) was contacted regarding Mr. Yeasin's presence at the game, and a police officer approached Mr. Yeasin, he attempted to exit the section in the other direction, but was met by another officer. Assistant Chief Keary reported "there definitely appeared to be some knowledge of guilt based on his hasty departure." [R. 2:310]. Mr. Yeasin was escorted off campus to his home by a PSO Officer and was issued a Notice to Appear for trespass. [R. 2:310]. When questioned why he was on campus in violation of the banning order, Mr. Yeasin claimed "he thought the ban only included academic activities." [R. 2:310].

6. Mr. Yeasin's Judicial Board Appeal.

Mr. Yeasin, through counsel, appealed the expulsion decision to the University Judicial Board. [R. 2:198-216] On February 10, 2014, Suzanne

Valdez, Chair University Judicial Board, dismissed the appeal based upon the pleadings alone, concluding that Mr. Yeasin's appeal failed to state a valid ground for which a hearing should be granted. [R. 2:443]. Mr. Yeasin's counsel filed a Motion for Reconsideration. [R. 444-447] Chair Valdez responded that there was no provision for reconsideration in the University's rules and regulations [R. pp. 448].

7. Petition for Judicial Review Proceedings

On March 11, 2014, Mr. Yeasin filed his Petition for Judicial Review. After briefing and oral argument, the District Court granted the petition, ruling that the University's decision was not supported by substantial evidence because it failed to establish by a preponderance of the evidence that Mr. Yeasin's conduct occurred on campus or at campus related activity. [R. 5 p. 763]. In addition, the Court ruled that the University erroneously interpreted the *Student Conduct Code* by applying it to conduct that occurred off campus. [R. 5 p. 764, App. 1-14].

Mr. Yeasin and the University each filed post-decision motions. [R. 5:765-895] On November 17, 2014, the Court heard argument on the pending motions. [R. 6, Transcript November 17, 2014]. The Court granted Mr. Yeasin's Motion for an Order Making Additional Findings or to Alter of Amend Judgment, and ordered that the University credit Mr. Yeasin for the tuition and fees he paid to attend KU during the Fall 2013 semester and assessed the costs of the preparation of the transcript in the amount of $436.80 against the

University. [R. 6:911] The Court granted the University's Motion for Stay of Memorandum and Judgment because the University's jurisdiction to punish students for off-campus conduct is an issue of first impression. [R. 6, p. 909-910].

The University filed a timely Notice of Appeal on December 22, 2014. [R. 6:914-915]. Thereafter, Mr. Yeasin filed his Notice of Cross Appeal. [R. 6:916-917]

II. ARGUMENTS AND AUTHORITIES

Issue I: The University is not limited to disciplining students for conduct that occurs only on campus or at University-sponsored events under the *Student Code* because the disjunctive clause "or as otherwise required by federal, state, or local law" extends the University's jurisdiction to additional conduct besides on-campus conduct or conduct that occurs at University-sponsored events.

A. Standard of Review

The review of agency actions is governed by the Kansas Judicial Review Act ("KJRA"), K.S.A. 77-601, et seq. In reviewing an agency's action under a petition for judicial review, the agency's action is presumed valid. *See Jones v. Kansas State University*, 279 Kan. 128, 139, 106 P.3d 10 (2005). The burden of proving the invalidity of the agency action rests on the party asserting invalidity. K.S.A. 77-621(a)(1).

Appellate courts exercise the same statutorily limited review of the agency action as does the trial court, i.e., as though the appeal had been made directly to the appellate court. *Kansas Dept. of Revenue v. Powell*, 290 Kan. 564, 567, 232 P.3d 856 (2010).

B. Rules of Interpretation mandate the disjunctive clause "or as otherwise required by federal, state, or local law" be given Meaning

In this case, the District Court erroneously concluded that the University's *Student Code* "applies only to student conduct that occurs on campus or at campus related activities." [R. 5:763; App. p. 13] The *Student Code* Article 20, however, provides:

> The University may not institute disciplinary proceedings unless the alleged violation(s) giving rise to the disciplinary action occurs on University premises or at University sponsored or supervised events, *or as otherwise required by federal, state or local law.*

(emphasis added). [R. 3:496]

The plain language of Article 20 identifies three separate conditions under which disciplinary action may be instituted. These three conditions are stated in the disjunctive. The first provides that disciplinary action is authorized for conduct that occurs on University premises. The second provides for conduct that occurs at University sponsored or supervised events. And the third provides for conduct that warrants discipline "as otherwise required by federal, state or local law."

The word "or" is generally read as a disjunctive. *State v. Bee*, 288 Kan. 733, 741, 207 P.3d. 244, 250 (2009). As such, the word "or" means that the

clauses stand on equal footing and any of them authorizes disciplinary action. *State v. Wiegand*, 275 Kan. 841, 845, 69 P.3d 627, 630 (2003).

It is a fundamental rule of construction that a rule should not be read to read out what as a matter of ordinary English is in it and each word must be given effect. *State v. Campell*, 279 Kan. 1, 5, 106 P.3d 1129, 1132 (2005) (citations omitted). Therefore, Article 20's phrase "or as otherwise required by federal, state or local law" must be given meaning and interpreted as extending the University's jurisdiction to discipline students for conduct other than simply that conduct that occurs on campus or at a University sponsored or supervised event. It must be read, as the plain language states, to allow the University to impose discipline on a student when required by "federal, state or local law."

Contrary to that fundamental rule of construction, the District Court's decision erroneously disregarded the plain language of Article 20, reading out of the University's rule the disjunctive phrase "or as required by federal, state or local law." Therefore, the District Court's decision must be reversed.

C. University's Interpretation of its Rule is Owed Deference

In 2011, *Student Code.* Article 20 was rewritten in its entirety, striking the old language: "No inquiry is permitted into the activities of students away from the campus where their behavior is subject to regulation and control by public authorities," and replacing it with the new Article 20 quoted above in Section B. [R. 5:803, Vol. 6, Tr. Nov. 17, 2014 @ 9:9 – 10:6] Marlesa Roney, Vice

Provost for Student Success explained the rationale for the new Article 20, stating:

> Previously the University was allowed no inquiry into behavior away from campus. We recognized a need for this change even before the directive from the Office of Civil Rights in their April 4, 2011 Dear Colleague Letter on Sexual Assault. While the University will not pursue all misconduct off campus, we now have the ability to respond to some off campus incidents.

[R. 5:803]

The University practices shared governance, which means that students, faculty, and staff, through each group's representative bodies, is provided the opportunity to advise the university on policies. Thus, the 2011 Revisions to the *Student Code* were approved by Student Senate on March 9, 2011. [R. 5:803]

Dr. Roney's Memorandum confirms that the University rewrote Article 20 to specifically expand the University's jurisdiction in order to authorize disciplinary jurisdiction for off-campus conduct. It did this, because the need for such jurisdiction was recognized, and, in part, to respond to the April 2011 *Dear Colleague Letter*.

It is well settled that deference is given to an agency's interpretation of its own rules and regulations, and that its regulations will not be disturbed on appeal unless the interpretation is clearly erroneous or inconsistent with the regulation. *Kansas Bd. of Regents v. Pittsburgh State Univ. Chapter of Kansas-Nat'l Educ. Assn.*, 233 Kan. 801, 809, 667 P.2d 306, 313 (1983). Thus, Mr.

Yeasin has a difficult burden to prove the invalidity of the University's interpretation of the language of Article 20 of the *Student Code.*

The University clearly intended the language of Article 20, specifically the phrase "or as otherwise required by federal, state or local law," to extend the University's jurisdiction to off-campus student misconduct. This interpretation is reasonable and not clearly erroneous. Accordingly, Mr. Yeasin has failed his burden to prove the University's interpretation of its jurisdiction under Article 20 invalid. Therefore, the District Court's decision must be reversed and the petition should be denied.

D. University's Interpretation of Article 20 language is Consistent with the Obligations imposed on it by Title IX

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, prohibits discrimination on the basis of sex in the University's programs and activities. It requires schools to prevent and remedy gender based harassment and sexual harassment in order to ensure a safe environment in which students can learn.

In 2001, the U.S. Department of Education Office for Civil Rights (hereafter OCR) issued its *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties. See* U.S. Department of Education Office for Civil Rights, available at: http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf (hereafter *2001 Guidance*).

The *2001 Guidance* stated that it "continue[d] to provide the principles that a school should use to recognize and effectively respond to sexual harassment of students in its program as a condition of receiving Federal financial assistance." *Id.* at Preamble (emphasis added). It made clear that Title IX imposes upon schools the "responsibility to respond promptly and effectively to sexual harassment." *Id.* at 9. Specifically, Title IX requires that:

> Once a school has notice of possible sexual harassment of students . . . it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again.

Id. at 14.

Prompt, effective steps to end harassment include disciplining students for sexual harassment:

> If a school determines that sexual harassment has occurred, it should take reasonable, timely, age-appropriate, and effective corrective action . . . . Appropriate steps should be taken to end the harassment. For example, school personnel may need to counsel, warn, or take disciplinary action against the harasser, based on the severity of the harassment or any record of prior incidents or both.

Id. at 16 (emphasis added). The *Guidance* specifically authorizes "the use of a student disciplinary procedure not designed specifically for Title IX grievances to resolve sex discrimination complaints." *Id.* at 21.

On April 4, 2011, OCR issued its *Dear Colleague Letter*, which it classified as a "significant guidance document." [R. 5:783-801; *See* 5:783 @ n. 1] As such,

OCR issued the letter to assist universities in meeting their obligations "under the civil rights laws and implementing regulations" enforced by OCR. *Id.* Thus, OCR once again confirmed that Title IX imposes on universities the affirmative obligation to prevent and remediate gender discrimination and sexual harassment by promptly responding to and address that conduct. [R. 5:784]

OCR's *Dear Colleague Letter* explicitly provides that a university's obligation to respond promptly and effectively to sexual harassment extends to harassment that occurs off campus:

> *Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity. . . . Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus.* For example, if a student alleges that he or she was sexually assaulted by another student off school grounds, *and that upon returning to school he or she was taunted and harassed by other students who are the alleged perpetrator's friends*, the school should take the earlier sexual assault into account in determining whether there is a sexually hostile environment. The school should also take steps to protect a student who was assaulted off campus *from further sexual harassment or retaliation* from the perpetrator and his or her associates.

(emphasis added) [R. 5:786]

The *Dear Colleague Letter* reaffirms a university's Title IX obligation "to adopt and publish grievance procedures providing for the prompt and equitable resolution of sex discrimination complaints," and again reiterates that a

university "may use student disciplinary procedures" to meet that obligation. [R 5:790] The *Dear Colleague Letter* also directs that a university's obligation to take immediate action to eliminate a hostile environment, prevent its recurrence, and address its effects extends beyond "taking disciplinary action against the harasser." [R. 5:797]

In addition, the university is required to "take steps to protect the complainant as necessary." [R. 5:797] In so doing, the *Dear Colleague Letter* counsels universities that complaints of sexual harassment "may be followed by retaliation by the alleged perpetrator or his or her associates," such as "name-calling and taunting." [R. 5:797] Therefore, Title IX requires that universities "have policies and procedures in place to protect against retaliatory harassment." [R. 5:797]

In this case, Mr. Yeasin's conduct was student-on-student violence, sexual harassment and retaliation against Ms. W. The conduct he engaged in, and that was proven by the University, fits squarely within the description of off-campus conduct discussed in the *Dear Colleague Letter*. The OCR directed that universities consider and address such off-campus conduct "because students often experience the continuing effects of off-campus sexual harassment in the educational setting." Consistent with OCR's direction, that is precisely what KU did in this case.

