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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

K.N.,

Plaintiff and Appellant,

v.

MARTIN STOWELL,

Defendant and Respondent.

G054963

(Super. Ct. No. 30-2017-00903204)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Timothy J. Stafford, Judge. Reversed and remanded with directions.

Law Offices of Brook John Changala and Brook John Changala for Plaintiff and Appellant.

Richard D. Rome for Defendant and Respondent.

\* \* \*

K.N. appeals from an order denying without prejudice her request for a restraining order against Martin Stowell. She contends the trial court was biased and the judge abused his discretion in denying her request. We conclude the court did not properly exercise its discretion in denying K.N.’s request for a restraining order. Accordingly, we reverse and remand for further proceedings in light of this opinion.

## I

### FACTUAL BACKGROUND & PROCEDURAL HISTORY

#### A. *Request for Restraining Order*

On February 15, 2017, K.N. filed a form request for a restraining order against Stowell under to Code of Civil Procedure section 527.6.<sup>1</sup> According to K.N., Stowell suffers from bipolar disorder and developed an unhealthy obsession with her. K.N. alleged Stowell made repeated unwanted sexual advances and harassed her via text messages, e-mails, and telephone calls. K.N. alleged the harassment spanned a year and a half, with the last incident occurring on February 13, 2017. Consequently, K.N. declared she has been “seeking psychological treatment for anxiety and depression arising out of [Stowell’s] conduct since August of 2016.” She sought an immediate stay-away order based on her belief that Stowell was “mentally unbalanced[ ] and violent.”

The superior court entered a temporary restraining order (TRO) prohibiting Stowell from harassing K.N. or being within 100 yards of K.N., her home or workplace. The TRO was based on “unlawful violence, a credible threat of violence, or stalking.” After the TRO expired on March 8, 2017, the trial court entered another TRO with similar terms.

#### B. *Hearing on Request for Restraining Order*

On April 5, 2017, the following evidence was presented at the hearing.

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<sup>1</sup> All further statutory citations are to the Code of Civil Procedure, unless otherwise stated.

1. K.N.'s case

K.N., married with children, worked at Marina Landscaping with Stowell. According to K.N., she and Stowell were co-workers since 2008. They were friends, and started becoming "closer friends" at the end of 2015. K.N. testified she never had any romantic or sexual relationship with Stowell.

At some point during their relationship, Stowell began making unwanted sexual advances. In May 2016, Stowell asked for a wallet-sized picture of K.N., but she refused. The following month, Stowell texted K.N. that "today you WOW!!!!!" In July 2016, Stowell called K.N. at work, and told her that "I was the only girl that he liked and that he wondered if I had ever had any weak moments toward anyone else or thought about anyone else besides my husband or if I had ever felt the pheromones towards him or anyone else besides my husband." K.N. responded, "No," and told Stowell that she did not want to have similar conversations. Later that day, she texted Stowell, "When you don't say/text/email [sic] sexually inappropriate things to me, it's smooth sailing." He reacted poorly, texting back: "Fucking double standard bullshit I'm so fucking good to you are you fuckin kidding me . . . ." Later, K.N. texted Stowell, "I appreciate the compliments and the nice gestures but some of the things that were said today crossed the line." Stowell responded that K.N. also had used language that "crossed the line with me," referring to a text that she had shown him about offering a blowjob to her husband if he bought her a car. Later, Stowell texted: "I got a good idea why don't you run to Bob and file a sexual harassment suit on me because I'm so fucking inappropriate."

Two days later, Stowell texted K.N.: "I was fucking kidding with you . . . you really think I'm chasing you . . . . when I was landscaping your slope you sent me an email [sic] saying you don't love me anymore[.] Do you fucking think I took th[at] literally . . . If I want to have an affair trust me . . . NO one will know . . . and it wouldn't be with you[.] Get over your fuckin self[.] In addition I [d]on't need to wear a fuckin

skirt to the bottom of my ass and pull down my top to go on a fucking review[.] How obvious was that to people WOW Kristen WOW.”

K.N. replied in an e-mail: “I think the best thing for me right now would just be to pull back and focus on work and my family. [¶] . . . [¶] I would just like to reiterate that I deeply appreciate all the nice things you have done for me, and the help you have given me. Those things never went unnoticed, and I did not take them for granted.” K.N. stated that the e-mail was her polite way of telling Stowell to leave her alone.

