Gordon D. Schaber Competition

2020-21

Moot Court

Hannah Cohn

v.

Placerado

Unified School Distirct, et al

FACT Situation

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

--oOo--

HANNAH COHN, a Minor, by and through her parents, Robert and Andrea Cohn, Plaintiff & Appellant, vs. PLACERADO UNIFIED SCHOOL DISTRICT & COUNTY OF PLACERADO, Defendants & Appellees.	Case No.: 2020-501 FACTS

The parties agree the following facts are undisputed:

During the 2019-20 school year, fifteen-year-old Hannah Cohn was a sophomore at Placerado High School in Auburnville, California. At the start of the school year, Hannah was elected sophomore class representative to the school's student government.

In March 2020, Hannah was on a school soccer trip in Arizona when the team had to rush home because of the Covid-19 epidemic. A few days after she returned home, Hannah started having symptoms consistent with Covid-19, including a fever, dry cough and difficulty breathing.

On March 15, 2020, Hannah's parents took her to Mercia Hospital in Auburnville, California. The doctors said she had symptoms of Covid-19, but they were unable to test her so they sent her home with instructions to self-quarantine. She was diagnosed with an acute upper respiratory infection. A few days later, Hannah's symptoms became more serious. Her parents rushed her back to the hospital, where she was finally tested.

Although her results came back negative on March 23, 2020, the doctors told Hannah that she still might have Covid-19 as she might have missed the window for testing. They told the Cohns to continue quarantining. That evening, Hannah started feeling a little better, and posted to Instagram that she had "beaten COVID-19." Hannah had about 200 followers on Instagram, mostly other high school students.

The next day, the Placerado County Health Department was notified by Mercia Hospital that Hannah had been tested for Covid-19 and that her test was negative. That same day, the Health Department started receiving phone calls from parents of students in Auburnville, advising that Hannah's Instagram account posted a message that Hannah had "beaten COVID-19." By the end of the day, both the Health Department and the school district had received numerous such phone calls from concerned citizens.

The Health Department reached out to the Placerado County Sheriff's Department regarding the Instagram post. Given concerns expressed by citizens, and in light of Hannah's negative test for Covid-19, the Health Department requested that the Sheriff's Department ask

the Cohn family if Hannah would agree to remove her social media post that said she had beaten Covid-19.

Placerado County Sheriff Griffith forwarded Hannah's Instagram post to Sheriff's Deputy Krupke and asked the deputy to contact the Cohn family to see if Hannah would remove the Instagram post. Deputy Krupke asked what he should do if Hannah would not agree to remove the post voluntarily. Sheriff Griffith said there could be a wide range of options, including potentially citing her for disorderly conduct under a Placerado County ordinance.[1]

The following day, Deputy Krupke drove to the Cohn family's home and met with Hannah's parents, Robert and Andrea Cohn, outside their home. Deputy Krupke explained the reason he was there: to discuss Hannah's Instagram post stating she had "beaten COVID-19," even though she had tested negative. Deputy Krupke told Mr. and Mrs. Cohn that this post was causing many issues with students and parents within the school district. The deputy also told them that the Placerado County Health Department had asked Sheriff Griffith to reach out to the Cohn family and to talk to their daughter to see if she would delete her post. Mr. Cohn defended his daughter's post, explaining that Hannah had had symptoms of Covid-19 and the hospital had said the negative test was inconclusive. As Deputy Krupke

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[1] Placerado County Ordinance § 50.03 provides: "Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of disorderly conduct."

1 and Mr. Cohn argued, Mrs. Cohn said “okay” and went back inside the
2 house.

3 A minute later, Hannah stepped outside and stood next to her
4 father. Deputy Krupke showed Hannah her Instagram post and asked
5 her to take the post down. He told her that if she refused to do so, she
6 could be cited for violating a Placerado County ordinance prohibiting
7 disorderly conduct. When Hannah hesitated, Deputy Krupke retrieved
8 a citation book from his pocket and began writing in it.

9 Hannah said she would delete the post, and then walked back
10 inside the house and closed the door. Mr. Cohn repeated to the deputy
11 that Hannah did in fact have Covid-19 symptoms and objected that the
12 county had no right to tell his daughter what she can or cannot post on
13 her social media. Deputy Krupke responded, “Robert, I don’t want it to
14 go any farther. It’s as simple as me coming out here and just getting the
15 post taken down and walking away.” Hannah then reemerged from the
16 house with her phone in her hand and confirmed that the Instagram
17 post had been taken down. Deputy Krupke put the citation book back in
18 his pocket without giving Hannah a citation.