The record shows that Ms. W. continued to feel the effects of Mr. Yeasin's violent June attack on her when she returned to school. [R. 2:83] She was on

anti-depressants and seeing a counselor to deal with the after-effects of his abuse, which left her in fear to leave her sorority house and caused her to contemplate transferring to another school. [R. 2:83] In addition, Mr. Yeasin's sexual harassment and retaliation against her continued to create a hostile educational environment at KU for her through his taunts, name-calling, and harassment disseminated to the campus community via his Twitter account. [R. 2:83] His social media posts and comments to their mutual friends and acquaintances caused her to experience several instances, including in an elevator at Wescoe Hall on campus, when she was subjected to laughter and ridicule. [R. 2:83].

KU, consistent with OCR's Title IX guidance, took prompt, effective remedial action to address Mr. Yeasin's harassment and retaliation against Ms. W. by disciplining Mr. Yeasin. The record before the Court proves that KU's interpretation of Article 20 of the *Student Code* is not only reasonable, but also consistent with the OCR's direction that universities must take disciplinary action to address off campus student-on-student sexual harassment in order to ensure that a victim's educational opportunity is not adversely affected.

The University's response to Mr. Yeasin's violence and sexual harassment and disciplinary expulsion of him for that conduct was not only consistent with the University's interpretation of its jurisdiction under Article 20, but its action was also consistent with *Title IX*. As a result, Mr. Yeasin cannot prove that the

University's interpretation of its jurisdiction was wrong. Therefore, the District Court's decision should be reversed and Mr. Yeasin's petition should be denied.

Issue II: The University's Expulsion Decision was supported by Substantial Evidence

A. Standard of Review

The standard of review on this point is the same as for the prior point, governed by the Kansas Judicial Review Act ("KJRA"), K.S.A. 77-601, et seq. with this Court applying the same statutorily limited review as if the case had been originally presented to the Court of Appeals. *Kansas Dept. of Revenue v. Powell*, 290 Kan. 564, 564, 232 P.3d 856 (2010).

B. Substantial Evidence Standard

Under the Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA), K.S.A. 77-621(c), the Court may grant relief only if it determines:

> (7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard or proof by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act;

Whether substantial competent evidence exists is a question of law. *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 514, 145 P.3d 494 (2007).

The 2009 amendments to the KJRA included K.S.A. 77-621(d), which provides:

> (d) For purposes of this section, "in light of the record as a whole" means that the adequacy of the evidence in the record before the court to support a particular finding of fact shall be judged in light of all the relevant evidence in the record cited by any party that detracts from such finding as well as all of the relevant evidence in the record. . . . In reviewing the evidence in light of the record as a whole, the court shall not reweigh the evidence or engage in de novo review.

K.S.A. 77-621(d) (emphasis added).

Substantial evidence is "such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion." *State v. Walker*, 283 Kan. 587, Syl. ¶ 2, 153 P.3d 1257 (2007).

1. Mr. Yeasin's violence against Ms. W. and his abuse of her was an Offense Against a Person, Sexual Harassment and Violated the University's "No Contact" Order

In this case, Mr. Yeasin was found to have committed an Offense Against a Person (Article 22.A.1.), violated the University's Sexual Harassment Policy, and violated the University's "No Contact" order. [R. 2: 190-193, 2:194-197]. As the discussion below demonstrates, the University's decision was supported by substantial evidence. Therefore, Mr. Yeasin failed his burden to prove otherwise and the District Court's decision should be reversed and the petition denied.

a) The Uncontroverted Evidence of Mr. Yeasin's Conduct

The evidence of Mr. Yeasin's violence against Ms. W., and his abuse and harassment of her was uncontroverted by Mr. Yeasin at the student disciplinary hearing. The record shows that Mr. Yeasin and Ms. W. stopped

dating before the end of the academic term. Despite having ended the dating relationship, Mr. Yeasin remained possessive and controlling of Ms. W. resulting in a number of violent episodes in summer 2013. On May 24, 2013, he was at Ms. W.'s home where he verbally assaulted her telling her she deserved a "slow and painful death." [R. 282] On May 27-28, 2013, he refused to leave Ms. W.'s residence and threatened to kill himself because Ms. W.'s family wouldn't allow her date him, resulting in Ms. W.'s family calling the police. [R. 282].

Mr. Yeasin's violence and manipulation continued culminating in the June 29, 2013, incident in which he restrained Ms. W. in his car and physically and verbally assaulted her in a jealous rage that resulted in his conviction for battery, criminal restraint, and criminal deprivation of property. [R. 2:263-265, 2:308-309] The jealous rage persisted via harassing, vulgar, and threatening text messages from Mr. Yeasin to Ms. W. in the early morning hours of June 30, 2013. [R. 2:290-300]

Despite his arrest and entry of an Order of Protection from Abuse that directed him to not "abuse, molest, or interfere" with Ms. W., Mr. Yeasin mercilessly persisted in victimizing and harassing her via social media, posting insulting, vulgar messages about her. [R. 2:290-300, 2:340, 2:342, 2:371]

Even after returning to KU and being directed by IOA to have "No Contact" with Ms. W. and to not retaliate against her, Mr. Yeasin showed no remorse by continuing to harass her via his messages on Twitter. Mr. Yeasin

demonstrated he was incorrigible continuing to harass and retaliate against Ms. W. by posting messages about her on Twitter despite IOA's repeatedly reiterating to him the "No Contact" Order and non-retaliation instruction and despite the student conduct hearing notice also directing him to have "No Contact" with her and not retaliate against her.

The University's IOA, the student conduct hearing panel, and Vice Provost Durham, each found that Mr. Yeasin's conduct constituted an Offense Against a Person and violated the University's Sexual Harassment Policy. [R. 2:192, 2:195-196]

b) Offense Against a Person violation Supported by Substantial Evidence

Under the University's *Student Code* an offense against a person is committed when a student:

> Threatens the physical health, welfare, or safety of another person, places another person in serious bodily harm, or uses physical force in a manner that endangers the health, welfare or safety of another person; or willfully, maliciously and repeatedly follows or attempts to make unwanted contact, including but not limited to physical or electronic contact, with another person. This prohibition includes, but is not limited to, acts of sexual assault.

[R. 3:497, Article 22.A.1]

The evidence outlined above proves that the Offense Against a Person finding was supported by substantial evidence. There can be no dispute that Mr. Yeasin's June 29, 2013, conduct clearly threatened the physical health and

safety of Ms. W. as confirmed by his criminal conviction for battery, unlawful restraint, and unlawful deprivation of property. But, that was not his only Offense against Ms. W.

An Offense Against a Person also occurred when he "willfully, maliciously, and repeatedly . . . attempted to make unwanted contact" by electronic means through the numerous texts he sent her on June 30, 2013, and through social media in the numerous messages about her that he posted on Twitter.

The 2011 bienniel revision of the *Student Code* amended the Offense Against a Person provision to add: "including but not limited to physical or electronic contact." [R. 5:804, Vol. 6, Tr. Nov. 17, 2014 @ 9:9 – 10:6]. This amendment was specifically made to address the "rise in cyber bullying" and ensure that an offense against a person was not limited to unwanted physical contact. [R. 5:804] Mr. Yeasin's harassment of Ms. W. via text and Twitter falls squarely within the intended purpose of this language.

In light of the uncontroverted evidence of his violent assault on Ms. W. in June 2013, and his subsequent electronic communications harassing her, he cannot satisfy his burden to demonstrate that the University's decision was not supported by substantial evidence. Therefore, the District Court' s decision should be reversed and the petition denied.

c) Sexual Harassment Violation Supported by Substantial Evidence

The University defines sexual harassment as:

> [B]ehavior, including physical contact, advances, and comments in person, through an intermediary, and/or via phone, text message, email, social media, or other electronic medium, that is unwelcome; based on sex or gender stereotypes; and is so severe, pervasive and objectively offensive that it has the purpose or effect of substantially interfering with a person's academic performance, employment or equal opportunity to participate in or benefit from University programs or activities or by creating an intimidating, hostile or offensive working or educational environment.
>
> Sexual harassment may include but is not limited to:
>
> - unwelcome efforts to develop a romantic or sexual relationship;
> - unwelcome commentary about an individual's body or sexual activities;
> - threatening to engage in the commission of an unwelcome sexual act with another person;
> - stalking or cyber stalking;
> - engaging in indecent exposure, voyeurism, or other invasion of personal privacy;
> - unwelcome physical touching or closeness;
> - unwelcome jokes or teasing of a sexual nature based upon gender or sex stereotypes; and
> - sexual violence.

[R. 2:195]

Mr. Yeasin's conduct was unwanted. His conduct was not only pervasive, but it was also severe, twice requiring police intervention. The second time resulting in his conviction for battery, criminal restraint, and unlawful deprivation of property. His conduct was based on sex – he was jealous and possessive of Ms. W. and angry when she wouldn't date him and had contact with other men. His conduct involved unwanted physical contact. In addition,

it involved unwanted comments via text and social media. Therefore, the evidence clearly met the University's definition of sexual harassment.

d) "No Contact" Order Violation Supported by Substantial Evidence

The University's "No Contact" Order issued to Mr. Yeasin clearly instructed Mr. Yeasin to refrain from contacting Ms. W. It also included a directive to refrain from retaliating against her.

> You are to refrain from any attempts to contact Ms. W. personally or through any other person. You are hereby informed that 'no contact' means that you understand you are prohibited from initiating or contributing through third-parties, to any physical, verbal, electronic, or written communication with A.W., her family, her friends or her associates. This includes a prohibition from interfering with her personal possessions. . . Moreover, retaliation against any persons who may pursue or participate in a University investigation, whether by you directly or by your associates, is a violation of University policy. A violation of this ruling could result in . . . further conduct sanctioning; including, but not limited to, suspension and expulsion from the University.

(emphasis added). [R. 2:312]

In violation of that Order and the repeated reiteration of the Order, Mr. Yeasin persisted in posting messages, which he does not deny were about Ms. W. Thus, not only did he retaliate against her, but he also initiated contact through electronic communication – Twitter.

Mr. Yeasin argued in the District Court that his Twitter postings were just his "venting," and that the postings did not constitute contact with Ms. W. However, the record proves otherwise, because the Twitter postings were brought to Ms. W.'s attention by other friends and associates. The record also

shows that Ms. W. was pointed at and laughed at by Mr. Yeasin's friends. Thus, the Twitter postings served the purpose of fulfilling Mr. Yeasin's threats in the summer – to "make it so that [she] wouldn't be welcome to any of the universities in Kansas," and to "reveal to everyone what [she] really [was]." [R. 2:263-265, 2:308-309].

Mr. Yeasin's conduct is no different than that in *State v. Craig*, No. 2013-229, slip op. February 12, 2015 (N.H.) *See* Appendix for a copy of the slip opinion. In *Craig*, the ex-girlfriend obtained a restraining order that required "no contact whatsoever, phone, email, et cetera." *See* Slip Op. @ 3. After issuance of the restraining order, Craig posted messages to his public Facebook page, which the ex-girlfriend saw and was alarmed by the content of the messages. *See Slip Op.* @ 5-6. On appeal from his conviction for stalking, Craig, argued that he did not contact the ex-girlfriend by posting messages to Facebook because he did nothing to communicate the messages to her. The Court, however, found that the stalking statute only required a person to act indirectly to communicate with another. *See* Slip Op. @ 10. The Court concluded that there was "'no logical reason' for the defendant to post statements directed to the victim on Facebook other than 'to communicate.'" *See* Slip Op. @ 11, quoting *O'Leary v. State*, 109 So. 3d 874, 877 (Fla. Dist. Ct. App. 2013) (upholding a trial court's finding that the defendant sent a threatening statement to one of his relatives and her romantic partner by posting it on his own Facebook page.).

