

IN THE COURT OF APPEALS OF IOWA

No. 6-696 / 05-2097
Filed November 30, 2006

**EMMA GOLDMAN CLINIC,
KAREN L. KUBBY, DIRECTOR,
and ROBERT M. KRETZCHMAR, M.D.,**
Plaintiffs-Appellees/Cross-Appellants,

vs.

DAN HOLMAN,
Defendant-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Johnson County, Patrick R. Grady,
Judge.

Defendant appeals and plaintiffs cross-appeal from a district court ruling
that permanently enjoined certain activities by the defendant. **AFFIRMED ON
APPEAL; AFFIRMED AS MODIFIED ON CROSS-APPEAL.**

Dan Holman, Keokuk, pro se.

Diane Kutzko and Kevin H. Collins of Shuttleworth & Ingersoll, P.L.C.,
Cedar Rapids, for appellees/cross-appellants.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

PER CURIAM

Defendant Dan Holman appeals and plaintiffs Emma Goldman Clinic; Karen L. Kubby, Director; and Robert M. Kretzschmar, M.D., cross-appeal from a district court order that granted the plaintiffs' application for a permanent injunction, restricted Holman's proximity to the clinic and Kubby's and Kretzschmar's persons and residences, and prohibited Holman from threatening the clinic's clients or staff. On appeal, Holman asserts the evidence before the district court was insufficient to warrant issuance of the injunction. On cross-appeal the plaintiffs assert the injunction does not place adequate restrictions on Holman's proximity to the clinic. We affirm the issuance of the permanent injunction, but modify its terms to further restrict Holman's proximity to the clinic.

I. Background Facts and Proceedings.

Emma Goldman Clinic, located in Iowa City, Iowa, provides women's reproductive health services, including abortions. The clinic, which faces east onto North Dubuque Street, is flanked to the north and south by parking lots. The north parking lot is accessed from Bloomington Street, while the south parking lot is accessed from an alley that opens onto North Dubuque Street. Walkways on either side of the building lead from the parking lots to the public sidewalk in front of the building. The sidewalk in turn abuts a short walkway that leads to the front door of the clinic. The front door of the clinic is approximately eighteen feet from North Dubuque Street.

Holman, an anti-abortion activist, began protesting at the clinic in November 2002. In September 2003 the plaintiffs filed an application for a temporary and permanent injunction against Holman. The application, as supported by Kubby's

affidavit, alleged the plaintiffs were concerned for their safety and the safety of the staff, volunteers, and contract workers of the clinic, in light of Holman's escalating behavior and recent comments to a newspaper reporter.

According to Kubby, Holman's behavior over the past year had escalated

from holding signs to using aggressive language to people walking into the Clinic, to taking license plate numbers of clients and staff, to videotaping individuals coming in and out of the Clinic, as well as coming up to the property line as close as possible without crossing it.

Kubby also noted Holman had been interviewed for a *New York Times* article about the recent execution of Paul Hill, a man convicted of murdering a doctor who performed abortions and the doctor's bodyguard, and of the wounding of the bodyguard's wife. The article stated:

Dan Holman, who said he drove here from Keokuk, Iowa, said Mr. Hill had "raised the standard" for anti-abortion protestors.

"Some day, I hope I will have the courage to be as much as a man as he was," said Mr. Holman, who carried a sign that said: "Dead Doctors Can't Kill."¹

The district court entered an ex parte temporary injunction that enjoined Holman from being any closer to the clinic than across North Dubuque and Bloomington Streets, from being in the alley to the south of the clinic, from being within 100 feet of Kubby and Kretzschmar or their residences, and from having verbal or electronic contact with the plaintiffs. Holman moved to dismiss the

¹ Although Holman asserts the article was inadmissible hearsay, as part of a joint pretrial statement he admitted making the following comment to the reporter:

Even at the threshold of death he never wavered in his belief that the unborn were entitled to the same justifiable use of force as post-born children. He has set the standard of what being pro-life should mean. There is no one, including myself, who is as true a man as Paul Jennings Hill. I hope someday to be as true a man as he is.

In addition, there is no dispute Holman has protested with a sign similar to that described in the article.

temporary injunction. Holman's request, and the plaintiffs' application for a permanent injunction, came on for an evidentiary hearing in March 2004.

In its April 2004 order, the court concluded Holman's statements could be reasonably interpreted by the plaintiffs as threats to harm them made with the purpose to intimidate them. The court noted that, although Holman had never threatened the plaintiffs directly, he did strongly advocate for what he believed to be the justifiable execution of abortion providers and patients, and that he included Kubby and Kretzschmar in that group. The court found it significant that Holman "has not stated that he would never use violence against abortion providers, only that it would be difficult for him given his pro-life beliefs." The court determined,

[G]iven the intensity of emotions that surrounded the execution of Paul Hill, Holman's regular, vocal presence at the Clinic and his stated desire to be "as much as a man" as Paul Hill was, . . . Holman intended his statements as a warning to abortion providers and . . . a reasonable person in Kubby and Kretzschmar's positions would feel threatened and intimidated by these statements.