19 The following week, all schools in Placerado County were ordered
20 closed through the end of the school year due to the Covid-19 pandemic.
21 Hannah and her classmates at Placerado High School finished the
22 school year via remote learning.

23 On September 14, 2020, Placerado High School reopened for in
24 person learning. As it was the start of the school year, Hannah
25 remained the sophomore class representative to the student

government pending student government elections which would take place later that month.

Hannah, like many of her classmates, was excited to return to school. The high school established protocols to ensure students remain safe during the Covid-19 pandemic, including mandating the wearing of face masks and physical distancing as practicable. The first week of school, students complied with the protocols, but by the third week of school many students were not wearing face masks and students were crowded together in hallways while walking between class periods.

On October 2, 2020, Hannah found herself standing in a school hallway with a large group of students walking ahead of her in the same direction, none of whom seemed to be wearing face masks. Hannah used her cellphone to take a photo of the students in the hallway. The photo shows at least thirty students and captures only the backs of their heads. The students are crowded together, walking shoulder to shoulder. It is clear from the lack of straps behind the ears or on the backs of the heads of at least the dozen or so of the nearest students that they are not wearing face masks. Hannah knew that a school rule prohibits the use of cellphones during school hours.

After classes were dismissed for the day, Hannah met two of her friends to walk home. They stepped onto a city-owned sidewalk directly in front of the school when Hannah stopped to show her friends the photo of the students in the hallway. Hannah's friends said she should post it on Instagram. Given Hannah's recent run-in with Deputy Krupke, Hannah responded that she thought that was a bad idea. But

her friends kept insisting that she post the photo, with one of them saying people need to know that students are not wearing face masks, so Hannah quickly posted the photo on her Instagram account, with a caption: “No one at Placerado High is wearing masks!”

Two days later, the Placerado High School principal, Mr. Headley, called Hannah into his office. He showed Hannah her Instagram post, and Hannah admitted that she had posted the photo. Mr. Headley said the photo had gone viral around the school campus, and that he had spent the past 24 hours responding to numerous phone calls from irate parents. He said some of the parents were angry because they thought the photo showed their son or daughter not wearing a face mask, and they said that violated their child’s right to privacy, although Mr. Headley conceded that the photo showed only the backs of students’ heads and that he couldn’t identify any of the students in the photo. Mr. Headley told Hannah that he had received complaints from many students and teachers who were angry that Hannah violated the school rule against using cellphones during school hours, and that several teachers reported they were having trouble getting students to focus on the lesson plan because students wanted to talk about and debate the school photo. Mr. Headley said he thought the caption was misleading because it suggested no one at the high school was wearing a mask, and Hannah conceded that she knew that many students around campus were wearing masks. And Mr. Headley told her he was disappointed with her in part because the student government Code of Conduct

indicated student government members should bring problems to the attention of school officials.

At the end of the discussion, Mr. Headley suspended Hannah for five days for violating the school rule against the use of cellphones during school hours and the student government Code of Conduct, and told her she was banned from student government during the 2020-21 school year.

Hannah, through her parents as guardians ad litem, filed a civil complaint in the United States District Court for the Eastern District of California, against the Placerado Unified School District and the County of Placerado. Hannah's complaint alleges the school district violated Hannah's rights under the First Amendment by disciplining her for posting the photo on Instagram. Hannah's complaint further alleges the county retaliated against her in violation of the First Amendment by Deputy Krupke's threat to cite her for disorderly conduct if she did not remove the Instagram post that she had "beaten COVID-19."

After an expedited summary judgment proceeding, the district court granted summary judgment in favor of the school district and the county. Hannah, through her parents, has appealed to the United States Court of Appeals for the Ninth Circuit. Three issues are now pending before the Ninth Circuit:

1. Did the district court err in rejecting Hannah's claim against the County of Placerado for First Amendment retaliation on the ground that Hannah failed to show that Deputy Krupke's threat of

citation for disorderly conduct was likely to deter future First Amendment activity?

2. Alternatively, did the district court err in concluding that even if the County of Placerado retaliated against Hannah, nevertheless Hannah fails to state a claim for First Amendment retaliation because there was probable cause for Deputy Krupke to cite or arrest Hannah for disorderly conduct?
3. Did the district court err in concluding Placerado Unified School District did not violate Hannah's rights under the First Amendment by suspending her and banning her from student government for posting the photo on Instagram?

LIBRARY[1]

[1]Some of the cases have been edited/altered for purposes of this competition.

