

# Superior Court of California County of San Diego

RE: Air California Adventure, Inc. vs. Robert Michael Kuczewski  
Council for Petitioner: Christopher C. Saldana, Esq.  
Council for Respondent: Michael T. Malowney, Esq.  
(Withdrew his appearance during the closing arguments)  
Judge Ipema, D-64

Case #: 2014-23482  
Date: March 5, 2015

## BACKGROUND

Respondent and Petitioner (Torrey Pines Glider Port's owners/operators/employees) have had a long history of conflict. Respondent is unhappy because currently no oversight exists over the operation of the Glider Port which is located in a public park. Respondent is a pilot at the Glider Port and spends a lot of time there. Respondent strongly believes there should be some oversight for the operation of the Glider Port. Respondent argues that without such oversight, the owners/operators would make arbitrary decisions that affects the pilots and the public, and there is no appeal process.

Respondent has taken it upon himself for years now to point out the alleged illegalities/irregularities in the operation of the Glider Port to its employees/owner/operators. Respondent has also filed numerous complaints with the governmental authorities/agencies as to the alleged violations, but has gotten nowhere and feels extremely frustrated. Respondent has therefore taken it upon himself to police the operation and constantly points out the irregularities to the employees/owner/operators, of the Glider Port and documents everything. This in turn frustrates, and annoys the employees/owner/operators, who seem to be tired of

Actually, I mostly point out problems to the City.

Again, I mostly bring problems to the City.

Respondent's constant remarks about things that he thinks they are doing wrong, filing complaints against them, and filming of them while at work. There is no dispute that the Petitioner and his employees do not like the Respondent and are extremely annoyed by his behavior. This has been going on for a great number of years (at least for the past 7 years.) Petitioner agrees that Respondent has never threatened anyone with physical violence and has never committed any unlawful act of violence against anyone at the Glider Port or elsewhere. Petitioner has called the police on a few occasions asking the police to remove Respondent from the premises but police reminded the Petitioner that Respondent had a right to be there. However, Respondent was recently arrested for trespass when he refused to leave the premises after hours and allegedly disobeyed the police. No charges have been filed against the Respondent.

The arrest was 3:30pm, not really after hours.

I told the police I had a right to be there via the lease.

Respondent argues that this is a public park and Petitioners cannot exclude him or ask him not to film or take pictures. He claims he has no interest in taking over their business, but would not hesitate to find others who qualify to take over the operation of the business if Petitioners refuse to run the place the way he envisions. Respondent has a website where he posts the pictures and films that he takes of the irregularities at the Glider Port, and is very vocal in expressing his dissatisfaction with the owners and operators of the Glider Port.

Petitioner has filed this request for workplace violence restraining order against Respondent claiming that Respondent is harassing and stalking the employees/owner/operators of the Glider Port, by standing on the "pilots-only" restricted area and taking pictures and pointing out irregularities to all. There is no doubt in the court's mind that Petitioner feels threatened by Respondent's actions and fears possibly losing their business and jobs if Respondent succeeds in finding someone interested to bid against them to take over Glider Port's operation. Petitioner argues Respondent has malicious intent and something bad is going to happen if he continues following employees around and filming them. Petitioner agrees that Respondent, being a pilot, has a right to be in the restricted area. However, Petitioner argues that by complaining, criticizing, commenting, taking pictures and filming in the restricted area, Respondent interferes with their business, and endangers the operation of the Glider Port. Petitioner argues

that Respondent's actions interfere with the training of the new pilots, thus creating unsafe and hazardous conditions for all pilots, who land or take off from that area; and it further distracts both trainees and trainers, and creates a "credible threat of violence" under the law. Moreover, Petitioner argues that Respondent is constantly confronting them, taunting and inciting the employees/owner/operators. Petitioner is afraid that the employees/owner/the operator might snap and hit Respondent at some point, and thus this creates a "credible threat of violence". Petitioner also agrees as "flight director" that Petitioner has the right to exclude people from the restricted area if they believe the person is a danger to the other pilots. However, in the past 7 years, Respondent has been taking pictures and filming in the restricted area without ever being excluded. There is no evidence of Respondent ever having created a hazardous situation for any pilot in the past 7 years.

30 to  
40 ft.  
per  
Gabe  
Jebb's  
12  
strides.

Respondent states he is not a violent person. Respondent presented the court with his last video that he took of his interactions with the Petitioner and his employees as evidence. The video shows Respondent standing in the restricted area (pilots-only) and video taping Petitioner training some new students. Respondent was approximately 20 feet from the Petitioner. Petitioner noticed Respondent was filming and tried to ignore him.