Although the court concluded the foregoing was adequate for the issuance of a temporary injunction, the court declined to make the injunction permanent. The court noted it had "struggled with trying to reach the proper balance between Holman's right to advocate and preach, the Plaintiffs' right to safety, and the governmental interest in protecting the freedom of women to seek lawful counseling and medical services." The court recognized that, in light of the possibility of gun violence by Holman, the safety of Kubby, Kretzschmar, and the clinic's patients and staff required the imposition of certain restrictions.

The court accordingly directed the clerk of court to issue a writ of injunction that prohibited Holman from (1) being on the real estate or property occupied by the clinic or at any time closer than across the street from the clinic, specifically from being any closer than the east side of North Dubuque Street, the north side of Bloomington Street, or in the alley to the south of the clinic, (2) from being less than 100 feet from the persons or residences of Kubby and Kretzschmar, and (3) from making threatening statements to Kubby, Kretzschmar, or the clinic's patients and staff by verbal, written, telephonic, or electronic means. The court provided the injunction would be subject to review, upon the request of any party, after one year.

Holman appealed, alleging there was insufficient evidence to grant injunctive relief. The plaintiffs cross-appealed from the district court's denial of their request for a permanent injunction. This court affirmed the district court on appeal and on cross-appeal. See *Emma Goldman Clinic v. Holman*, No. 04-0678 (Iowa Ct. App. April 28, 2005).

In August 2005 Holman filed a motion to dissolve the temporary injunction. He noted his compliance with the injunction and the fact that other protests he had participated in were free from violence against abortion providers. The plaintiffs resisted the motion, asserting they and the clinic's staff continued to fear that Holman's activities would result in violence against them. Following an October 2005 evidentiary hearing, the district court determined the injunction should be made permanent, but that it should be modified to allow Holman to come in closer proximity to the clinic.

The court focused on Holman's explanation of his belief that violence against abortion providers was justified as defense of the "pre-born." Holman stated that he believed abortion providers and women who obtain abortions should be executed, that he admired "hero[s]" like Paul Hill who had carried out such justifiable killings, and that believed Kubby and Kretzschmar deserved to be executed. He asserted, however:

I myself don't engage in force to stop them. . . . I don't love my neighbor as myself. I don't love God with my whole heart and soul and I certainly don't love them as much as Paul Hill loved them, who willingly laid down his life, you know, for them.

. . . .
He was willing to suffer the deprivations of prison. He was willing to suffer all the rejection and absence of his family. I don't . . . have that much love in my heart If that were my child, if that were myself, I would certainly do more. Because I don't, what I do is wholly inadequate.

Holman denied contemplating killing an abortion provider since entry of the temporary injunction, but refused to answer questions regarding whether he owned any firearms.

The district court again noted its struggle to balance Holman's First Amendment rights with the public's right to access the clinic's services and the plaintiffs' right to provide those services while free from intimidation. The court concluded,

[I]t is clear that some of [Holman's] pronouncements and signs he carries contain what are legitimately considered threatening statements and that, at least in the vicinity of the Clinic, staff and patients exercising their constitutional rights should not have to be subjected to threats in order for Holman to carry out his ministry.

However, referencing Holman's activities while the injunction was in place, and Holman's assertion that he did not personally engage in violence against abortion

providers, the court further concluded it was not necessary to ban Holman from the sidewalk in front of the clinic.

The court accordingly modified the terms of the prior injunction, and made it permanent. The court prohibited Holman from being any closer to the clinic than the sidewalk in front of the clinic “and east of the Clinic door,” and from being in “the alley and parking lot that adjoin the clinic.” Holman was further enjoined “while within 100 feet in any direction of the Emma Goldman Clinic from threatening clients or staff of the Clinic, which shall be defined as predicating, promising or advocating death or injury to clients of the Clinic, abortion providers or abortion procurers.” Finally, the court enjoined Holman from being less than 100 feet from Kubby’s and Kretzschmar’s residences, and from being less than 100 feet from Kubby’s and Kretzschmar’s persons “at any other time than when [they are] in the square block on which the Emma Goldman Clinic sits.”