Just like Craig's Facebook posts, there is no logical reason for Mr. Yeasin to have posted the messages he did about Ms. W. on Twitter other than out of a spiteful, vindictive desire to harm and harass Ms. W. Therefore, Mr. Yeasin has failed his burden to prove that substantial evidence did not prove the violation of the "No Contact" order and his petition should be denied.

III. CONCLUSION

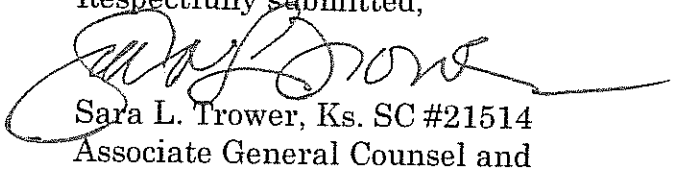
The University must have the authority to address student-on-student violence and harassment regardless of where that conduct occurs when the student victim continues to experience the effects of that violence and harassment. To that end, the University specifically amended the *Student Code* to include "or as otherwise required by federal, state or local law" for that purpose. Contrary to the rules of construction, the District Court disregarded the language of this clause. The University's interpretation of its rule defining its jurisdiction is entitled to deference. Moreover, its interpretation is consistent with the OCR's Title IX guidance, which instructs that universities must address off-campus sexual harassment through disciplinary processes. Accordingly, the University did not wrongfully interpret its *Student Code*. The District Court's decision, therefore, should be reversed, the petition denied, and the University's expulsion decision affirmed.

Mr. Yeasin failed his burden to prove that the University's expulsion decision was not supported by substantial evidence. The evidence in the record showing that he violently battered, restrained, and continually harassed Ms.

W. despite an Order of Protection from Abuse and despite the University's "No Contact" Order was not controverted by Mr. Yeasin at hearing. Accordingly, the University's decision that he committed an offense against a person, that he violated the University's Sexual Harassment Policy, and violated the University's "No Contact" order were supported by substantial evidence. The District Court's decision, therefore, should be reversed, the petition denied, and the University's expulsion decision affirmed.

The University, therefore, requests that the Petition be denied and for whatever other relief the Court deems proper.

Respectfully submitted,

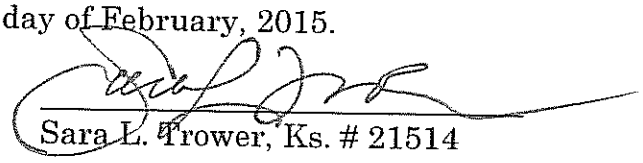


Sara L. Trower, Ks. SC #21514
Associate General Counsel and
Special Assistant Attorney General
245 Strong Hall
1450 Jayhawk Blvd.
Lawrence, KS 66045
Tel: (785) 864-3276
Fax: (785) 864-4617
e-mail: strower@ku.edu

Attorney for Respondent–Appellant/
Cross Appellee University of Kansas

IV. Certificate of Service

The undersigned certifies that service of the above and foregoing Brief of Appellant was made by hand-delivering sixteen copies to Clerk of the Appellate Courts, Kansas Judicial Center, 301 SW 10th Ave., Topeka, and by hand-delivering two copies to Terrence E. Leibold, 842 Louisiana, P.O. Box 485, Lawrence, KS 66044, this 25th day of February, 2015.



Sara L. Trower, Ks. # 21514

Appendix

IN THE DISTRICT COURT OF DOUGLAS COUNTY, KANSAS

Navid Yeasin,)
Petitioner,)
v.)
)
The University of Kansas,)
Respondent.)

Case No. 2014CV102
Div. No. 1

Pursuant to K.S.A. Chapter 77.

MEMORANDUM DECISION

This matter comes on before the court on Petitioners' petition for judicial review. The parties have filed briefs and made arguments in support of their positions and the court is now ready to rule on the petition.

Statement of Facts

Petitioner was a petroleum engineering student at the University of Kansas (KU). He met Ms. W at KU in the fall of 2012 when both students were enrolled in the same class. They dated off and on from fall 2012 through May 2013. The relationship was tumultuous and at times toxic.

On June 28, 2013, petitioner drove Ms. W to her appointment with a therapist. Petitioner decided to stay in the car while Ms. W visited with her therapist and asked Ms. W to borrow her phone to play games. When Ms. W came back to the car petitioner was angry with her about messages to a male that he found on her phone. They argued and the argument continued as they drove around Olathe and Leawood, Kansas. Ms. W asked petitioner to let her out of the car and petitioner refused. Petitioner also took Ms. W's cell phone and refused (both orally and physically) to give it back to her. He also

made the statement, "I want everyone to see what a horrible person you really are." He also told Ms. W that he wanted to "make it so that [Ms. W.] wouldn't be welcome to any of the universities in Kansas." Eventually, petitioner gave Ms. W her cell phone and drove her to her car.

Later, Ms. W went to the police and reported the incident. The Johnson County District Attorney charged petitioner with criminal restraint, battery and criminal deprivation of property. The charges were resolved by the court entering an Order for Protection from Abuse on July 25, 2013. The order contained the required PFA order language and, among other things, prohibited petitioner from having any direct or indirect contact with Ms. W. After receiving the order, petitioner removed Ms. W as a follower of his "tweets."

Ms. W filed a complaint with KU's Office of Institutional Opportunity and Access (IOA) alleging that petitioner sexually harassed her. The IOA began an investigation of the complaint and sent petitioner a "no contact letter" on August 14, 2013. The letter informed petitioner that:

> [A] "no contact order has been placed on [petitioner] with respect to student [Ms. W].You are to refrain from any attempts to contact Ms. W. personally or through any other person.
>
> You are hereby informed that this 'no contact' order means that you understand you are prohibited from initiating, or contributing through third-parties, to any physical, verbal, electronic or written communication with [Ms. W.], her family, her friends or her associates. This also includes a prohibition from interfering with her personal possessions."

After receiving this letter petitioner posted the following messages on his Twitter account:

- "Jesus Navid, how is it that you always end up dating the psycho bitches? #butreallyguys" (6:53 p.m., August 14, 2013).

- "Oh right, negative boob job. I remember her." (12:19 a.m. August 15, 2013).

- "If I could say one thing to you it would probably be 'Go fuck yourself you piece of shit.' #butseriouslygofuckyourself #crazyassex." (11:12 p.m. August 23, 2013).

- "Lol, she goes up to my friends and hugs them and then unfriends them on Facebook. #psycho #lolwhat." (1:56 a.m. September 5, 2013).

On September 6, 2013, Jennifer Brooks, an IOA investigator, sent an e-mail to petitioner that recited the contents of the tweet dated August 23, 2013, and stated:

> "On August 14, 2013, you were issued a No Contact Order stating that you are not to make contact with [Ms. W] directly or indirectly. While your August 23rd tweet does not specifically state the name of your ex-girlfriend, this communication is in violation of the No Contact Order. I am writing to you to clarify that any reference made on social media regarding Ms. W, even if the communication is not sent to her or state her name specifically, it is a violation of the No Contact Order.
>
> Going forward, if you make any reference regarding Ms. W, directly or indirectly, on any type of social media or other communication outlet, you will be immediately referred to the Student Conduct Officer for possible sanctions which may result in expulsion from the University."

After receiving this e-mail, Petitioner posted the following message on his Twitter account:

- "#lol you're so obsessed with me you gotta creep on me using your friends accounts #crazybitch." (12:02 p.m. September 7, 2013).

The IOA concluded its investigation and found that petitioner violated the University's *Sexual Harassment Policy*. The IOA sent its findings and recommendation to the Vice Provost of Student Affairs, the Assistant Vice Provost of Student Affairs, and

the Director of Student Conduct and Community Standards in the Office of Student Affairs, Nicholas Kehrwald. On October 18, 2013, Mr. Kehrwald sent petitioner a letter informing petitioner that:

> "On October 7, 2013, IOA forwarded to me their investigative findings; namely, that based on a preponderance of the information, you violated the University sexual harassment policy and the University's No Contact Order by repeatedly posting demeaning tweets referenced at the Complainant, physically restraining the Complainant in your car on July 1, 2013. IOA's finding was based on the fact that you held the Complainant, against her will, for three hours in your car, yelled at the Complainant, called her demeaning names, and threatened suicide when she attempted to break-up with you. The record also indicates that you have had electronic communications directed at the Complainant after August 14, 2013. While some of these actions have occurred off-campus, the record demonstrates the relationship and behavior has had on-campus affects for the Complainant."

This letter was attached to an e-mail sent to petitioner on October 18, 2013, that notified petitioner that a formal hearing would be held on November 4, 2013 at 1 p.m. in the Governor's Room of the Kansas Union. The hearing panel convened on November 4, 2014, when it reviewed documents submitted by the University and heard comments from the various IOA investigators; Jane McQueeny, Executive Director of IOA; Mr. Kehrwald; Ms. W, and petitioner.

On November 6, 2013, the chair of the panel sent the Vice Provost for Student Affairs a letter conveying the panel's findings. Those findings are:

1. "In violation of Article 22 A, the behavior of Yeasin shows threats to the physical health, welfare and safety of [Ms. W].
    a. Yeasin physically restrained [Ms. W] in his car, yelled at her for hours and demonstrated hostile, controlling and unstable behavior, making [W] afraid for her safety. [W] repeatedly expressed during the time she was restrained in the care [sic], "I am scared. I am scared for my safety. [...] I do not feel safe."
        i. From the IOA report: Yeasin drove [W] to the Verizon store near Town Center Plaza in Leawood, Kansas and told [W] she had to

block the numbers of people she had been flirting with. [W] said she was scared at this point, and she went into the store to block the numbers even though [W] and Yeasin had not been dating for over a month.

ii. From the IOA report: While [W] was in Yeasin's car, Yeasin told [W] she had to call Jacob (a boy [W] had been talking to) and tell him that [W] was dating someone the whole time they had been sending messages to each other. [W] said she was afraid of Yeasin at this time, so she called Jacob and told him that.

b. Yeasin repeatedly followed and attempted to make unwanted contact including but not limited to physical or electronic contact with [W] via test message, twitter and in person after the no-contact order had been delivered to Yeasin, and after IOA had made clarification with Yeasin that any reference regarding [W], directly or indirectly, was a violation of the no-contact order.

i. Tweets made by Yeasin after he received the no contact order:

1. 'Jesus Navid, how is it that you always end up dating the psycho bitches? #butreallyguys.' (6:53 p.m. August 14, 2013)
2. 'Oh right, negative boob job. I remember her.' (12:19 a.m. August 15, 2013).
3. 'If I could say one thing to you it would probably be "Go fuck yourself you piece of shit." #butseriouslygofuckyourself #crazyassex.' (11:12 p.m. August 23, 2013).
4. 'Lol, she goes up to my friends and hugs them and then unfriends them on Facebook. #psycho #lolwhat .' (1:56 a.m. September 5, 2013).

ii. Tweets made by Yeasin after Brooks sent Yeasin the clarifying email regarding the no contact order:

1. '#lol you're so obsessed with me you gotta creep on me using your friends accounts. #crazybitch.' (12:02 p.m. September 7, 2013.