Respondent then told Petitioner that he should wear his helmet when he is training the students. Petitioner was visibly upset by being criticized in front of his students, and asked Respondent to leave; but Respondent did not move. Petitioner then moved towards Respondent in a defensive and irritated manner and got into his face and asked Respondent to stop filming him. Respondent taunted Petitioner by saying what are you going to do? Hit me? (Or something to that effect.) Another pilot was asked by the flight director/owner to step in between them and stop the confrontation. That pilot was of no help and added to the conflict by calling Respondent names and saying Respondent was scared and shaking.

offensive?

Petitioner objected to the introduction of the tape indicating that it "might not be the entire tape", but Respondent testified that nothing happened before or after the footage and it is the entire tape. Both parties admit that captured coverage accurately reflects what happened between the parties from the moment that Petitioner noticed Respondent filming him to the

Gabe spoke first: Bob you gotta get out of here.

Shelby was the first one to say this.

moment that Respondent finally stopped the taped and walked away. The court admitted the tape into evidence over the Petitioner's objection.

Respondent argues that it is not illegal to film or take pictures in a public place. Respondent states that there are three reasons behind his filming; 1) he wants to protect himself of any unfair accusations or harm in retaliation since he knows Petitioner is after him; 2) to document the irregularities/illegalities that he intends to present to the governmental authorities to convince them to create an oversight; 3) he also films for his own enjoyment and for publishing interesting and useful information on his website. Respondent argues there is a legitimate reason behind his filming and he does not intend to harass anyone. Respondent argues that he has a right to be there and he is not breaking any laws. Respondent argues that he is not stalking anyone, is not following anyone, and is not creating any safety issues in the restricted area or elsewhere; so there is no credible threat of violence. Respondent argues that Petitioner has filed this action against him in retaliation.

### **LAW AND ANALYSIS**

CCP § 527.8(a) authorizes an employer to seek a TRO and injunction on behalf of an employee or employees who has or have "suffered [(1)] unlawful violence or [(2)] a credible threat of violence from any individual."

§ 527.8(b)(7) defines "unlawful violence" as "any [(a)] assault or [(b)] battery, or [(c)] stalking as prohibited in Section 646.9 of the Penal Code, but shall not include lawful acts of self-defense or defense of others."

§ 527.8(b)(2) defines "credible threat of violence" as "a knowing and willful statement or course of conduct<sup>1</sup> that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose."

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<sup>1</sup> "Course of conduct" is a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an employee to or from the place of work; entering the workplace; following an employee during hours of employment; making telephone calls to an employee; or sending correspondence to an employee by any means, including, but not limited to, the use of the public or private mails, interoffice mail, facsimile, or computer email." (§ 527.8(b)(1).)

CCP 527.6(a) authorizes “any person who has suffered harassment” to seek a TRO and injunction. “Subdivision (b) [of § 527.6] defines ‘harassment’ to include not just [(1)] actual violence or [(2)] threats of violence, but also [(3)] ‘a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person,’ that serves no legitimate purpose, and that is not constitutionally protected activity.” (*R.D. v. P.M.* (2011) 202 Cal.App.4th 181, 188.)<sup>2</sup> In other words, § 527.6 includes a third category of enjoined conduct not found in § 527.8.

Nonetheless, § 527.6’s and § 527.8’s definitions of the two common categories of “unlawful violence” and “credible threat of violence” are identical. (See, § 527.6, subds. (b)(7) and (b)(2), respectively.) Although the definitions of “course of conduct” are slightly different in § 527.8(b)(1) and § 527.6(b)(1), with the former tailored to an employee in the workplace, “[s]ection 527.6 was amended in 1998 to *parallel* the provisions of section 527.8 regarding the definitions of “[u]nlawful violence,” “[c]redible threat of violence” and “[c]ourse of conduct.” (Stats.1998, ch. 581, § 2.)” (*Scripps Health v. Marin* (1999) 72 Cal.App.4th 324, 333, fn. 7, emphasis added).<sup>3</sup>

As explained in *Scripps Health, supra*, at pages 333-334:

At the time section 527.8 was enacted, section 527.6 prevented harassment when there has been a knowing and willful course of conduct directed at a specific person which annoys or harasses the person and serves no legitimate purpose. ...