On July 22, Stowell texted K.N., “If you could give me a pass on my behavior this last week or so[,] I would appreciate it.” She replied, “I thought I was pretty clear, I just need some space and some peace right now. I am going through a lot at work and in my personal life, health wise, etc, and I just can’t take any more stress on top of it. And yet these angry emails [*sic*] keep coming at me and I’m not even doing anything. Please just let it rest.” In response, Stowell sent an e-mail offering to “cover” for her so she could take a few days off to spend with her family. She politely declined the offer.

On July 27, 2016, Stowell wrote that he would leave K.N. “alone and give you your space . . .” On July 30, 2016, however, Stowell e-mailed K.N. and attached a 2015 e-mail chain about the landscaping work at K.N.’s home. In the e-mail, he called K.N.’s husband a “pussy.” He also stated: “One more thing, don’t drag [your friend Nikki’s] pussy husband in this like you did with the flowers[. H]e will lose his fucking teeth permanently[.]” K.N. testified that when she received Stowell’s e-mail, she was extremely upset and concerned for her safety, the safety of her husband, and the safety of her friend and her friend’s husband. Stowell later texted saying that he had crossed the line with the July 30 e-mail. K.N. responded, “Thank you.”

On August 16, 2016, Stowell e-mailed K.N., “I’m sure this will fall in the inappropriate category But your upper body and arms today Sexxxxxxxxxxy

Wowwee[.]” On August 30, he e-mailed: “Coming down tomorrow want to go to lunch Promise I won’t put my arm around you or tickle you[.] [winking emoji]” On September 9, 2016, Stowell left an angry voicemail, stating that he did not need K.N. to “refund” the money he had spent on her. On September 20, K.N. texted Stowell, “The yelling, the scolding me in my office, the horrible voicemail that you left me, cussing me out . . . not knowing if and when I’m going to get yelled at again is causing me extreme anxiety. I have been with a therapist for 4 weeks now to manage the panic attacks. Any response I give you on text or email [sic] launches into another argument. That’s why it’s better if I just keep my distance.” Stowell continued to text and e-mail K.N., and she occasionally responded.

On October 19, 2016, K.N. e-mailed Stowell, “Please leave me alone.” K.N. estimated Stowell tried to contact her more than 70 times after October 19. She never responded to any of Stowell’s communications after that date. K.N. began working from home on November 18, 2016, to avoid Stowell’s harassment. Stowell sent an expensive Christmas gift to K.N., which she refused to accept. Stowell left Marina in January 2017, after his division was sold.

On February 13, 2017, Stowell called K.N. from a private blocked number. According to K.N., Stowell said, “Please don’t hang up. I just have some things I want to get off my chest.” He proceeded to tell me that he had feelings for me, that he let them get out of control, that he became obsessed with me, that he had felt that I owed him something, and even though I didn’t owe him anything, he felt that I did, and that’s why he just kept pushing and pushing and pushing things. [¶] Umm, and I let him know during that phone call that I do not want to talk to him. I said it multiple times. I let him know that he had damaged relationships with co-workers at work. He had affected my relationship at home, affected my job. I didn’t feel comfortable coming to the office. I have anxiety. A whole list of things. . . . [¶] And at the end of the

conversation I said, 'Please leave me alone. I'm not going to ask you again.' And he said, 'Okay.'"

Later that day, Stowell texted a long message to K.N. After stating "At least you finally came clean," Stowell said he was "amaze[d]" that she blamed him for ruining her life when it was the fault of "a couple of drama queens" who started the false rumors. He stated: "This ain't over[.] People will go down [for] this shit[.] That I guarantee you[.] You Kristen of all people should have blown this shit off like [me]." "Yes, it got to me as well and I took it out on you because you just sat there and let the rumor mill run Check Mate . . . This is gonna get ugly[.] Pass that on to[ ] those two bitches." He stated that he would pray for K.N.'s health. He ended the message by stating K.N. should not let other "miserable human beings try to take you down." Later that day, Stowell e-mailed: "I'm not sorry for shit when it comes to this rumor bullshit[.] And I will be dropping the bomb on this shit[.] It's not right and you know it. It's funny I am being treated like I have done something just [like] you are[.] The difference is I stand up for the situation not let it destroy me." K.N. stated she felt threatened by Stowell's text message.

On February 14, 2017, Stowell e-mailed K.N., stating that he was sorry to hear about her health situation. He stated: ". . . the only thing I can do from here forward is Pray for you, be there if you need anything and stay away and not get in your way and cause any stress in your life." K.N. filed for a restraining order the following day.