2. In violation of the University's Sexual Harassment policy, the behavior of Yeasin is unwelcome, based upon sex or sex stereotypes, and are so severe, pervasive and objectively offensive that they have the purpose or effect of substantially interfering with [W]'s academic performance or participation in the University's programs and activities.

a. Yeasin restrained [W] in his car, posted derogatory comments about her on social media, threatened to commit suicide if she broke up with him, threatened to spread rumors about [W], and demonstrated hostile, controlling and unstable behavior to [W]. Yeasin's actions specifically violate the University's Sexual Harassment policy as they include 'physical contact, advances and comments made in person and/or by

phone, text message, email or other electronic medium that is unwelcome.'

b. Yeasin made threats to [W] indicating he would make the University of Kansas campus environment so hostile, [W] would not attend any university in the state of Kansas.
c. [W] expressed in the Impact Statement that she read during the Hearing that her grades had slipped significantly during the summer because of the emotional toll her interactions with Yeasin had taken on her. The University's Sexual Harassment policy states that a violation occurs when another person's 'physical contact, advances and comments [...] interferes with a person's academic performance.'
d. [W] states that her relationship with Yeasin has affected her day-to-day on-campus activities, since she cannot enter public campus places without receiving glares and remarks from Yeasin's friends telling her she needs to leave and that her presence is unwanted. According to the University's Sexual Harassment policy, a violation includes "physical contact, advances and comments [...] that interferes with a person's academic performance, employment or equal opportunity to participate in or benefit from University programs or activities."
e. In an email to IOA, [W] writes that she notices that 'everywhere I go on campus, I feel nervous and oftentimes I do not feel safe. I try to stay inside my sorority house as much as possible because I fear the possibilities of what could happen if I left the building.'

In addition, there was no information presented at any time to dispute the actions set forth in the complaint or to demonstrate Yeasin did not violate Article 22, A and the University's Sexual Harassment policy. In fact, Yeasin admitted that some tweets that appeared to indirectly target [W] were, in fact, direct reference to [W].

After thorough review and consideration of the information presented to the Hearing Panel, as set forth above, we believe Navid Yeasin should be held responsible for his actions and the violation of the Code of Student Rights and Responsibilities brought forth by the complainant. We recommend the following sanctions be implemented:

1. Expulsion from classes, other University privileges and activities. This expulsion is permanent and effective immediately.
2. Ban from KU Lawrence campus until Ms. [W] has graduated from her undergraduate education. This ban is effective immediately. The ban from KU Lawrence should be reviewed by the Student Conduct Officer should Ms. [W] pursue graduate work at KU."

The Vice Provost for Student Affairs, Tammara Durham, sent petitioner a letter on November 13, 2013. In the letter she summarizes the findings of the hearing panel

and adopts its recommendations that petitioner be expelled from KU and barred from the Lawrence campus.

The petitioner appealed this decision to the University Judicial Board. The Judicial Board dismissed petitioner's appeal. Pursuant to the Act for Judicial Review and Civil Enforcement of Agency Actions the petitioner appeals the Judicial Board's dismissal to this court and the findings made by Tammara Durham, Vice Provost for Student Affairs that are affirmed by the Judicial Board's dismissal of petitioner's appeal.

Standard of Review

Judicial review of agency actions is governed by the Act for Judicial Review and Civil Enforcement of Agency Actions, 77-601, *et seq.* The district court's scope of review is set out in K.S.A. 77-621, the applicable subsection of which provides the following:

> (c) The court shall grant relief only if it determines any one or more of the following:
> (1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;
> (2) the agency has acted beyond the jurisdiction conferred by any provision of law;
> (3) the agency has not decided an issue requiring resolution;
> (4) the agency has erroneously interpreted or applied the law;
> (5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;
> (6) the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification;
> (7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or
> (8) the agency action is otherwise unreasonable, arbitrary or capricious.

"The scope of review provisions of K.S.A. 77-621 are a codification of the common law of Kansas." *Peck v. University Residence Committee of Kansas State*

University, 248 Kan. 450, 455 (1991). The *Peck* court cites *Zinke & Trumbo, Ltd. v. Kansas Corporation Commission*, 242 Kan. 470, 474-475 (1988) as establishing the following principles:

> The district court: (1) is restricted to considering the grounds for relief set forth in K.S.A. 77-621(c); (2) must presume the agency's findings valid; (3) may not set aside an agency order merely because the court would have reached a different conclusion if it had been the trier of fact; (4) may set aside the agency's finding when the finding is not supported by substantial competent evidence. (when the agency's determination "is so wide at the mark as to be outside the realm of fair debate"). 248 Kan. at 456.

In *Jones v. Kansas State University*, 279 Kan. 128. 106 P.3d 10 (2005) the Supreme Court defined substantial competent evidence as:

> [E]vidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issue can reasonably be resolved. 297 Kan. at 140.

The *Jones* Court went on to hold that:

> The appellate court must accept as true the evidence and all inferences to be drawn therefrom which support or tend to support the findings of the factfinder and must disregard any conflicting evidence or other inferences. A rebuttable presumption of validity attaches to all actions of an administrative agency, and the burden of proving arbitrary and capricious conduct lies with the party challenging the agency actions. [Citations omitted].

The burden of proving the invalidity of the agency's action is on the party asserting the invalidity.

Conclusions of Law

The petitioner has four contentions:

1. The hearing panel and Judicial Board erroneously applied the University's Code of Student Rights and Responsibilities (Student Code).
2. The University's action in expelling and banning petitioner was

unconstitutional in the following manner:

a. The no contact letter and follow-up e-mail were overbroad and constitute a prior restraint, making them unconstitutional on their face.

b. The University's expulsion of petitioner for the content of his electronic messages was unconstitutional as applied to him.

3. The University's action is not supported by the factual record.

4. The University failed to follow its own procedure.

I. Application of the University's Code of Student Rights and Responsibilities.

The court finds petitioner's conduct to be reprehensible. In its brief the University makes a point of providing extensive detail concerning the actions that underlie this complaint and other conduct by petitioner that the University did not include in its charges. The court must interpret and apply the law (in this case, the Student Conduct Code). The court should not decide this case based on the conduct itself. No matter how reprehensible the University may find petitioner's conduct to be, the University must follow its own rules and regulations in order to take impose sanctions on the petitioner as a result of the conduct.

Petitioner first contends that the University may not punish non-academic conduct occurring off of the University campus. Article 22 of the Student Code provides in part:

> "Students and organizations are expected to conduct themselves as responsible members of the University community. While on University premises or at University sponsored or supervised events, students and organizations are subject to disciplinary action for violations of published policies, rules and regulations of the University and Regents, and for the following offenses:
> A. Offenses Against Persons

An offense against a person is committed when a student:

1. Threatens the physical health, welfare, or safety of another person, places another person in serious bodily harm, or uses physical force in a manner that endangers the health, welfare of safety of another person; or willfully, maliciously and repeatedly follows or attempts to make unwanted contact, including but not limited to physical or electronic contact, including but not limited to physical or electronic contact with another person. This prohibition includes, but is not limited to, acts of sexual assault."

Article 18 of the Student Code states that: "If a violation of federal, state or local law occurs on campus and is also a violation of a published University regulation, the University may institute its own proceedings against an offender who may be subjected to criminal prosecution. . . ." Article 20 of the Student Code provides that: "The University may not institute disciplinary proceedings unless the alleged violation(s) giving rise to the disciplinary action occurs on University premises or at a University sponsored or supervised events, or as otherwise required by federal, state or local law."

Nicholas Kehrwald, Director of Student Conduct & Community Standards, set out the allegations against petitioner in a letter attached to an e-mail to petitioner dated October 18, 2013. The University alleged that petitioner's conduct violated Article 22 of the Student Code. The conduct specified by Mr. Kehrwald is the following:

"[R]epeatedly posting demeaning tweets referenced at the Complainant, physically restraining the Complainant in your car on July 1, 2013. IOA's finding was based on the fact that you held the Complainant, against her will, for three hours in your car, yelled at the Complainant, called her demeaning names, and threatened suicide when she attempted to break-up with you. The record also indicates that you have had electronic communications directed at the Complainant after August 14, 2013. While some of these actions have occurred off-campus, the record demonstrates the relationship and behavior has had on-

campus affects for the Complainant."

The details of the July1 incident are set forth above. The facts presented at the hearing demonstrate that the entire incident occurred during the summer when neither petitioner nor Ms. W were enrolled in KU. The incident occurred inside petitioner's car while it was located at various places in Olathe, Kansas and Leawood, Kansas. No evidence was presented that any of the acts occurred on the University campus or that petitioner was participating in a University sponsored event.

Likewise, KU presented no evidence that petitioner posted the offending "tweets" on the KU campus or at a University sponsored event. The University contends that the petitioner "should have reasonably believed his statements would be read on campus or otherwise reach campus, as was the case."

KU contends that petitioner violated Article 22 of the Student Code. As noted above, Article 22 states that: "While on University premises or at University sponsored or supervised events, students and organizations are subject to disciplinary action for violations of published policies, rules and regulations of the University and Regents, and for the following offenses" (specific offenses are then set out. Article 18 states that: "If a violation of federal, state or local law occurs on campus and is also a violation of a published University regulation, the University may institute its own proceedings against an offender who may be subjected to criminal prosecution. . . ." Article 20 of the Student Code provides that: "The University may not institute disciplinary proceedings unless the alleged

violation(s) giving rise to the disciplinary action occurs on University premises or at a University sponsored or supervised events, or as otherwise required by federal, state or local law."

Petitioner argues that all of these provisions make it clear that the University must show that the alleged violations occurred on University property or at University sponsored events. KU claims that the last portion of Article 20, "or as otherwise required by federal, state or local law," permits the University to discipline petitioner for his actions committed off-campus. The University then refers to Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, *et seq.* (Title IX). Title IX and its implementing regulations prohibit a university from discriminating against anyone on the basis of sex in education programs or activities. KU directs the Court's attention to the "Dear Colleague" letter it received from the Assistant Secretary for Civil Rights in the United State Department of Education. That letter specifies the Title IX responsibilities of schools, colleges and universities that are recipients of Federal financial assistance. The University points out the consequences the law imposes on schools that do not comply with the Title IX requirements. However these consequences are a result of a university's failure to comply with the Title IX requirements. They do not purport to punish the offending student.

Title IX and the "Dear Colleague" letter are not part of the University Student Conduct rules. Rather than proscribing the conduct of individuals, Title IX addresses the conduct of schools, colleges and universities. The "Dear Colleague" letter states that a recipient of Federal funding must, in addition to

other requirements, "Adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints." This section of the letter also contains the following admonishment: "OCR advises recipients to examine their current policies and procedures on sexual harassment and sexual violence to determine whether those policies comply with the requirements articulated in this letter and the *2001 Guidance*. Recipients should then implement changes as needed."

The court finds that the University's own Student Conduct Code only applies to student conduct that occurs on campus or at campus related activities. Title IX does not create an exception to this requirement. Likewise, the Student Code does not make an exception for this requirement to prohibit conduct in which a student publishes a statement off-campus that he or she "should have reasonably believed . . . would be read on campus or otherwise reach campus, as was the case."

The University failed to establish by a preponderance of the evidence that petitioner's conduct occurred on campus or at campus related activities. The University can easily change its Student Conduct Code if it wishes to prohibit off-campus student conduct.

II. *Remaining Issues.*

Because of the court's finding on the first issue, the court does not need to reach the remaining issues. The First Amendment issue is intriguing; however, the court should not consider the constitutional issues if the court can decide the case on a different basis.

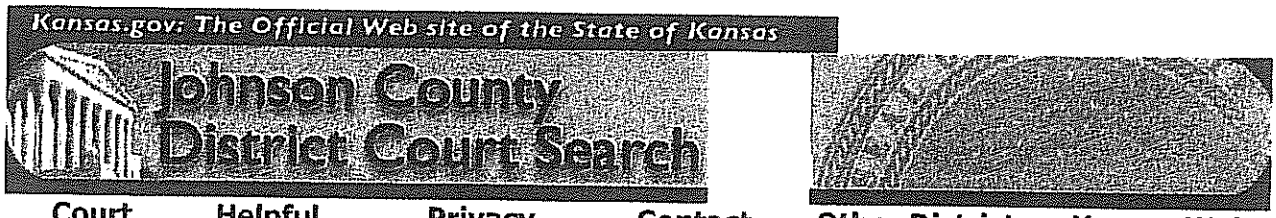
The court finds that the findings of the hearing panel and the vice provost and that were adopted by the judicial board are not supported by substantial evidence. Additionally, the University has erroneously interpreted the Student Conduct Code by applying it to conduct that occurred off-campus.