Section 527.8 was enacted in 1994 to establish parallel provisions to section 527.6.<sup>4</sup> It authorized any employer to pursue a TRO and an injunction on behalf of its employees to prevent threats or acts of violence by either another employee or third person. Given that section 527.6 only allowed

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<sup>2</sup> (3) “‘Harassment’ is [(i)] unlawful violence, [(ii)] a credible threat of violence, or [(iii)] a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose.” (CCP § 527.6(b)(3).)

<sup>3</sup> The definitions of “unlawful violence,” “credible threat of violence,” and “course of conduct” are identical in the 1999 and current versions of § 527.6; the same is true for the 1999 and current versions of § 527.8.

<sup>4</sup> Here, at footnote 8: “Indeed, the early versions of Assembly Bill No. 68 (1993-1994 First Ex. Sess.) in 1994 paralleled the precise language, terminology and process in section 527.6, including the definitions of “‘harassment’” and “[c]ourse of conduct.””

injunctive relief for natural persons [case citation], section 527.8 was enacted to allow a corporate employer to bring such an action on behalf of an employee. Section 527.8 was thus intended to enable employers to seek the same remedy for its employees as section 527.6 provides for natural persons. The express intent of the author of the legislation was to address the growing phenomenon in California of workplace violence by providing employers with injunctive relief so as to *prevent* such acts of workplace violence. [Citation.]

Consistent with the foregoing, section 527.8, subdivision (a) expressly declares the Legislature's intent to provide employers with traditional prohibitory injunctive relief on behalf of their employees who have suffered unlawful violence or a credible threat of such violence from facing more in the future.

The court acknowledges that "stalking" is also included in § 527.8's definition of "unlawful violence," – as found in § 527.8(b)(7).

Petitioner's attorney argued that, notwithstanding its absence from § 527.8's definitions, "a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose" (§ 527.6(b)(3)) is also enjoin-able under § 527.8 *even though there is no reference to it in that section*. However Petitioner's argument is not convincing and Petitioner has not provided any authority.

There are cases which note, unsurprisingly, that because the definitions of "credible threat of violence" are identical in the two statutes, they are interpreted identically. For example: "[In *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228,] the Fourth District, Division 1, found that publications on a web site constituted credible threats of violence within the meaning of both sections 527.6, subdivision (b)(2) and 527.8, subdivision (b)(2). Examining section 527.6, the harassment statute, the court stated, "It is not necessary that the defendant intend to, or be able to carry out his threat; the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat." (*Id.* at p. 1256 ....) The court further observed that while

Huntingdon Life Sciences, Inc. had no standing under section 527.6, it could seek relief for its employees under section 527.8. Because those two statutes were intended to provide the same relief, the same reasoning applied to both. Accordingly, the court held that Huntingdon Life Sciences, Inc. had demonstrated a probability of prevailing under not only section 527.6 but also section 527.8[.]” (*City of San Jose v. Garbett* (2010) 190 Cal.App.4th 526, 540.)

In *Scripts Health* (supra.) the Court of Appeal does not say that *conduct* enjoin-able under § 527.6 is necessarily enjoin-able under § 527.8. If the Court of Appeal intended to judicially expand the scope of conduct enjoin-able under § 527.8 beyond the clear statutory language, it would have certainly been more clear about it.

Furthermore, in its reply brief, petitioner relies on the following language from *Huntingdon Life Sciences*: “Section 527.8, however, allows an employer to seek injunctive relief on behalf of its employees under the same criteria set forth in section 527.6.” At best, this is arguably dicta because, as *Garbett* quote notes, the alleged conduct in *Huntingdon Life Sciences* was the “credible threat of violence” prong which is indisputably common to both § 527.6 and 527.8.

The court has not found any published case law that has expanded the enjoin-able conduct in § 527.8 beyond that statute’s definitions of “unlawful violence” and “credible threat of violence.” Petitioner’s arguments are thus not persuasive.

CCP §527.8 provides for the issuance of a TRO or injunction based on unlawful violence or a credible threat of violence. “Unlawful violence” is any assault or battery or stalking under PC §646.9. (CCP §527.8(b)(7).) There is no case on point as to the issue of stalking arising in a workplace violence restraining case.

There is no dispute as to the fact that respondent has not committed an unlawful act of violence. The only two issues raised by Petitioner are: 1) stalking and 2) credible threat of violence.

1) Stalking:

PC §646.9 defines stalking as follows:

(a) Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.