On cross-examination, K.N. acknowledged that in December 2015, she texted her husband, "Will you buy me a new car if I give you a blowjob every day?" Her husband responded, "I wish I could, but I can't afford to." She showed Stowell the text.

In February 2016, K.N. wrote a lengthy e-mail to Stowell explaining her decision to "pull back" from further interactions with him. K.N. stated she found Stowell funny and "was very much entertained hearing your stories about your crazy huge house or your wild kids or your crazy business endeavors or your sexual escapades." But K.N.

explained being nice to Stowell had “backfired” on her. K.N. acknowledged that Stowell had performed many favors for her, including a landscaping project at her home. But, after Stowell sent her flowers at the office, “I started being accused of having an affair with you. My husband was upset about the flowers, yes. . . . it caused a weird rift in my marriage, a weird rift between me and Nikki . . . , and started weird rumors about me swirling around the office.” Similarly, after K.N. called Stowell following a car accident, she heard a rumor that “Kristen called Marty right after she got in an accident and asked him to buy her a new car.” She stated: “I know you didn’t mean to fuck things up for me on purpose, but it is what it is so now I am trying to take steps to get myself out of that position. Those steps include not answering texts I feel are inappropriate, or may further make it look like I am involved in an affair.” “So if I get a text that says ‘Im gonna buy you a house,’ or ‘I miss you,’ or ‘you look stunning,’ etc, I KNOW that you are being nice and you mean no harm, but all I can think about is if someone at the office saw that email [*sic*] or that text, how it was just add[ing] more fuel to the rumor fire, or if my husband saw it, how it would create more doubt in his mind that I am telling the truth. . . . So that is why I get so frustrated, and you don’t get a response.”

K.N. had lunch with Stowell several times after sending this February 2016 e-mail. K.N. also asked for Stowell’s help in getting a raise. K.N. acknowledged that there were many occasions where she and Stowell had “blowups and it would calm down.” Stowell’s drinking contributed to these blowups.

K.N. testified she never blocked Stowell’s e-mails or text messages. She also never filed a formal grievance with human resources against Stowell. But K.N. testified in October or November 2016 she asked their boss to tell Stowell to stop contacting her. She affirmed that she had no contact with Stowell from October 19, 2016 to February 13, 2017, when he called her.

## 2. Stowell's case

Stowell testified he was past president of Marina Landscape Maintenance and currently a vice-president at another landscaping company. While at Marina, he had a very strong friendship with K.N., and acknowledged that on multiple occasions, K.N. wanted him to “back off,” but after a few days, they would “become buddies again.” Stowell testified that no one -- such as human resources or an attorney -- contacted him to tell him to refrain from communicating with K.N. He further testified he did not contact K.N. to harass or annoy her. Rather, he communicated with K.N. because “at some certain point in time the rumor mill at Marina got pretty bad. It was affecting her, to a point where it started affecting me, and I didn't like to see her hurt over it, so I was always trying to fix the problem,” but, “I made it worse.” Stowell testified that he meant it when he told K.N. that if she really wanted him to leave her alone he would do so. He stated that even without a protective order, he would be able to stay away from contacting or bothering K.N. in the future, and noted he was no longer working at the same location with her.

A coworker at Marina testified that about six months before the hearing, he had a conversation with K.N. at a trade show about a bonus not being paid to the employees. K.N. told the co-worker that Stowell would “take care of it.” She stated, “Marty's a good guy. He has a good heart. You know, he'll give you the shirt off his own back.” Asked on cross-examination whether K.N. complained about Stowell not leaving her alone, the co-worker testified he did not recall anything negative about Stowell coming up during the conversation.

The owner of Marina testified that he never told Stowell to stop contacting K.N. The head of human resources (HR) at Marina testified K.N. never filed a complaint against Stowell. The HR head acknowledged that on multiple occasions, she told Stowell to stop contacting K.N.

### 3. Violations of TRO

At the hearing on K.N.'s request for a restraining order, the parties also addressed four alleged violations of the TRO. The first violation occurred when Stowell sent K.N. an e-mail hours after being served with the TRO on February 17, 2017.

Stowell admitted sending the e-mail, but explained that it was an inadvertent mistake. He was compiling all e-mail communications he had sent to K.N., and forwarding them to his secretary when he inadvertently forwarded one of the e-mails -- a February 23, 2016 e-mail -- to K.N. Stowell's secretary testified that at the time Stowell sent that e-mail to K.N., he was forwarding other e-mails to her.

