

FINAL BILL REPORT

ESHB 1569

C 127 L 93
Synopsis as Enacted

Brief Description: Changing provisions relating to malicious harassment.

By House Committee on Appropriations (originally sponsored by Representatives Appelwick, Veloria, Wineberry, Romero, Wang, Locke, Thibaudeau, Wolfe, Brough, Miller, Leonard, Campbell, Cothorn, L. Johnson, J. Kohl and Anderson).

House Committee on Judiciary
House Committee on Appropriations
Senate Committee on Law & Justice

Background:

INTRODUCTION

The malicious harassment statute is a criminal statute which is intended to prevent and punish harassment, motivated by bigotry and bias, against people of a certain race, color, religion, ancestry, or national origin, or against people with a mental, physical, or sensory handicap.

DEFINITION OF THE CRIME OF MALICIOUS HARASSMENT

A person is guilty of malicious harassment if the person maliciously and with intent to intimidate or harass the victim due to the victim's membership in a protected category:

- (1) injures another person;
- (2) damages or destroys another person's property; or
- (3) by words or conduct, places another person in reasonable fear of injury.

1989 AMENDMENTS TO THE MALICIOUS HARASSMENT STATUTE

In 1989, the malicious harassment statute was amended in two significant ways. First, language was added to provide that "words or conduct" that could place a victim in reasonable fear included cross burnings and defacement of a victim's property with symbols that historically or traditionally have connoted hatred towards the class of which the victim

is a member. Second, cross burnings and defacement of the property of the victim or a third person with hate symbols became *per se* violations of the statute. The *per se* provisions relieved the state of the responsibility to prove that the person intended to maliciously harass the victim or that the victim was afraid.

As a result of the amendments, the state has two avenues for prosecution if the facts involve a swastika placed on the victim's property or a cross burning, whether or not the cross is burned on the victim's property: The state can either prove that the totality of the circumstances indicate the defendant intended to maliciously harass the victim, or the act was a *per se* violation, or both.

INCIDENTS CHARGED AS MALICIOUS HARASSMENT AND RELATED COURT RULINGS

In 1991, two separate incidents involving cross burnings occurred in King County. Two superior court judges heard the different cases. Prior to going to trial in both cases, the defendants made motions to dismiss the cases alleging that the malicious harassment statute is unconstitutional. One superior court judge held that the *per se* provision is unconstitutional but that the rest of the statute is constitutional. The other judge held that the entire statute is unconstitutional. Those cases were consolidated on appeal and are pending before the Washington State Supreme Court. The Washington State Supreme Court will also consider the impact of a United States Supreme Court decision invalidating another state's hate crimes statute.

OTHER PROVISIONS CONCERNING MALICIOUS HARASSMENT

The statute does not explicitly state whether a person is guilty of malicious harassment if the person harasses someone due to the harasser's mistaken impression that the victim was a member of a protected class. For example, in one celebrated case, the murderer mistakenly believed the family he murdered was Jewish.

Sexual orientation and gender are not included in the list of protected classes.

A victim may file a civil suit against the defendant for malicious harassment. The defendant may be liable for actual damages and punitive damages of up to \$10,000. The statute does not provide for an award of costs or reasonable attorneys' fees.

The Washington Association of Sheriffs and Police Chiefs can monitor the frequency of various crimes. Under a voluntary

reporting program, the association has monitored some incidents of crimes of bigotry and bias.

Summary: A number of changes are made to the malicious harassment statute to address constitutional concerns and new policy considerations.

AMENDMENTS TO ADDRESS CONSTITUTIONAL CONCERNS

Legislative Findings: The Legislature makes findings concerning the seriousness of hate crimes. The Legislature finds that historically and traditionally cross burnings have been used to threaten African Americans and swastikas have been used to threaten Jewish people. The Legislature finds that a person who burns a cross or displays a swastika on the victim's property or does so as part of a series of acts that are directed toward a particular victim, knew or should know that the act may create a reasonable fear of harm in the victim. Finally, the Legislature finds that gender based hate crimes can be identified in the same way that other hate crimes are identified.

A New Definition of Harassment: The definition of malicious harassment is revised. The list of words or conduct that may violate the statute is deleted. The state must prove that the defendant maliciously and intentionally threatened the victim. The victim must be placed in reasonable fear of harm. "Reasonable fear" is defined to mean the fear that a reasonable person would experience under all the circumstances. A "reasonable person" is a person who is a member of the class of which the victim is a member. Words alone do not constitute malicious harassment unless the context or circumstances surrounding the words indicate the words are a threat. Threatening words do not constitute malicious harassment if it is apparent to the victim that the person does not have the apparent ability to carry out the threat. Evidence of expressions or associations of the accused may not be introduced as substantive evidence at trial unless the evidence specifically relates to the crime charged or unless the evidence is used to impeach a witness.

Per Se Provisions Stricken and Replaced with a Reasonable Inference Provision: The "per se" language is stricken and replaced with a provision that the trier of fact may draw a reasonable inference that the defendant intended to threaten the victim if the defendant:

- (1) burns a cross on the property of a victim who is or who the actor perceives to be of African American heritage; or

- (2) defaces the property of a victim who is or who the defendant perceives to be of Jewish heritage by defacing the property with a swastika.

The state bears the burden of proof beyond a reasonable doubt on all elements of the crime. Even if the facts do not support a reasonable inference, the state may still prosecute a defendant if the totality of evidence indicates that the person intended to threaten the victim and the victim was placed in reasonable fear of harm.

CLARIFYING LANGUAGE

The law is clarified in three ways: (1) It is not a defense that the defendant was mistaken about the person's membership in a protected class; (2) it expressly provides that a person who commits another crime during the commission of malicious harassment may be punished and prosecuted for the other crime separately; and (3) the term "another person" means the victim as well as any other person the defendant injures or harasses.

NEW POLICY PROVISIONS

Gender and sexual orientation are added to the list of protected categories under the act. Sexual orientation means heterosexuality, homosexuality, or bisexuality.

In a civil action, the plaintiff may be awarded reasonable attorneys' fees and costs, as well as actual damages, and punitive damages up to \$10,000.

DATA COLLECTION

The Washington Association of Sheriffs and Police Chiefs must establish a central repository of information regarding malicious harassment. The association must summarize the information and annually report to the governor, the Senate Law and Justice Committee, and the House Judiciary Committee.

LAW ENFORCEMENT TRAINING

The Criminal Justice Training Commission must train law enforcement officers to identify, respond to, and report crimes of malicious harassment and bigotry and bias.

ADDITIONAL CIVIL RIGHTS NOT CREATED UNDER THE ACT

Nothing in the act confers or expands any civil rights or protections to any group or class identified in the statute beyond those rights or protections that exist under the

federal or state constitutions or the civil laws of the state of Washington.

Votes on Final Passage:

House	85	12	
Senate	29	20	(Senate amended)
House	84	12	(House concurred)

Effective: July 25, 1993