The court further finds that judgment should be entered in favor of petitioner and the action of the University expelling the petitioner and banning him from the Lawrence Campus should be set aside.

This memorandum decision constitutes a journal entry and judgment is entered in accordance with the findings hereinabove made. This memorandum is dated and effective this 26th day of September 2014.

Robert W. Fairchild
District Judge

cc: Sara L. Trower
Terrence E. Leibold



Johnson County District Court
Criminal/Traffic Court: Full Appearance Docket Search Results

Searched on Case #: **13DV00797**

CASE NO 13DV00797

LAST NAME YEASIN

FIRST NAME NAVID

CHARGE	DESC	PLEA	FINDING
21-5411	CRIM RESTRAINT	NO CONTEST	GUILTY
21-5413(a)	BATTERY	NO CONTEST	GUILTY
21-5803(a)	CRIM DEPRIV PR	NO CONTEST	GUILTY

ROA ENTER DT	ROA ACTION
07/01/13	CASE E-FILED; AGENCY OPPD RPT# 13-013856
07/01/13	INITIAL CHARGE(S) 21-5411 CRIM RESTRAINT; 21-5413(a) BATTERY; 21-5803(a) CRIM DEPRIV PR FILED
07/01/13	JUDGE JAMES E PHELAN ASSIGNED TO CASE, DIVISION M3
07/01/13	SCHED. AR ON 07/01/13, 02:30pm, DIV M4
07/01/13	FILE STAMP 07/01/13, AFFIDAVIT
07/01/13	FILE STAMP 07/01/13, COMPLAINT, INITIATION OF ACTION
07/01/13	FILE STAMP 07/01/13, PRE-TRIAL RISK ASSESSMENT
07/01/13	SCHED. DIVERSION on 08/14/13,10:00am,Div18
07/01/13	COUNT 1 21-5411 PLAINTIFF APPEARS BY FRITZ,DEFENDANT APPEARS IN CUSTODY PRO SE ,COURT APPOINTED COUNSEL REQUESTED GERSTLE,READING WAIVED ,PLEA NOT GUILTY,DEFENDANT ORDERED TO PERSONALLY APPEAR AT NEXT COURT HEARING , CONTINUED BY DEFENSE ,SET BOND 2500/CASH OR SURETY (DWV)(ER)
07/01/13	SET BOND CONDITION, HOUSE ARREST W/GPS MONITORING. NOT GO WITHIN 100 YARDS OF VICTIM'S RESIDENCE/EMPLOYMENT NO ALCOHOL NO FIREARMS NO CONTACT VICTIMS/WITNESSES RESIDENCE/EMPLOYMENT MISCELLANEOUS
07/01/13	DEFENSE ATTORNEY GERSTLE, JOHN P ASSIGNED
07/01/13	FILE STAMP 7/1/2013, DOMESTIC VIOLENCE COURT BOND CONDITIONS
07/01/13	BOND RECEIPT# 1303823, $2500.00, HABIBA YEASIN
07/01/13	PROBATION RECORD CREATED
07/02/13	ADDL COST NEWWIT 10.00
07/02/13	FILE STAMP 7/2/2013, BOND FILED
07/02/13	(Removed) ADDL COST NEWWIT 10.00
07/02/13	JUDGE TPM ASSIGNED TO CASE , DIV 18
07/02/13	FILE STAMP 7/1/2013, WITNESS AFFIDAVIT

07/02/13	ADDL COST NEWWIT 10.00
07/05/13	FILE STAMP 7/5/2013, NO CONTACT ORDER
07/09/13	ELECTRONIC ENTRY OF APPEARANCE BY CARL E CORNWELL AS DEFENSE ATTORNEY (SUBSTITUTE)
07/16/13	SCHED. BOND MOTION HEARING on 07/25/13,10:30am,Div 18
07/16/13	FILE STAMP 7/16/2013, MOTION TO MODIFY BOND CONDITIONS
07/19/13	MEMO; DIVERSION BEING APPLIED FOR
07/25/13	COUNT 1 21-5411 PLAINTIFF APPEARS BY WEINGART,DEFENDANT APPEARS WITH ATTORNEY CORNWELL,BOND MODIFICATION DENIED (TPM)(ER)
08/08/13	CANCELLED DIVR on 08/14/13,10:00am,Div18
08/08/13	COUNT 1 21-5411,FINDING OTHER TERMINATION
08/08/13	COUNT 2 21-5413(a),FINDING OTHER TERMINATION
08/08/13	COUNT 3 21-5803(a),FINDING OTHER TERMINATION
08/08/13	<******* Bench Notes *********>
08/08/13	DIVERSION AGREEMENT HAS BEEN SIGNED
08/09/13	FILE STAMP 8/9/2013, ORDER OF DIVERSION/AGREEMENT
08/09/13	COUNT 1 21-5411,SENTENCE DATE 08/09/13,COURT COSTS TO DEFENDANT 161.50
08/09/13	ADDL COST FNGRPRT 10.00
06/24/14	SCHED. OTA DIVERSION REVOCATION on 08/06/14,10:00am,Div 18
06/25/14	FILE STAMP 06/24/2014, MOTION TO REVOKE DIVERSION/ORDER TO APPEAR
07/01/14	CHANGED STATUS FROM O TO "C"
07/09/14	FILE STAMP 07/09/2014, MOTION FOR REVOCATION OF DIVERSION, AMENDED
08/06/14	SCHED. GO DIVERSION REVOCATION on 09/02/14,01:30pm,Div18
08/06/14	COUNT 1 21-5411 PLAINTIFF APPEARS BY MAZZA,DEFENDANT APPEARS WITH ATTORNEY KENNEY,CONTINUED BY DEFENSE , DEFENDANT ORDERED TO PERSONALLY APPEAR AT NEXT COURT HEARING (TPM)(ER)
09/02/14	SCHED. GO DIVERSION REVOCATION on 09/25/14,03:30pm,Div18
09/02/14	COUNT 1 21-5411 PLAINTIFF APPEARS BY WEINGART,DEFENDANT APPEARS WITH ATTORNEY CORNWELL,CONTINUANCE ,DEFENDANT ORDERED TO PERSONALLY APPEAR AT NEXT COURT HEARING , (TPM)(HE)
09/25/14	DEFENDANT REPORTED TO ROOM 115A FOR COURT SERVICE AND HAS BEEN GIVEN REPORTING INSTRUCTIONS
09/25/14	COUNT 1 21-5411 PLAINTIFF APPEARS BY WEINGART,DEFENDANT APPEARS WITH ATTORNEY CORNWELL,DEFENDANT STIPULATES TO VIOLATIONS OF PROBATION ,DEFENDANTS DIVERSION REVOKED ,PLEA NO CONTEST,FINDING GUILTY,DEFENDANT SENTENCED TO CUSTODY OF SHERIFF'S DEPT., SCREEN FOR WORK RELEASE. IF ACCEPTED, THE DEFENDANT SHALL BE TRANSFERRED TO THE CUSTODY OF THE JOHNSON COUNTY DEPARTMENT OF CORRECTIONS FOR WORK RELEASE WITH THE DATE OF PLACEMENT DETERMINED BY CORRECTIONS STAFF. ,JAIL FOR A PERIOD OF 6M//,PROBATION GRANTED FOR 12M, COMMENT NO CONTACT WITH ALEXANDRIA WARNER,COMMENT ALL COUNTS CONCURRENT (TPM)(ER)
09/25/14	COUNT 2 21-5413(a) PLEA NO CONTEST,FINDING GUILTY,DEFENDANT SENTENCED TO CUSTODY OF SHERIFF'S DEPT., SCREEN FOR WORK RELEASE. IF ACCEPTED, THE DEFENDANT SHALL BE TRANSFERRED TO THE CUSTODY OF THE JOHNSON COUNTY DEPARTMENT OF CORRECTIONS FOR WORK RELEASE WITH THE DATE OF PLACEMENT DETERMINED BY CORRECTIONS STAFF. ,JAIL FOR A PERIOD OF 6M// (TPM)(ER)
09/25/14	COUNT 3 21-5803(a) PLEA NO CONTEST,FINDING GUILTY,DEFENDANT SENTENCED TO CUSTODY OF SHERIFF'S DEPT., SCREEN FOR WORK RELEASE. IF ACCEPTED, THE DEFENDANT SHALL BE TRANSFERRED TO THE CUSTODY OF THE JOHNSON COUNTY DEPARTMENT OF

	CORRECTIONS FOR WORK RELEASE WITH THE DATE OF PLACEMENT DETERMINED BY CORRECTIONS STAFF. ,JAIL FOR A PERIOD OF 6M// (TPM)(ER)
09/25/14	CHANGED STATUS FROM "C" TO "P"
09/30/14	FILE STAMP 9/29/2014, ORDER OF PROBATION
09/30/14	FILE STAMP 9/29/2014, JOURNAL ENTRY OF JUDGMENT
09/30/14	ADDL COST PROBF 60.00
09/30/14	ADDL COST DVSF 100.00

Another Criminal/Traffic Court: Search By Case Number Search
Johnson County Main Search Page

THE SUPREME COURT OF NEW HAMPSHIRE

Rockingham
No. 2013-229

THE STATE OF NEW HAMPSHIRE

v.

BRIAN CRAIG

Argued: April 3, 2014
Opinion Issued: February 12, 2015

Joseph A. Foster, attorney general (Natch Greyes, fellow, on the brief and orally), for the State.

Christopher M. Johnson, chief appellate defender, of Concord, on the brief and orally, for the defendant.

BASSETT, J. Following a jury trial in Superior Court (Delker, J.), the defendant, Brian Craig, was convicted on one count of criminal threatening, RSA 631:4 (Supp. 2014); one count of witness tampering, RSA 641:5 (2007); and one count of stalking, RSA 633:3-a (Supp. 2014). The convictions were based on a series of messages that he posted on his Facebook profile page in April 2012 that were directed to the victim. At the conclusion of the State's case, the defendant unsuccessfully moved to dismiss all three charges. On appeal, the defendant argues that the trial court erred in denying his motion to

dismiss the witness tampering and stalking charges for insufficient evidence. He does not challenge his conviction for criminal threatening. We affirm.

I. Factual Background

The jury could have found the following facts. In late 2011, the defendant met the victim at a restaurant in Exeter where she worked as a bartender and waitress. The defendant initially came to the victim's workplace with his brother or with friends. The victim interacted with the defendant only at work, and, according to her, their relationship consisted only of "very casual, very simple" customer-server communications. In time, the defendant began coming to the restaurant by himself, and the victim noticed that he stared at her. On one occasion, he came in alone, and told the victim that he came in just to see her.

In April 2012, the defendant mailed a letter to the victim at her workplace. The letter addressed the victim by name, and began: "So, you must've heard I was speaking highly of you on my Facebook page. I can tell, because you are trying to hurt me." Alarmed by the letter, the victim contacted the Exeter Police Department. Shortly thereafter, the victim received a second letter at work, in which the defendant stated that he "had to get a few things off of [his] chest" about their relationship before he could "say good bye properly."

On April 22, Officer Chadwick of the Exeter Police Department served the defendant with a stalking warning letter. Chadwick explained to the defendant that the victim had complained about his behavior, and that the letter was a warning from the Exeter Police Department that "future stalking behavior" would result in prosecution for stalking under RSA chapter 633:3-a. Chadwick confirmed that the defendant understood the warning letter and the consequences of violating it. On the same day, the Exeter police served the defendant with a no-trespass notice from the victim's employer, informing him that he was forbidden from entering the victim's workplace, and that if he did so, he could be arrested for criminal trespass. See RSA 635:2 (Supp. 2014).