Holman appeals. He asserts the court erred in denying his motion to dissolve the temporary injunction and in issuing the permanent injunction, because there is insufficient evidence to establish any threat or intention to use violence against the plaintiffs or the clinic’s staff and patients, and the injunction violates his constitutional right to freedom of speech. The plaintiffs cross-appeal. They assert the terms of the injunction are insufficient to protect their physical safety and the safety of the clinic’s staff and patients and that Holman should be further enjoined from coming any closer to the front of clinic than the east side of North Dubuque Street.²

² The plaintiffs frame their arguments on cross-appeal primarily as a challenge to the district court’s decision to modify the terms of the temporary injunction. However,

II. Scope and Standard of Review.

A request for an injunction invokes the district court's equitable jurisdiction. Iowa R. Civ. P. 1.1501. We accordingly conduct a de novo review of the district court's order issuing a permanent injunction. *Opat v. Ludeking*, 666 N.W.2d 597, 603 (Iowa 2003). We give weight to, but are not bound by, the court's factual findings and credibility assessments. *Id.*

III. Merits.

The purpose of injunctions is to prevent irreparable harm to individuals without an adequate remedy at law. *Planned Parenthood of Mid-Iowa v. Maki*, 478 N.W.2d 637, 639 (Iowa 1991). Thus, as the parties requesting injunctive relief, the plaintiffs were required to establish (1) an invasion or threatened invasion of a right, (2) that substantial injury or damage would result unless the injunction is granted, and (3) that no adequate legal remedy is available. *Opat*, 666 N.W.2d at 604. Although courts do not typically enter injunctions to prevent an act independently subject to penal law, an injunction may issue if a criminal act is connected with the violation of a private right. *See Matlock v. Weeks*, 531 N.W.2d 118, 122 (Iowa 1995). Before granting an injunction, the court should carefully weigh the relative hardships that would be suffered by the parties should an injunction issue. *Maki*, 478 N.W.2d at 639.

immediately after modifying the terms of the prior injunction, the court made the injunction permanent. Upon issuance of a permanent injunction, the temporary injunction merges into the permanent injunction and becomes moot. *Matlock v. Weeks*, 531 N.W.2d 118, 121-22 (Iowa 1995). We accordingly limit our inquiry to whether a permanent injunction should have been issued and, if so, whether the restrictions it placed upon Holman struck an appropriate balance between any hardship incurred by Holman and the need to prevent harm to the plaintiffs. *See Planned Parenthood of Mid-Iowa v. Maki*, 478 N.W.2d 637, 639 (Iowa 1991).

As recognized by the district court, the injunction in this case places restrictions on Holman's First Amendment right to freedom of speech. See U.S. Const. amend. I; *State v. Musser*, 721 N.W.2d 734, 742 (Iowa 2006) (noting First Amendment safeguards "the right to speak freely" (citation omitted)). The First Amendment protects not only Holman's right to protest abortions, but also his right to advocate the view that it is justifiable to use deadly force against abortion providers. See *U.S. v. Dinwiddie*, 76 F.3d 913, 926 n.10 (8th Cir. 1996).

However, not every limitation on speech violates the Constitution. See *Musser*, 721 N.W.2d at 742-43 (citing *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n*, 447 U.S. 530, 535, 100 S. Ct. 2326, 2332, 65 L. Ed. 2d 319, 326 (1980)). Moreover, free speech protections do not extend to certain categories of speech, including threats of violence. See *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002) (noting need to distinguish "true threats from protected speech"); *Dinwiddie*, 76 F.3d at 926 n.10 (distinguishing between a First Amendment right to advocate a view and whether publication of such a view demonstrated intimidation with threats of force). Such speech can be proscribed without offending the First Amendment, even though the threatening words may have some political or social value in certain circumstances, because there is "an overriding interest in 'protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.'" *Id.* (citation omitted).

If, as the plaintiffs assert, Holman's statements and actions amounted to a threat of violence against them and the clinic's staff and patients, then we have little difficulty concluding there is a need for a permanent injunction limiting

Holman's actions and proximity to the plaintiffs. The United States Supreme Court has yet to set forth a bright line rule for distinguishing a threat from protected speech. Federal circuit courts have, however, consistently applied an objective standard of "whether a reasonable person would interpret the purported threat as a serious expression of an intent to cause a present or future harm." *Id.* The circuits diverge only as to the perspective from which the statement should be viewed. *Id.* Some ask whether a reasonable speaker would foresee that the recipient would perceive the statement as a threat, while others ask how a reasonable recipient would view the alleged threat. *Id.*

The later approach, which looks to the perception of a reasonable recipient, is the one that has been adopted by the Eighth Circuit. See *Dinwiddie*, 76 F.3d at 925. This approach is also consistent with Iowa law, which looks to whether the defendant's behavior appeared dangerous or threatening to a reasonable person. *Matlock*, 531 N.W.2d at 122-23; see also *State v. Milner*, 571 N.W.2d 7, 10 (Iowa 1997) (requiring courts to consider, in criminal context, "whether a reasonable person of ordinary intelligence would interpret another's statement as a threat, . . . [when] viewed in light of the surrounding circumstances"). Utilizing such a standard, we must conclude that a reasonable person in the plaintiffs' position would have interpreted Holman's statements and actions as a threat.