940 F.3d 1046
United States Court of Appeals, Ninth Circuit.

Jonathan C. CAPP; N.C., a minor, by and thru their Guardian ad litem; J.C., a minor, by and thru their Guardian ad litem, Plaintiffs-Appellants,
v.
COUNTY OF SAN DIEGO; Kathy Jackson; Bob Prokesch; Johanna Firth; San Diego Health and Human Services Agency, Defendants-Appellees.

No. 18-55119
|
Argued and Submitted July 10, 2019
Pasadena, California
|
Filed October 4, 2019

Appeal from the United States District Court for the Southern District of California, Anthony J. Battaglia, District Judge, Presiding, D.C. No. 3:16-cv-02870-AJB-MDD

Before: MILAN D. SMITH, JR. and MICHELLE T. FRIEDLAND, Circuit Judges, and STANLEY A. BASTIAN,[*] District Judge.

M. SMITH, Circuit Judge:

* * *

I. First Amendment Retaliation Claim

A. Violation of a Constitutional Right

To state a First Amendment retaliation claim, a plaintiff must plausibly allege "that (1) he was engaged in a constitutionally protected activity, (2) the defendant's actions would chill a person of ordinary firmness from continuing to engage in the protected activity and (3) the protected activity was a substantial or motivating factor in the defendant's conduct." *O'Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016) (quoting *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 770 (9th Cir. 2006)). To ultimately "prevail on such a claim, a plaintiff must establish a 'causal connection' between the government defendant's 'retaliatory animus' and the plaintiff's 'subsequent injury.' " *Nieves v. Bartlett*, ––– U.S. ––––, 139 S. Ct. 1715, 1722, 204 L.Ed.2d 1 (2019) (quoting *Hartman v. Moore*, 547 U.S. 250, 259, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006)). Specifically, a plaintiff must show that the defendant's retaliatory animus was "a 'but-for' cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive." *Id.* (quoting *Hartman*, 547 U.S. at 260, 126 S.Ct. 1695).

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We find instructive the Supreme Court's decision in *Nieves*. There, the Court held that plaintiffs bringing "First Amendment retaliatory arrest claims" must generally "plead and prove the absence of probable cause." *Nieves*, 139 S. Ct. at 1723.

285 F.Supp.3d 1070
United States District Court, E.D. Wisconsin.

Daniel BLACK, Plaintiff,
v.
David CLARKE, County of Milwaukee, Wisconsin, and John Does One–Six, Defendants.

Case No. 17–CV–156–JPS
|
Signed 01/05/2018

J. P. Stadtmueller, U.S. District Judge

1. INTRODUCTION

This action arises from an encounter on an airplane between former Milwaukee County Sheriff David Clarke ("Clarke") and the plaintiff, Daniel Black ("Black"), which led to airport questioning and a social media spat. Black accuses Clarke of First, Fourth, and Fourteenth Amendment violations, and seeks to hold both him and Milwaukee County liable.

On September 11, 2017, the defendants filed a motion for summary judgment. (Docket # 15). Black responded on October 11, 2017, (Docket # 25), and the defendants replied on October 25, 2017 (Docket # 29). For the reasons explained below, the defendants' motion will be granted in part and denied in part. The surviving claim will proceed to a jury trial.

***

3.2 Relevant Facts

On January 15, 2017, Clarke boarded a plane bound for Milwaukee, Wisconsin from the Dallas / Forth Worth International Airport. He took his seat toward the front of the plane. Black boarded the plane after Clarke, and, during the boarding process, stopped in the aisle immediately adjacent to Clarke's seat. Black asked Clarke if he was the Milwaukee Sheriff, and Clarke responded affirmatively. Then, in what Clarke believed was a physically threatening manner, Black stared at Clarke and shook his head. As Black started to walk toward his seat, Clarke asked Black if he had a problem, and Black responded by turning, shaking his head, and waving Clarke off in a manner indicating displeasure. The men did not have further interaction during the flight.