The second violation allegedly occurred when Stowell came to Marina's Anaheim office on February 27, 2017. Stowell explained that after his division had been sold in January 2017, the owner of Marina called him and asked him to come to the Anaheim office to sign some transition paperwork. Stowell asked whether K.N. was there and was told she was not. K.N. normally worked at Marina's office in Orange, and she had been working from home since November 2016. He came to the Anaheim office and signed the paperwork.

The third violation allegedly occurred when Stowell came to Marina's Orange location on March 6, 2017. Stowell explained that Marina's CFO had called him to ask him to sign additional paperwork. He stayed a couple of blocks away from the office and had a notary come out to his car so he could sign the paperwork.

The fourth violation allegedly occurred when Stowell spoke with Marina's HR head, and told her that if she was going to talk to K.N. to pass along that if "both sides could just drop this and be done with this[,] that would be great." Stowell explained he had expressed his desire to have the matter dropped. He never asked the HR head to contact K.N. to convey his sentiments.

The trial court did not rule whether Stowell had violated the TRO.

C. *Trial Court's Ruling*

The trial court denied the request for a restraining order without prejudice, and it dissolved the TRO. The court: “All right. I feel like I’ve sat for the past four and a half or five hours dealing with junior high school students, both of you, even though you have some gray over your ears.” The judge expressed concern that neither K.N.’s husband nor Stowell’s wife testified. He stated that “[t]he two people that should be in this definition [*sic*] are the husband and the wife,” because “they had to put up with it.” The judge also noted that K.N.’s husband “had to listen.” He interpreted the evidence as follows: “It was like Mr. Stowell was pretty much the big man on campus, had the bucks in his back pocket, and the petitioner [K.N.] was the best looking girl in school, and he was going to get her any way he possibly could, all right. And she knew it, and she liked it, because she got things.” The judge also stated: “If I got a letter from someone, or a phone call saying, I’ll give you a blow job every day for the rest of your life for a car, we will be at the Mercedes dealer pretty soon. . . .”

K.N. timely appealed from the order denying her request for restraining order.

## II

### DISCUSSION

A. *K.N. Has Not Shown the Trial Judge Was Biased*

K.N. contends the trial court denied her due process right to an impartial factfinder. She bases her claim on what she characterizes as the trial judge’s sexist and misogynist comments. As an initial matter, she failed to raise the issue in the trial court. (See *People v. Samuels* (2005) 36 Cal.4th 96, 114 [“Failure to raise the issue of judicial conduct at trial waives claims of statutory or constitutional error.”].) Even if K.N. had not forfeited her claim, we would conclude the judge’s comments do not show actual bias or a high probability of actual bias. (See *People v. Freeman* (2010) 47 Cal.4th 993, 1006 (*Freeman*) [litigant’s due process right to an impartial factfinder violated where there is

actual bias or a high probability of actual bias; mere appearance of bias insufficient to disqualify judge].)

K.N. challenges the trial court's comments that "the two people that should be in this definition [*sic*] are the husband and the wife" and that "your husband had to listen." While acknowledging "it is unclear what Judge Stafford precisely means," K.N. argues the comments casted her "as a chattel belonging to her husband and echoes conservative Christian principles." We disagree. We interpret the court's comment as referring to K.N.'s husband and Stowell's wife, not to K.N. and her husband, and therefore the judge's comments did not cast K.N. in a subordinate role to her husband. Rather, the judge expressed his opinion the relationship between K.N. and Stowell had an adverse impact on their respective relationships with their spouses. The judge's comment that K.N.'s husband "had to listen" to the trial testimony further expressed this point. The judge's opinion was supported by K.N.'s own testimony that rumors about her relationship with Stowell caused friction in her marriage. (See *Kreling v. Superior Court* (1944) 25 Cal.2d 305, 312 [judge's opinion based on "actual observance of the witnesses and the evidence given during the trial" not evidence of bias or prejudice].)

K.N. argues that the trial judge "insulted, denigrated, and belittled [her] with virtually no comment to Stowell." The record, however, shows the judge directed his ire at both parties, commenting that "both" Stowell and K.N. were acting like "junior high school students." He observed that Stowell's wife had to "put up" with his behavior toward K.N. Even the judge's comments that Stowell was acting like "the big man on campus" and trying to get the prettiest girl "any way he possibly could" are not complimentary statements about Stowell.