Holman points out that he has never directly threatened the plaintiffs with physical harm. However, "[a]n actual assault or verbal physical threat is not necessary before behavior reasonably seen to be dangerous may be enjoined." *Matlock*, 531 N.W.2d at 123. Holman also points out that he has disavowed the

personal use of violence against abortion providers. Even if we were to take his assertions at face value, we find it troubling that Holman appears to view this as a personal failing. The underlying implication of Holman's testimony, when taken in context, is that if he were a better or more faithful man, like Paul Hill, he might be able to move from merely advocating for the execution of abortion providers to carrying out the act. We are also troubled by the fact that Holman refuses to disclose whether he owns any firearms.

When we look to the totality of Holman's words and actions, including an escalating aggressiveness in his protest tactics, a clear and unshakeable belief that the plaintiffs and the clinic's staff and patients deserved to be killed, his admiration of individuals capable of carrying out such "justifiable executions," and his apparent desire to be more like those individuals, we conclude they are tantamount to a threat of violence against the plaintiffs and the clinic's staff and patients. We agree Holman poses a threat to the safety of the plaintiffs, that the plaintiffs have no adequate legal remedy to prevent harm to themselves or the clinic's staff and patients, and that some restrictions on Holman's actions are necessary to prevent such harm. We accordingly conclude a permanent injunction was properly entered in this case.

We therefore turn to the terms of that injunction. An injunction should be limited to the requirements of the case, and the restrictions the injunction imposes must be properly balanced so as not to place an undue hardship on Holman. *Matlock*, 531 N.W.2d at 123. Looking to those terms, we conclude the inconvenience they cause to Holman does not outweigh the harm to the plaintiffs that the injunction seeks to prevent. See *id.* However, we agree with the

plaintiffs that the restrictions placed on Holman are inadequate to serve the aim of the injunction—to protect the plaintiffs and the clinic’s patients and staff from harm.

The plaintiffs assert Holman should not be allowed to protest on the sidewalk directly in front of the clinic. After considering the physical layout of the clinic and surrounding area, we must agree. The injunction, as currently written, allows Holman to be less than eighteen feet from the front door of the clinic and in the direct path of anyone, staff or patient, who wishes to access the front door. The protections afforded by enjoining Holman’s presence in the parking lots and alley, and requiring him to stay at least 100 feet from Kubby and Kretzschmar *unless* they are on the same block as the clinic, lose their significance if Holman is allowed access to the sidewalk immediately in front of the clinic.

We are mindful of Holman’s right to protest the actions of the plaintiffs. We also recognize it was the district court’s concern with adequately protecting that right, along with Holman’s compliance with the temporary injunction and disavowal of violence that prompted the court to allow Holman access to the sidewalk in front of the clinic. As we have already noted, however, the weight given to Holman’s assertions of non-violence is lessened by the context in which they were made. Moreover, we do not place significant weight on the fact that Holman complied with the temporary injunction.

Holman admitted that he simply abandoned protesting at the clinic on the assumption that the plaintiffs would continually and wrongfully accuse him of violating the terms of the temporary injunction. He concluded, in light of these assumptions, that his time would be better spent protesting at other sites that

provide abortions. We find little assurance in this explanation in light of the fact that Holman, who believes the political and legal systems of this country are corrupt, has been arrested more than 300 times and spent four of the last ten years in jail for charges and convictions related to his anti-abortion protests, including two arrests at other sites after the temporary injunction was issued.

Upon reviewing the totality of the relevant facts and circumstances, we conclude the terms of the permanent injunction are inadequate to prevent harm to the plaintiffs. We accordingly conclude the injunction should be modified as follows, in order to provide a proper balance between Holman's right to protest the plaintiffs' activities and ensuring the safety of the plaintiffs and the clinic's staff and patients: Holman is enjoined from coming onto the property where the clinic is located, including the parking lots, and from being in the alley to the south of the clinic. In addition, Holman is enjoined from coming any closer to the clinic than (1) to the north, the sidewalk on the south side of Bloomington Street, up to and including the corner at the intersection of Bloomington Street and North Dubuque Street, (2) to the south, the south edge of the alley adjoining the south parking lot and, (3) to the east, the east side of North Dubuque Street. The provisions governing Holman's proximity to Kubby, Kretzschmar, and their individual residences, and precluding Holman from threatening staff and clients while within 100 feet from the clinic, remain unchanged.

AFFIRMED ON APPEAL; AFFIRMED AS MODIFIED ON CROSS-APPEAL.