The next day, the victim received a third letter at her workplace. The defendant wrote, "[I can] never give you another shot again, since you chose not to repair the damage you caused in having me banned from [the restaurant] for having spoken of it on the internet." Although the victim had been told by the police that the defendant had mailed another letter prior to being served with the stalking warning letter, she was nevertheless distressed when she received it. The victim was so troubled that, later that day, she filed a petition for a temporary restraining order.

On April 24, the Superior Court (McHugh, J.) issued a temporary restraining order against the defendant under RSA chapter 173-B, which was

served on the defendant the same day. See RSA ch. 173-B (2014) (protection of persons from domestic violence). The restraining order required the "[s]toppage of the mail letters and no contact whatsoever, phone, email, et cetera." The order also notified the defendant that a final hearing on the restraining order was scheduled for May 4, 2012.

Subsequent to service of the restraining order, the defendant continued to post statements directed to the victim on his public Facebook page. On April 27, the defendant posted:

> Dear Kitty Kat:
>
> I just wanted to remind you that since you would have to choose to look at the things I say to you on Facebook, that it means my butt is covered. Also, you are not allowed to do anything back to me all week, as it would constitute a breach in your end of the whole Restraining order thing. So technically, you are the one in cuffs. HA HA!
>
> . . . .
>
> [Y]ou need to stop trying to beat me and start helping save people from death.
>
> . . . .
>
> I think by the day in court you will have come around.
>
> . . . .
>
> Now you see, [victim's name], why it has to be you. Only you can wake up and say "Oh, there's no beating him, I better help him or we're all dead."

The next day, April 28, the defendant posted:

> Dear Babe
>
> . . . .
>
> [Y]ou are the one person I could never walk away from, unless I was made to. I am just asking you not to make me. . . . [Y]ou made it so I could not come back. You did so to see if I would care . . . . Well, damnit, I care! . . . . This is not goodbye.

Despite acknowledging that, "I know you want me to slow down a bit on here," the defendant continued to post statements directed to the victim on his Facebook page:

> So you want to push with this restraining order eh? Ha Ha, okay! Here's what we will do. Since it won't be resolved this Friday, and you intend to use my facebook posts against me, even though they are not a crime, I can retaliate with law too. . . . I can represent myself and beat you . . . .
>
> . . . .
>
> Just tell the judge you are all set, and I will never speak your name again. Don't forget to bring this post in with you.
>
> . . . .
>
> You'll have to lie under an oath of God to tell them you first became aware of my words on Facebook via my letter.
>
> . . . .
>
> You don't want to go to jail for perjury do you?
>
> . . . .
>
> The document I have here does not mention my Facebook wall. You lose again[.]
>
> . . . .
>
> HA HA. I mentioned Facebook in a letter, you mentioned your knowledge of it in your complaint, yet did not say not to talk about you on here.

Later on April 28, the defendant posted four more messages, instructing the victim as to what he wanted her to do and say at the hearing scheduled for Friday, May 4, and threatening her if she did not comply:

> [H]ere's my proposal. On Friday, you can either tell the judge you are all set with me . . . [o]r, you can drop all [the] charges and become an honest woman.
>
> . . . .

[G]oing to trial means the entire staff at [your workplace] gets put on the stand to answer the question "Did she view [the defendant's] Facebook wall, prior to the letter in which he mentions it was received?["] Since I know you have been viewing my wall for quite some time, I win.

. . . .

Oh Schnookums! I forgot to mention . . . if you get me convicted of anything, I go to jail for a year, and everyone dies in the Apocalypse, and it will be all your fault. So, your options are to be all mine as of this Friday, or f**k off forever.

. . . .

No, I want the order removed before Friday now. Or I will have you held accountable . . . . You go tell the judge that you were mistaken, and you'd like it removed. . . . You're a s**t! [S]o shut up and do as I say.

. . . .

Well folks, I am going to go silent for the week, and let [the victim] eat s**t and rot in Hell.

. . . .

[G]o tell them you were lying and you want to face the music for it.

. . . .

You can tell the police the truth and drop the charges on [M]onday[.] No, right now, go there now. [I]f and when I receive documentation that you have dropped the charges we can start all over. . . .

Several days after the court's entry of the restraining order against the defendant, the victim, for the first time, decided to read the defendant's Facebook page. She did so because the defendant's first letter referenced his posts about her on Facebook, and because her mother, who had read the posts, warned the victim of "the extent and the severity" of the language in them.

Although the victim had a Facebook page at the time, she was not a "Facebook friend" of the defendant.[1] However, because the defendant's page was public, the victim found the defendant's Facebook page simply by entering his name into the Facebook search tool. The defendant's posts were contained in his Facebook "Notes," which the victim could read by opening the "Notes" section of the defendant's Facebook profile page.[2]

The victim spent "about three hours" reading the defendant's posts about her. She was "appalled" and "scared" by the language he used in reference to her, and by reading her name in one of his posts. Consequently, she contacted the Exeter Police Department and reported the content of the Facebook page. In response, Officer Chadwick logged onto Facebook, found the defendant's Facebook page, and read the multiple posts directed to the victim, many of which were written after the defendant had been served with the restraining order. On April 28, Chadwick went to the defendant's home and confronted him with printed copies of the Facebook posts. The defendant admitted that he wrote them, but said that he was "expressing his feelings." Chadwick then arrested the defendant.

A grand jury indicted the defendant for witness tampering, RSA 641:5; stalking, RSA 633:3-a, I(c); and criminal threatening, RSA 631:4. A jury trial was held on December 11, 2012. At the conclusion of the State's case, the defendant moved to dismiss each charge. The court denied the motion. The jury convicted the defendant on all three charges. This appeal followed.

On appeal, the defendant argues that the trial court erred in denying his motion to dismiss the witness tampering and stalking charges. He contends that the evidence was legally insufficient to convict him of the two charges.

II. Explanation of Facebook Technology Relevant to this Case

Facebook is a widely-used social media website, available for free to anyone with an e-mail account, whose stated mission is "to give people the power to share and make the world more open and connected." Mazzone, Facebook's Afterlife, 90 N.C. L. Rev. 1643, 1646 (2012) (quotation omitted); see

---

[1] "Facebook friends" are other Facebook users whom the user has invited to join the user's social network. O'Leary v. State, 109 So. 3d 874, 874 n.1 (Fla. Dist. Ct. App. 2013). Any pair of users may agree to become friends. Users' posts are automatically sent to their Facebook friends by way of their live News Feed. Id. at 877; see also Ehling v. Monmouth-Ocean Hosp. Service Corp., 961 F. Supp. 2d 659, 662 (D.N.J. 2013).

[2] "Notes" is a Facebook application that allows users to write posts without the usual word limit imposed by Facebook. The Notes are available directly from a user's profile page. Other users can read the Notes by clicking on a link that appears under a user's profile picture on his profile page. See Jay Leon, What are Facebook Notes For?, Houston Chronicle, http://smallbusiness.chron.com/facebook-notes-for-26637.html (last visited Jan. 22, 2015).

Democko, Comment, Social Media and the Rules on Authentication, 43 U. Tol. L. Rev. 367, 376 (2012) (discussing access to Facebook). Facebook and other social media sites are becoming the dominant mode of communicating directly with others, exceeding e-mail usage in 2009. Diss, Note, Whether You "Like" It or Not: The Inclusion of Social Media Evidence in Sexual Harassment Cases and How Courts Can Effectively Control It, 54 B.C. L. Rev. 1841, 1842 (2013). With over one billion active users, Facebook is "revolutionizing the way people behave . . . and interact with one another in their everyday lives" through site functions that facilitate sharing information, such as a user's "profile page," the ability to send personal messages to other users, and by allowing users to become "Facebook friends" with other users. Democko, supra at 368, 375-76; see Ehling v. Monmouth-Ocean Hosp. Service Corp., 961 F. Supp. 2d 659, 662 (D.N.J. 2013).

A profile page "is a webpage that is intended to convey information about the user." Ehling, 961 F. Supp. 2d at 662. "By default, Facebook [profile] pages are public." Id. When a user shares something publicly, "anyone including people off of Facebook can see it." Facebook, http://facebook.com/help/211513702214269?refid=69 (last visited Jan. 22, 2015); see also Diss, supra at 1844 n.17 ("Public information is available to anyone, even to people without an account on [Facebook]."). Alternatively, Facebook users can restrict access to their Facebook content using Facebook's customizable privacy settings. Ehling, 961 F. Supp. 2d at 662. "Access can be limited to the user's Facebook friends, to particular groups or individuals, or to just the user." Id.

III. Analysis

To prevail on a challenge to the sufficiency of the evidence, a defendant must show that no rational trier of fact "could have found the essential elements of the crime beyond a reasonable doubt, considering all the evidence and all reasonable inferences therefrom in the light most favorable to the State." State v. Germain, 165 N.H. 350, 354-55 (2013) (quotation omitted). We examine each evidentiary item in the context of all the evidence, not in isolation. Id. at 355. Circumstantial evidence may be sufficient to support a finding of guilty beyond a reasonable doubt. Id. Further, the trier of fact may draw reasonable inferences from facts proved and also inferences from facts found as a result of other inferences, provided they can be reasonably drawn therefrom. Id. When the evidence as to one or more elements of the charged offense is solely circumstantial, the defendant must establish that the evidence does not exclude all reasonable conclusions except guilt. Id. at 361. Because a challenge to the sufficiency of the evidence raises a claim of legal error, our standard of review is de novo. State v. Kay, 162 N.H. 237, 243 (2011).

A. Stalking

We first address whether the State presented sufficient evidence on the charge of stalking. See RSA 633:3-a, I(c). The defendant's arguments challenging the sufficiency of the evidence are closely intertwined with questions of statutory interpretation. For example, the defendant contends that there was insufficient evidence that he stalked the victim because he did not take an "action to communicate" with the victim as required by the definition of "contact" in RSA 173-B:1, IV. Therefore, determining whether there is sufficient evidence to convict the defendant of stalking requires us to interpret the stalking statute, RSA 633:3-a, I(c), and the definition of contact in RSA 173-B:1, IV.

We begin our analysis by outlining the pertinent portions of the statutory scheme. In order to convict the defendant of stalking in violation of RSA 633:3-a, I(c), the State had to prove that the defendant, after being served with a protective order issued pursuant to RSA chapter 173-B that prohibited contact with the victim, "purposely, knowingly, or recklessly engage[d] in a single act of conduct that both violates the provisions of the order and is listed in paragraph II(a)." RSA 633:3-a, I(c) (emphases added); see RSA 633:3-a, II(a). Here, the State charged that the defendant: (1) engaged in an "act of communication, as defined in RSA 644:4, II," see RSA 633:3-a, II(a)(7); and (2) that this act of communication violated the provision of the restraining order that required "no contact whatsoever, phone, email, et cetera." RSA 644:4, II defines "communicates," in relevant part, as "impart[ing] a message by any method of transmission, including . . . electronic transmission." RSA 644:4, II (2007). RSA 173-B:1, IV defines "contact" as "any action to communicate with another either directly or indirectly, including, but not limited to, using any form of electronic communication, leaving items, or causing another to communicate in such fashion."

The interpretation and application of statutes present questions of law, which we review de novo. See Deveso v. Cavadi, 165 N.H. 76, 79 (2013). "We are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole." State v. Dor, 165 N.H. 198, 200 (2013). "When interpreting a statute, we first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning." Id. "We do not read words or phrases in isolation, but in the context of the entire statutory scheme." Id. "Our goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme." Id.