K.N. contends the trial judge viewed her as a "sexual object" and implied he wanted oral sex from her when he stated, "If I got a letter from someone, or a phone call saying, I'll give you a blow job every day for the rest of your life for a car, we will be at the Mercedes dealer pretty soon. . . ." Although the judge's comment is clearly

inappropriate, it is not an implied statement the judge would like oral sex from K.N. Rather, as K.N. acknowledges, it is a reference to a text message K.N. had sent to her husband and shown to Stowell. Stowell used that text message to support his claim that he and K.N. often engaged in inappropriate speech. Although the comment does not demonstrate judicial bias, it did “not accord with recognized principles of judicial decorum consistent with the presentation of a case in an atmosphere of fairness and impartiality.” (*In re Marriage of Iverson* (1992) 11 Cal.App.4th 1495, 1501 (*Iverson*), overruled on other grounds by *People v. Freeman, supra*, 47 Cal.4th at p. 1006, fn. 4.) Judicial ethics require a judge to “be patient, dignified, and courteous to litigants . . . .” (Cal. Code Jud. Ethics, canon 3(B)(4).) The judge’s comment is the antithesis of judicial decorum and courtesy.

Finally, K.N. contends the judge was misogynist when he stated that she was “the best looking girl in school, and [Stowell] was going to get her any way he possibly could, all right. And she knew it, and she liked it, because she got things.” In context, the judge’s comment on K.N.’s physical appearance was meant to explain Stowell’s actions over the entirety of their turbulent relationship, and not that the judge found K.N. sexually attractive. As to the judge’s conclusion that K.N. liked Stowell’s attention and “got things” from Stowell, the judge failed to identify the applicable time frame. To the extent it referred to Stowell’s conduct before late 2016, was supported by evidence presented at the hearing. For example, in July 2016, K.N. e-mailed Stowell: “I would just like to reiterate that I deeply appreciate all the nice things you have done for me, and the help you have given me. Those things never went unnoticed, and I did not take them for granted.” But no evidence showed K.N. “liked” Stowell’s attention or “got things” after July 2016. We cannot definitively conclude the judge’s comments show actual bias, but the comments were inappropriate and created an appearance of gender bias because they suggest the female target of a “big man on campus” would like the attention. (See *Iverson, supra*, 11 Cal.App.4th at pp. 1500-1501 [at minimum,

appearance of gender bias shown where judge employed gender-based stereotypes in decisionmaking process]; see also Cal. Code Jud. Ethics, canon 3B(5) [“A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (a) bias or prejudice, including but not limited to bias or prejudice based upon . . . sex, gender. . .”].)

Based on the trial judge’s comments, K.N. also claims she was denied substantive due process based on the trial judge’s “personal feelings on society and women’s role in society” and that the court violated the Equal Protection Clause by discriminating against her based on her sex. For the same reasons stated above, we reject her claims.

B. *The Trial Court Abused Its Discretion*

Section 527.6, subdivision (a)(1), provides that a “person who has suffered harassment as defined in subdivision (b) may seek a temporary restraining order and an order after hearing prohibiting harassment as provided in this section.” At the hearing on a petitioner’s request for a restraining order under section 527.6, “the judge shall receive any testimony that is relevant, and may make an independent inquiry. If the judge finds by clear and convincing evidence that unlawful harassment exists, an order shall issue prohibiting the harassment.” (§ 527.6, subd. (i).) K.N. contends the trial court abused its discretion in denying her request for a restraining order under section 527.6, arguing that the court “completely ignored the law.” We agree.

“All exercises of discretion must be guided by applicable legal principles, however, which are derived from the statute under which discretion is conferred. [Citations.] If the court’s decision is influenced by an erroneous understanding of applicable law or reflects an unawareness of the full scope of its discretion, the court has not properly exercised its discretion under the law. [Citation.] Therefore, a discretionary order based on an application of improper criteria or incorrect legal assumption is not an exercise of informed discretion and is subject to reversal.” (*Farmers Ins. Exchange v.*

*Superior Court* (2013) 218 Cal.App.4th 96, 106.) Here, we lack confidence the trial court's decision to deny K.N.'s request was an exercise of informed discretion.

Under section 527.6, a trial court "shall" issue a restraining order if after independently considering the relevant evidence, it finds by clear and convincing evidence that harassment exists. "Harassment" within the meaning of section 527.6 means "unlawful violence, a credible threat of violence, or 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. The course of conduct must be that which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the petitioner." (§ 527.6, subd. (b)(3).) "Course of conduct" is defined as 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 individual, making harassing telephone calls to an individual, or sending harassing correspondence to an individual by any means, including, but not limited to, the use of public or private mails, interoffice mail, facsimile, or [computer] email [*sic*]." (§ 527.6, subd. (b)(1).)

