

CRIMINAL HARASSMENT

The defendant is charged with criminal harassment. Section 43A of chapter 265 of our General Laws provides as follows:

**“Whoever,
willfully and maliciously
engages in a knowing pattern of conduct or series of acts over a
period of time
directed at a specific person,
which seriously alarms that person
and would cause a reasonable person to suffer substantial
emotional distress
shall be punished...”**

In order to prove the defendant guilty of this offense, the Commonwealth must prove four things beyond a reasonable doubt:

First: That the defendant knowingly engaged in a pattern of conduct or speech, or a series of acts, on at least three separate occasions, directed at [the alleged victim] ;

Second: That those actions were of a kind that would cause a

reasonable person to suffer substantial emotional distress;

Third: That those actions did cause [the alleged victim] to become seriously alarmed; and

Fourth: That the defendant engaged in those actions willfully and maliciously.

To satisfy the first element of the offense, the Commonwealth must prove a pattern of conduct which includes a minimum of three incidents of harassment. The Commonwealth must further prove that each incident was directed at [the alleged victim] , and that the defendant intended that [the alleged victim] know that each of these incidents was directed at (him) (her).

To satisfy the second element, the Commonwealth must prove that a reasonable person would suffer substantial emotional distress if confronted with those acts, conduct or speech. By substantial emotional distress, I mean distress that is considerable, of importance, solid and real. The offending conduct must be such as would produce a considerable or significant amount of emotional distress in a reasonable person; something markedly greater than the level of uneasiness, nervousness, unhappiness or the like which is commonly experienced in day to day

living.

To satisfy the third element, the Commonwealth must prove that

[the alleged victim] was seriously alarmed by this conduct.

To satisfy the fourth element, the Commonwealth must prove that the defendant acted willfully and maliciously. An act is “willful” if it is done intentionally and by design, and not out of mistake or accident. The defendant acted willfully if the defendant intended the conduct.

An act is done with “malice” if the defendant’s conduct was intentional and without justification or mitigation, and any reasonably prudent person would have foreseen the actual harm that resulted to

[the alleged victim] .

If you find that the Commonwealth has proved each of these elements beyond a reasonable doubt, you should return a verdict of guilty on this charge. If you find that the Commonwealth has not proved one or more of these four elements beyond a reasonable doubt, you must return a verdict of not guilty of this charge.

SUPPLEMENTAL INSTRUCTION

Communications covered by statute.

The conduct, acts or threats may be communicated by any means including, but not limited to (mail) (telephone) (facsimile transmission) (e-mail) (internet communications) (telecommunications device) (electronic instant messages) (any electronic communication device including any device that transfers [signs] [signals] [writing] [images] [sounds] [data] or [intelligence of any nature] transmitted in whole or in part by a [wire] [radio] [electromagnetic system] [photo-electronic system] [photo-optical system]).

NOTES:

1. **Wilful conduct.** Wilful conduct must be intentional (as opposed to negligent), but does not require that the defendant intend its harmful consequences as well. *Commonwealth v. O'Neil*, 67 Mass. App. Ct. 284, 290-293, 853 N.E.2d 576, 582-584 (2006).

2. **Malicious conduct.** The requirement of malice does not require a showing of cruelty, hostility or revenge, nor does it require an actual intent to cause the required harm, but merely that the conduct be "intentional and without justification or mitigation, and any reasonable prudent person would have foreseen the actual harm that resulted." *O'Neil, supra*. Accord, *Commonwealth v. Paton*, 63 Mass. App. Ct. 215, 219, 824 N.E.2d 887, 891 (2005); *Commonwealth v. Giavazzi*, 60 Mass. App. Ct. 374, 375-376, 802 N.E.2d 589 (2004). Prior to the *O'Neil* decision, the instruction included language that: "An act is 'wilful' if it is done intentionally and by design, in contrast to an act which is done thoughtlessly or accidentally. The defendant acted wilfully if the defendant intended both the conduct and its harmful consequences. An act is done with 'malice' if it is done out of cruelty, hostility or revenge. To act with malice, one must act not only deliberately, but out of hostility toward [the alleged victim]."

3. **Three or more harassing incidents required.** “The phrase ‘pattern of conduct or series of acts’ requires the Commonwealth to prove three or more incidents of harassment.” *Commonwealth v. Welch*, 444 Mass. 80, 825 N.E.2d 1005 (2005).

4. **Substantial emotional distress.** The term “substantial emotional distress” is defined as considerable in amount, or of real worth and importance. *Commonwealth v. Robinson*, 444 Mass. 102, 825 N.E.2d 1021 (2005); *Commonwealth v. Paton*, 63 Mass. App. Ct. 215, 824 N.E.2d 887 (2005).

5. **Harassing conduct does not encompass protected speech.** Although the statute reaches harassing speech, it does not reach protected speech. Specifically, it reaches only “fighting words.” *Commonwealth v. Welch*, 444 Mass. 80, 825 N.E.2d 1005 (2005).