The defendant does not dispute that he was served with the domestic violence restraining order on April 24, or that he subsequently posted the statements at issue on his Facebook page. Thus, the State had to prove that the defendant, by posting on his own public Facebook page after he had

received the restraining order, engaged in a single act of conduct that constitutes: (1) an "act of communication"; and (2) "contact" pursuant to RSA 173-B:1, IV that violates the April 24 restraining order.

1. Act of Communication Pursuant to RSA 644:4, II

The trial court concluded that "the nature of what [was] written and how [it was] written . . . suggest[ed] that [the defendant's posts were] a communication directed at [the victim] in a public forum," and that "the definition of communication [in RSA 644:4, II] is broad enough, certainly, to cover . . . these posts on Facebook." Although the defendant asserts on appeal that the trial court erred in its interpretation of RSA 644:4, II, he makes only a passing reference in his brief to the issue; therefore, he has failed to develop this argument sufficiently for our review. State v. Young, 159 N.H. 332, 337 (2009).

2. Contact Pursuant to RSA 173-B:1, IV

The defendant's argument that he did not "contact" the victim in violation of the restraining order has two main components. First, he asserts that his conduct is insufficient, standing alone, to constitute an "action to communicate" as required by RSA 173-B:1, IV. Second, he argues that the victim's affirmative act of searching for and reading his Facebook posts precludes his conduct from constituting "contact" as defined above.

We first consider the defendant's argument regarding his own conduct. The defendant contends that, in order for his conduct to constitute "contact" pursuant to RSA 173-B:1, IV, he must "be the actor not only in the creation of the message, but in the conveyance of it to the protected person." The defendant argues that his Facebook posts cannot constitute contact because he merely posted publicly online without sending the posts directly to the victim, and, therefore, did not take an "action to communicate" as required by RSA 173-B:1, IV. We disagree.

In essence, the defendant asks us to rewrite the statute. The defendant's argument that "contact" requires that the defendant "be the actor not only in the creation of the message, but in the conveyance of it to the protected person," is fatally undermined by the legislature's definition of the term "contact" in RSA 173-B:1, IV. The statute provides that "any action to communicate with another either directly or indirectly" constitutes contact. See RSA 173-B:1, IV (emphases added).

Additionally, the defendant incorporates a narrow "conveyance" requirement in his proffered interpretation of "contact," that would require that the defendant deliver the message directly to "the protected person." Although we agree with the defendant that "contact" requires more than merely creating

a message, his limitations do not find support in the actual language chosen by the legislature, which requires only that a person act "either directly or indirectly" to "communicate with another." See RSA 173-B:1, IV (emphases added). Further, in this case, the defendant did more than merely create a message. By posting messages addressing the victim on his public Facebook page, and directing the victim's attention to his page, the defendant both created a message and took steps to convey it to the victim. To construe the statute as not encompassing the defendant's conduct — writing a message addressing the victim and posting it in a public forum, but not personally conveying the message to the victim — would add limiting language that the legislature did not include. See Landry v. Landry, 154 N.H. 785, 788 (2007) (concluding that phrase "any property" requires broad interpretation of statute). Such a change to the statute's language is not for this court to make. Id. "The legislature's choice of language is deemed to be meaningful." O'Brien v. N.H. Democratic Party, 166 N.H. 138, 143 (2014) (quotation and brackets omitted).

Moreover, it is significant that RSA 173-B:1, IV lists "any form of electronic communication" in its nonexhaustive list of "action[s] to communicate." This reflects the legislature's awareness that technological advances in communication — including e-mail and social media websites such as Facebook — provide a fertile environment for criminal behavior and that "[s]ometimes, particularly in stalking and harassment cases, social media facilitates the crime." Morrison, Passwords, Profiles, and the Privilege Against Self-Incrimination: Facebook and the Fifth Amendment, 65 Ark. L. Rev. 133, 136 (2012); cf. Beagle, Comment, Modern Stalking Laws: A Survey of State Anti-Stalking Statutes Considering Modern Mediums and Constitutional Challenges, 14 Chap. L. Rev. 457, 474 n.129 (2011) (observing that New Hampshire, like many states, added "electronic communications" to its general anti-stalking statute to address growing problem of cyberstalking).

Additionally, as we have previously recognized:

> the legislature intended RSA chapter 173-B to be construed liberally. See N.H.H.R. Jour. 649 (1999). "It is the public policy of this state to prevent and deter domestic violence through equal enforcement of the criminal laws and the provision of judicial relief for domestic violence victims." Id. at 648. A broad interpretation of the statute comports with the legislative purpose to "preserve and protect the safety of the family unit for all family or household members by entitling victims of domestic violence to immediate and effective police protection and judicial relief." Id. at 649.

State v. Kidder, 150 N.H. 600, 603 (2004). Therefore, a broad interpretation of "any action to communicate" comports with the legislative purpose of RSA

chapter 173-B: to provide those who seek protective orders pursuant to the statute with "immediate and effective police protection and judicial relief." Id.

Our interpretation finds support in cases from other jurisdictions in which defendants have been held accountable for posting messages on the internet. See Baughman, Friend Request or Foe? Confirming the Misuse of Internet and Social Networking Sites by Domestic Violence Perpetrators, 19 Widener L.J. 933, 959-60 (2010) (discussing cases where courts have found liability for internet communications). For example, in O'Leary v. State, the District Court of Appeal for the First District of Florida upheld a trial court's finding that a defendant "sent" a threatening statement to one of his relatives and her romantic partner by posting it on his own Facebook page. O'Leary v. State, 109 So. 3d 874, 877 (Fla. Dist. Ct. App. 2013). The defendant in O'Leary identified his victims by name, and his Facebook page was "accessible by any member of the public who wanted to view [it]." Id. at 875. A Facebook friend of the defendant read the post and informed the victims about it. Id. at 874-75. Although the defendant in O'Leary claimed that "he 'sent' nothing because he neither asked anyone to view the posting on his personal Facebook page, nor addressed the posting to anyone," the Court of Appeal rejected that argument, stating that "a common sense review of the facts suggests that [the defendant] has done more than he contends." Id. at 877. The court ruled that "by the affirmative act of posting the threats on Facebook, even though it was on his own personal page, [the defendant] 'sent' the threatening statements to all of his Facebook friends . . . ." Id. The court explained:

> When a person composes a statement of thought, and then displays the composition in such a way that someone else can see it, that person has completed the first step in [sending a message]. . . .
>
> [The defendant] reduced his thoughts to writing and placed this written composition onto his personal Facebook page. . . . Given the mission of Facebook, there is no logical reason to post comments other than to communicate them to other Facebook users. Had [the defendant] desired to put his thoughts into writing for his own personal contemplation, he could simply have recorded them in a private journal, diary, or any other medium that is not accessible by other people.

Id. We recognize that, unlike the victim in this case, the recipient of the threat in O'Leary was a Facebook friend of the defendant, and he received the post by way of his Facebook News Feed. However, we find that, given the circumstances in this case — that the defendant directed the victim to his Facebook page — the O'Leary court's rationale applies with equal force here: there is "no logical reason" for the defendant to post statements directed to the victim on Facebook other than "to communicate them." Id. Had the defendant

desired merely "to put his thoughts into writing for his own personal contemplation," and not wished them to be communicated to the victim, he could have written his thoughts in "any other medium that is not accessible by other people." Id.

Similarly, in Rios v. Fergusan, a Connecticut court upheld a restraining order against a defendant after he "posted a video on YouTube in which [the defendant] brandished a firearm in a rap song in which he states that he wants to hurt the applicant, to shoot her and to 'put her face on the dirt until she can't breathe no more.'" Rios v. Fergusan, 978 A.2d 592, 595 (Conn. Super. Ct. 2008). The court observed that "[the defendant's] YouTube video [was] more than the mere posting of a message on an open Internet forum . . . [because] he specifically targeted his message at [the victim] by threatening her life and safety." Id. at 599-600 (emphasis added). Further, the court explained, the defendant "posted the video on an Internet medium that can be disseminated world-wide, but the content of the video establishes that he was purposefully directing it to [the victim] . . . ." Id. at 601. (emphases added).

We find these cases to be instructive. In this case, as in O'Leary, the defendant chose to make his page "public," meaning his page was "available to anyone, even to people without an account on [Facebook]." Diss, supra at 1844 n.17. If, as he asserted to Officer Chadwick at the time of his arrest, the defendant was only "expressing his feelings," he could have chosen to make his page private, or recorded his thoughts in "any other medium that is not accessible by other people." O'Leary, 109 So. 3d at 877; see Ehling, 961 F. Supp. 2d at 662 (discussing Facebook privacy options).

Further, in several posts that the defendant wrote after he received the restraining order, he stated that he was aware that the victim was reading his Facebook page:

> [S]ince you would have to choose to look at the things I say to you on Facebook, that . . . means my butt is covered.
>
> . . . .
>
> The document I have here does not mention my Facebook wall. You lose again . . . HA HA. . . . [Y]ou mentioned your knowledge of [my Facebook page] in your complaint, yet did not say not to talk about you on here.
>
> . . . .
>
> Since I know you have been viewing my wall for quite some time, I win.

These posts demonstrate that the defendant, like the defendant in O'Leary, had "no logical reason to post comments other than to communicate them" to the victim. O'Leary, 109 So. 3d at 877.

In addition, we note that most of the defendant's posts would have been meaningless to any reader other than the victim. For example, the defendant instructed the victim to take certain actions and say specific things "on Friday," referring to the final restraining order hearing, and referenced specific details of the victim's complaint. The content of these posts shows that the defendant, like the defendant in Rios, "specifically targeted his message at [the victim]," and "purposefully direct[ed]" his posts to her. Rios, 978 A.2d at 600; see also Baughman, supra at 960-61 (discussing case in which court held that content of MySpace posts revealed that defendant intentionally communicated a public message on MySpace to specific victim).

Finally, the defendant himself acknowledged in his motion to dismiss that "it would violate the [stalking] statute if . . . he had the intent [to make contact] and was in a place where he knew [the victim] might be." Although during oral argument the defendant attempted to distinguish his Facebook posts from "standing out on the street corner where [he] might know [the victim] is going to be present and shouting out" to the victim — an act that he concedes would constitute an "action to communicate" and, thus, contact — we find the defendant's posited scenario to be materially equivalent to the situation in this case. In both circumstances, the defendant's contact with the victim is calculated, not fortuitous. The defendant's posts reveal that he was aware that the victim had been reading his posts on Facebook. We discern no meaningful difference between the defendant posting messages on Facebook with both the purpose and effect of communicating a message to her, and the defendant positioning himself on a street corner with the knowledge and expectation that the victim would pass by, and then shouting to her. For all of these reasons, we conclude that the defendant's conduct was sufficient to constitute an "action to communicate" pursuant to RSA 173-B:1, IV.

We next address the defendant's argument that, because the victim "voluntarily retrieved" rather than "merely received" the defendant's messages when she searched for his Facebook page, he did not "contact" her in violation of the restraining order. We disagree.

First, nothing in the language of RSA 173-B:1, IV or RSA 633:3-a, I(c) addresses the actions of a victim or the recipient of a message, nor states that they have a bearing on the issue of "contact." "We will not consider what the legislature might have said or add language that the legislature did not see fit to include." Dor, 165 N.H. at 200. Although we can envision circumstances in which a protected person's conduct could impact the "contact" analysis — for example, if the protected person, without enticement, sought out the restrained person — this case does not present such a circumstance.