The Respondent's conduct does not fall within the above definition of stalking. He has not followed any of the employees/owner/operators home or elsewhere. His actions are limited to filming and videotaping in a public forum and bringing up irregularities in the operation of the Glider Port business. Furthermore, Respondent's conduct does not appear to be directed at a specific person but rather the Glider Port as an entity. Further, there does not seem to be facts which support malice or that any employee reasonably fears Respondent will cause an individual direct harm. While the filming in close proximity might cause a concern because it is a distraction, he appears to be legally permitted to be on the property filming. Thus, it does not appear there are sufficient facts to support the conclusion Respondent has engaged in stalking as defined by PC §646.9. In addition, Respondent has been taking pictures and has been filming for years and Petitioner or the employees never raised the issue of stalking before. No other employee/operator/owner has ever filed a restraining order against the Respondent before. (One female employee attempted to file a temporary restraining order but did not complete the work and gave up). The previous owner banned Respondent from the premises for thirty days a few years ago, but allegedly Respondent's attorney contacted the owner about Respondent's rights and Respondent was allowed to return to the Glider Port.

**KEY  
Issue**

The last sentence might be confusing a 30-day ban by Robin Marien in the summer of 2013 with David Jebb's 1 year ban in 2008. It was in 2008 that my attorney wrote a letter stating that Jebb could not ban us (he banned another pilot as well) without a written reason. I actually defied the 2013 30 day ban by openly returning 4 weeks (28 days) later for our next "Second Sunday" and I was not removed



## 2) Credible Threat of Violence:

The next issue is whether there is a credible threat of violence, which is defined as a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety that serves no legitimate purpose. (CCP §527.8(b)(2).)

(e) For the purposes of this section, "harasses" means engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose.

(f) For the purposes of this section, "course of conduct" means two or more acts occurring over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct."

(g) For the purposes of this section, "credible threat" means a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat. The present incarceration of a person making the threat shall not be a bar to prosecution under this section. Constitutionally protected activity is not included within the meaning of "credible threat."

(h) For purposes of this section, the term "electronic communication device" includes, but is not limited to, telephones, cellular phones, computers, video recorders, fax machines, or pagers. "Electronic communication" has the same meaning as the term defined in Subsection 12 of Section 2510 of Title 18 of the United States Code.

In the present case, while it is implied that Respondent interferes with Petitioner's business operations by being in a place where he is legally

permitted to be, there is no indication Respondent has caused harm or intends to cause harm to any of Petitioner's employees. Under California law Civil Code Sec. 1708.8, It is not per se illegal for someone to film another in a public place regardless of whether there is physical trespass or not.... (Civ. Code, section 1708.8). Use of the camera in a public forum is clearly acceptable but they cannot be used to harass or invade the privacy of another. Petitioner has not proven that Respondent has violated any privacy laws.

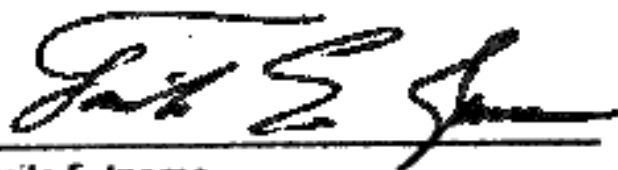
If Petitioner believes that Respondent's filming while he is standing in the restricted area causes safety concerns due to distraction for the other pilots or trainers or trainees, then Petitioner as flight director and operator of the premises may place signs in the restricted area asking pilots not to film while standing in the restricted area and direct them to take pictures from outside of that restricted zone; but Petitioner has never done this. Further, the argument that a credible threat of violence arises from Respondent's inciting Petitioner's employees to cause violence is not supported by the law. A court cannot issue an injunction to protect a respondent from petitioner's violence under the statute. Although Respondent's filming and unsolicited comments and criticisms are annoying, none of the facts seem to support the conclusion that anything he is doing is illegal. It would be more productive for the Respondent to file his complaints with the governmental entity in charge of dealing with illegal operation of the Glider Port instead of constantly approaching the employees/owner/operators and criticizing them in front of their student trainees and other pilots; it is precisely this behavior that has led to conflict and hostility between the parties. If petitioner's argument is that Respondent is interfering with his business and livelihood, then he could follow another course of action in the appropriate civil court. Petitioner has failed to prove this falls within the workplace violence law.

The court finds that Petitioner has not met his high burden of prove to prove workplace violence with a clear and convincing evidence. The temporary restraining order is therefore denied and dismissed.

*This is what I do at this point. I very rarely bring issues to the staff as it has been useless.*

IT IS SO ORDERED.

Date: March 5, 2015

A handwritten signature in black ink, appearing to read "Tamila E. Ipema", written over a horizontal line.

Tamila E. Ipema  
Judge, San Diego Superior Court