Here, the trial court impliedly found that no harassment existed, based in part on its implied finding that K.N. was not "seriously alarm[ed], annoy[ed], or harass[ed]" by Stowell's conduct. (§ 527.6, subd. (b)(3).) Rather, the court found, K.N. "liked it, because she got things." However, the trial court appears to have focused on an earlier point in the parties' relationship. No evidence was presented at the hearing showing K.N. received anything from Stowell after July 2016. The landscaping work at K.N.'s home occurred in 2015, and Stowell's assistance following K.N.'s car accident occurred before February 2016. Although the record is not clear on when Stowell provided guidance about getting a raise, that event occurred before July 2016, as the parties discussed it in various text messages in July 2016. Although Stowell continued to send unsolicited gifts or made unsolicited offers afterward, K.N. declined them.

In addition, the undisputed evidence shows that at least by October 19, 2016, K.N. did not like Stowell's attention. She stopped responding to any of Stowell's communications after October 19, 2016, and in November 2016, she began working from home to avoid Stowell. (See *Harris v. Stampolis* (2016) 248 Cal.App.4th 484, 496 [reviewing court applies substantial evidence test to determine whether evidence in the record supports court's finding on existence or nonexistence of willful harassment]; *Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, 1515 [existence or nonexistence of substantial evidence is question of law].) Under section 527.6, any pattern of conduct over a period of time, however short, can constitute harassment. Because K.N. was not seriously annoyed, alarmed or harassed in the past does not foreclose the possibility she was seriously annoyed, alarmed, or harassed after October 2016. Thus, the trial court appears to have applied an improper criterion – that K.N. liked Stowell's conduct in the past – in denying K.N.'s request for a restraining order.

The trial court's comments and references to irrelevant evidence undermine our confidence it properly exercised its discretion in denying K.N.'s request for a restraining order. That the court felt like it was dealing with junior high school students is irrelevant to whether willful harassment existed. Junior high school kids can engage in harassment within the meaning of section 527.6. Whether K.N.'s husband and Stowell's wife should be present, whether they had to "put up" with the parties' behavior or whether K.N.'s husband "had to listen" to the parties' testimony has no direct relevance to the existence of harassment. The undisputed evidence shows Stowell's conduct was directed at K.N., not at K.N.'s husband. That the conduct may have caused substantial emotional distress to Stowell's wife was not probative of K.N.'s emotional distress. That Stowell may have been acting like a "big man on campus" does not absolve Stowell of any harassing conduct. Finally, the fact that K.N. used sexually-charged language with her husband in 2015 has no bearing on Stowell's conduct, including his use of sexually inappropriate language with K.N. in 2016 or 2017.

Stowell contends the trial court's order denying the request without prejudice can be supported on an alternate basis, viz., by an implied finding that any harassment was unlikely to recur in the future. (See *Russell v. Douvan* (2003) 112 Cal.App.4th 399, 402-403 [injunction restraining future conduct under section 527.6 authorized only when it appears that harassment is likely to recur in the future].) Stowell argues the court could credit his testimony that he would not contact or bother K.N. again, and deny the request for a restraining order on that basis. But in light of the trial court's application of improper criteria in determining that no harassment existed, we lack confidence the court understood that it could exercise its discretion on this basis. We note the court never referred to Stowell's testimony on this point. More important, Stowell's testimony does not foreclose the possibility he might use a third party to harass K.N. We note that after the TRO was granted and after Stowell was no longer working with K.N. at Marina, Stowell allegedly asked Marina's HR head to contact K.N. to convey his sentiments about her efforts to obtain a restraining order.

In sum, we conclude the trial court did not properly exercise its discretion in denying K.N.'s request for a restraining order. Thus, we reverse and remand for a new hearing on K.N.'s request. On remand, in light of our determination that there was an appearance of judicial bias on the part of Judge Stafford, we conclude the hearing on K.N.'s request should be before a different judge. (See § 170.1, subd. (c) ["At the request of a party *or on its own motion* an appellate court shall consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court." (Italics added.)].)

### III

#### DISPOSITION

The order is reversed and remanded for a new hearing on K.N.'s request for a restraining order. On remand, the Presiding Judge of the Orange County Superior Court is directed to assign the matter to a different judge (§ 170.1, subd. (c)). The parties are to bear the own costs on appeal.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

THOMPSON, J.