Moreover, to deny the victim in this case protection under the stalking statute would frustrate the statute's purpose and thwart the intent of the legislature. The legislature passed RSA chapter 633:3-a with a focus upon protecting individuals from "domestic violence and problems of like gravity, such as threatening strangers and obsessive former lovers," and in recognition of the fact that "[h]arassing and threatening behaviors toward innocent people is a serious problem." Fisher v. Minichiello, 155 N.H. 188, 195 (2007) (Dalianis, J., concurring) (quotation omitted). Acknowledging that "[s]talking is a part of [domestic violence]," the legislature enacted RSA chapter 633:3-a in response to the "wide spread need in New Hampshire for legislation to allow the police to interfere before a domestic violence situation escalates into violence." Id. (quotations omitted). We conclude, therefore, that interpreting RSA chapter 633:3-a to deny protection to a victim who has viewed publicly available Facebook posts and alerted the police to the threatening messages would frustrate the purpose of the stalking statute. Were we to conclude otherwise, the incongruous and potentially dangerous result would be — as the defendant himself observed in his Facebook posts directed to the victim — that the restraining order, rather than restraining the threatening behavior of the defendant, would make the victim "the one in cuffs."

Notably, the defendant does not cite, and we are unable to find, any case law supporting his assertion that the victim's affirmative act of finding and reading his Facebook posts operates to bar his conduct from constituting "contact" pursuant to RSA 173-B:1, IV. In Commonwealth v. Butler, 661 N.E.2d 666, 667 (Mass. App. Ct. 1996), the court concluded that an indirect communication can constitute contact by the defendant, despite a victim's affirmative act. Although the case did not involve online conduct, the court held that the defendant had violated a restraining order by anonymously sending flowers to the victim. Id. at 666-67. In that case, the restraining order provided that the defendant was "not to contact [the victim] either in person, by telephone, in writing, or otherwise, either directly or through someone else." Id. at 666. The victim then received flowers at her home, with a card that gave the sender's name as "requested withheld." Id. Suspecting that the defendant was the sender, the victim called the florist and confirmed that the defendant had sent them. Id. The defendant had not given the florist his name, address, or telephone number, and wanted no name on the card. Id. Nonetheless, the court concluded that the defendant violated the "no contact" order, because he "achieved a communication with [the victim] amounting to 'contact.'" Id. at 667. The court noted that "[the defendant's] profession of anonymity merely invited inquiry" by the victim into the identity of the person who sent the flowers. Id.

Like the defendant in Butler, the defendant here "achieved a communication" with the victim indirectly. As in Butler, the defendant took deliberate steps to communicate with the victim while attempting to avoid culpability for violating the terms of the restraining order. As the victim

testified, she would have had no "reason or desire to go look up [the defendant's] Facebook page" if she had not received the defendant's letter in which he told her that he was "speaking highly of [her] on [his] Facebook page," or if her mother had not read the defendant's posts and urged her to read them. Although the letter was sent prior to the issuance of the restraining order, and, therefore, its mailing did not, standing alone, violate the restraining order, it is critical in that it invited the victim's later inquiry as to the nature of the defendant's Facebook posts. See In the Matter of McArdle & McArdle, 162 N.H. 482, 487 (2011) (observing that acts committed by defendant prior to grant of restraining order are relevant to court's inquiry as to whether recent acts pose a credible present threat to safety). The victim was "alarmed" by the defendant's letter referencing his Facebook posts, and was urged by her mother to read the posts; it strains credulity to expect that the victim — or any person in her position — would refrain from ensuring her own safety by searching for and reading the defendant's public Facebook page. Thus, just as the defendant in Butler "invited inquiry" into who had anonymously sent the flowers, Butler, 661 N.E. 2d at 667, the defendant here, by referring to Facebook posts in his letter, "invited inquiry" by the victim into what his posts said. The reasoning of Butler is equally applicable in the context of the internet. We conclude that the victim's affirmative act of viewing the defendant's Facebook page does not preclude the defendant's conduct from constituting "contact" as used in RSA 173-B:1, IV.

The legislature expansively defined "contact" in RSA 173-B:1, IV to include "any action to communicate with another either directly or indirectly." See RSA 173-B:1, IV (emphases added). Here, the defendant, having alerted the victim to his Facebook posts in his earlier correspondence, and believing that the victim was reading his posts, continued to post messages directed to her on his public profile page after he had been served with the restraining order. The victim's mother urged her to read the posts due to "the extent and the severity and the vulgar use of words" about her daughter. In sum, examining the defendant's conduct "in the context of all the evidence, not in isolation," Germain, 165 N.H. at 355 (quotation omitted), and "considering all the evidence and all reasonable inferences therefrom in the light most favorable to the State," id. at 354-55 (quotation omitted), we conclude that the defendant has not met his burden to demonstrate that no rational trier of fact could have found beyond a reasonable doubt that the defendant's posts on his public Facebook page constitute "contact" in violation of the protective order. Accordingly, we conclude that the trial court properly denied the defendant's motion to dismiss the stalking charge.

In so ruling, we need not decide whether a public Facebook post, standing alone, is sufficient to constitute "contact" pursuant to RSA 173-B:1, IV. Moreover, although we are mindful that Facebook posts, under some circumstances, may constitute protected speech under the First Amendment of the United States Constitution, see Elonis v. United States, No. 13-983 (U.S.

argued Dec. 1, 2014) (addressing question of whether defendant's conviction for posting threats on his personal Facebook page violates his free speech rights under the First Amendment), no First Amendment argument was advanced by the defendant in this case, nor does he contend that his Facebook posts served some legitimate purpose aside from communicating with the victim. Cf. RSA 633:3-a, II(a).

B. Witness Tampering

We turn next to the defendant's argument that the State presented insufficient evidence on the charge of witness tampering. See RSA 641:5. Pursuant to RSA 641:5, a person is guilty of witness tampering if, "[b]elieving that an official proceeding . . . or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to . . . [t]estify or inform falsely." See RSA 641:1, II (2007) (defining "official proceeding"). There is sufficient evidence of witness tampering if the State proves that "the testimony the defendant sought to induce was in fact false, and that the defendant acted purposely to induce [the victim] to testify to something which the defendant believed was false." State v. DiNapoli, 149 N.H. 514, 516-17 (2003).

The defendant first argues that the State failed to prove that the defendant acted purposely because it did not show that the defendant believed that the testimony he attempted to induce from the victim — telling the judge that she was "all set with [the defendant]," "[was] mistaken," and no longer wanted the restraining order — would actually be false. The defendant asserts that an individual like himself — with an erroneous or delusional view of reality — might subjectively believe that the statements that he asked the victim to make to the judge or the police were actually true, and, therefore, the State could not establish that he acted purposely with knowledge that the testimony was false. The State counters that the defendant was aware that the victim feared him, and, therefore, that he knew that asking her to tell the judge that she no longer wanted the protective order would require her to testify falsely.

In State v. DiNapoli, we "assume[d] without deciding that the State had to prove that the testimony the defendant sought to induce was, in fact, false" to convict the defendant of witness tampering. Id. at 516. Making the same assumption here, we must, as we did in DiNapoli, "consider whether the State presented sufficient evidence to support a finding that the testimony the defendant attempted to induce was false and that he knew it was false." Id.

"Because persons rarely explain to others the inner workings of their minds or mental processes, a culpable mental state must, in most cases, as here, be proven by circumstantial evidence." Id. (quotation omitted). The jury is entitled to infer the requisite intent from the defendant's conduct in light of all the circumstances in the case because "conduct illuminates intent." Id. at

516-17 (quotation and brackets omitted). Thus, here, we look to the circumstances surrounding the victim's interactions with the defendant to determine whether a reasonable jury could have found that he acted purposely, meaning that he believed the statements he sought to induce with his Facebook posts to the victim were, in fact, false.

The victim testified that she had no relationship with the defendant beyond her interactions with him at work, and that she was alarmed by his letters. The defendant was made aware of the victim's complaints and concerns about his behavior when he received the stalking warning letter, a no-trespass notice from the victim's employer, and the restraining order against him. Further, the defendant himself acknowledged in his first letter that the victim was not interested in him, writing, "It's not as if you are actually into me, or you wouldn't be with someone else." Given these facts, we find that a rational jury could have concluded that the statements that the defendant told the victim to make were in fact false and that the defendant believed that they were false. See id. (considering testimony and entirety of defendant's conduct to find sufficient evidence of witness tampering); State v. Baird, 133 N.H. 637, 641 (1990) (considering "the totality of the evidence presented" when evaluating falsity in witness tampering charge).

The defendant next argues that the State did not prove that the defendant understood that he was asking the victim to give false testimony. The defendant contends that he merely asked the victim to "drop the charge," which he asserts is very different from asking her to testify falsely. The State counters that the defendant mischaracterizes his Facebook posts and that, in fact, the defendant sought to intimidate the victim into testifying falsely at the upcoming hearing. We agree with the State.

In support of his argument, the defendant relies upon Rantala v. State, 216 P.3d 550, 556 (Alaska Ct. App. 2009), claiming that he, like the defendant in that case, merely asked the victim to "tell the authorities (whether she testified or not) that she did not wish to pursue" her complaint against the defendant. Rantala, 216 P.3d at 556. The defendant's reliance on Rantala is misplaced. In Rantala, the defendant was charged with burglary after breaking into the home where he had previously lived with the witness. Id. at 555. Prior to the grand jury hearing on his burglary charge, the defendant told the witness that she did not have to testify if she had not been subpoenaed, and asked the witness not to pursue the case against him because he "believed that the burglary prosecution could not go forward" without her consent. Id. at 555-57. The court concluded that the defendant's statements did not constitute a "request, or even a suggestion, that [the witness] lie about what happened" if the case went forward and she was subpoenaed to testify, and, therefore, he did not violate the witness tampering statute. Id. at 557.

In contrast, here, the defendant did not merely ask the victim not to pursue the case; rather, the defendant's Facebook posts evidence that he was aware that the victim would be testifying at the final hearing on Friday, May 4, and that he sought to affect her testimony before the judge at that hearing. On the Saturday before the scheduled hearing, the defendant posted on Facebook repeatedly, urging the victim to do and say specific things "on Friday." For instance, the defendant wrote: "On Friday, you can either tell the judge you are all set with me . . . [o]r, you can drop all [the] charges"; "[Y]our options are to be all mine as of this Friday, or f**k off forever"; and "I want the order removed before Friday now. . . . You go tell the judge that you were mistaken." Looking to "the inferential meaning of the [defendant's] words and the context in which they were used," Rantala, 216 P.3d at 557 (quotation and ellipsis omitted), a rational jury could infer that the defendant's repeated reference to "Friday" indicated that he was asking the victim to make statements during the restraining order hearing scheduled for May 4. See Germain, 165 N.H. at 355 (explaining that jury may draw reasonable inferences from facts proved and facts found as a result of other inferences).

Additionally, the defendant's Facebook posts reflect his understanding that the victim would be "under oath or affirmation" when she spoke at the restraining order hearing. See Black's Law Dictionary 1704 (10th ed. 2014) (defining "testimony" as "[e]vidence that a competent witness under oath or affirmation gives at trial"). The defendant wrote that the victim would have to "lie under an oath of God," and suggested that she could "go to jail for perjury." Both statements show that the defendant understood that the victim would be testifying under oath at the restraining order hearing.

Finally, the defendant's Facebook posts belie his contention that he merely asked the victim to drop the charges. He wrote, "On Friday, you can either tell the judge you are all set with me . . . [o]r you can drop all [the] charges and become an honest woman." (Emphases added). Because the defendant posited two distinct scenarios, and offered the victim a choice between testifying falsely and "drop[ping] all [the] charges," a rational jury could have concluded that, "in light of all the circumstances," the defendant understood that he urged the victim to give false testimony. See DiNapoli, 149 N.H. at 516-17. Accordingly, we conclude that the trial court did not err when it denied the defendant's motion to dismiss the witness tampering charge.

Affirmed.

DALIANIS, C.J., and HICKS, CONBOY, and LYNN, JJ., concurred.