Before the plane took off, Clarke used his cell phone to call Inspector Edward Bailey ("Bailey"), who was then employed by the Milwaukee County Sheriff's Office and whose regular duties included meeting Clarke at the Milwaukee airport when Clarke arrived home from an out-of-state trip. Clarke informed Bailey of the confrontation with Black, saying "it had happened again" and that he had had a "confrontation with a passenger on an aircraft." (Docket # 17 at 4).[2] Clarke described Black to Bailey and told Bailey that the confrontation had not been physical. Clarke did not think that it amounted to an offense for which a citation or arrest was appropriate. Clarke nevertheless told Bailey that he wanted deputies to conduct a "field interview" of Black when the plane arrived in Milwaukee. According to Clarke's undisputed version of the facts, a "field interview" in the Sheriff's parlance is a "voluntary police-citizen encounter in which an officer obtains information from a citizen and makes an identification of the citizen." (Docket # 17 at 4).[3]

Bailey immediately called Captain Mark Witek ("Witek"), commander of the Airport

Division of the Milwaukee County Sherriff's Office, to relay the information he had just received from Clarke. Separately, Clarke sent a text message to Witek instructing him to have deputies conduct a field interview of Black after the plane landed. Before the plane arrived in Milwaukee, Witek told Deputies Steven Paull ("Paull") and Jeffrey Hartung ("Hartung") that there was an individual on Clarke's flight that had possibly harassed him, and that the deputies were to conduct a field interview of that individual to identify him and obtain basic information.

After the plane landed, Clarke exited the plane, entered the concourse at Gate D54, and walked up to several waiting Milwaukee County Sheriff's Office personnel. Witek, Sergeant James Sajdowitz ("Sajdowitz"), Deputy Karen Mills ("Mills"), and Mills' canine were there to greet Clarke as part of standard procedure for the sheriff's airport arrival. Paull and Hartung were there solely for the field interview. Clarke stayed in the gate area with the other Sheriff's Office personnel until Black exited the plane and entered the concourse. Clarke identified Black to Witek, Paull, and Hartung and then left the gate area with Witek, Sajdowitz, and Mills.

Paull and Hartung approached Black and said they needed to speak with him about an incident with Clarke on the plane. A brief segment of security footage from the gate area shows that the deputies did not use physical force when confronting Black. (Docket # 22–10). They walked with him to an open area at the center of Concourse D, near an unoccupied commercial space, that was not as confined and crowded as the gate area.[4] As they walked, Paull was several feet to Black's left and Hartung was behind Paull. When they arrived in the open area of the concourse, the deputies told Black to set down his bag and provide proof of his identity, which he did. Hartung called dispatch to run a check of Black's name and information from his Illinois driver's license for any outstanding warrants.

While they waited on dispatch, Paull asked Black to describe what happened with Clarke on the plane. Black relayed his account, and Paull, skeptical that Black's account was complete, asked Black if he had done anything else toward Clarke. Black called the situation ridiculous and Paull agreed. Paull asked Black what he thought of Clarke and Black responded, "[n]o comment." (Docket # 17 at 8). Paull and Black then discussed other topics, apparently in a friendly manner. The three men learned that they all had attended the University of Wisconsin—Milwaukee for college, and both Black and Hartung had played rugby there. When the field interview concluded (presumably the warrant check came back negative), the deputies escorted Black through the airport and outside to a waiting car driven by Black's friend. The field interview lasted approximately fifteen minutes.[5]

At no point in the interview did the deputies tell Black he was not free to leave, nor did Black ask if he was free to leave.[6] Black used his cell phone during the encounter to communicate with the friend who was picking him up at the airport. Black also filmed video as the deputies escorted him out of the airport, and the deputies did not stop him from doing so. At his deposition, Black described the deputies who questioned him as "kind." (Docket # 22–1 at 2). Black acknowledged that he did not refuse to answer the deputies' questions and said he was "trying to be helpful." (Docket # 22–1 at 8). He also testified that he felt as though he could not leave without answering the deputies' questions. *Id.*

Shortly after leaving the airport, Black posted about his interaction with Clarke and the deputies on a public Facebook group page. (Docket # 22–1 at 13). His post read:

> Just got off a flight from Dallas. Our wonderful Sheriff Clarke was on the flight. I couldn't tell if it was him because he was all decked out in all Cowboys gear, so I asked. When he responded yes, I shook my head at him and moved on. From behind me he asked if I had a problem and I shook my head no again. When we landed at Mitchell International, I had a welcoming party of about six cops and drug/bomb dogs, who questioned me for about 15 minutes before escorting me out. Just posting to let y'all know be careful around our Sheriff, he needs to be in a safe space at all times.
>
> (Docket # 22–1 at 13).

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4. ANALYSIS

Black brings claims against Clarke under the First, Fourth, and Fourteenth Amendments.[9] Black also brings a *Monell* claim against Milwaukee County based on Clarke's alleged constitutional violations. The defendants respond by contesting each of the alleged constitutional violations and arguing that, even if the Court finds a violation, Clarke is entitled to qualified immunity.

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4.2 First Amendment Retaliation

Black complains of two First Amendment violations. First, he alleges that in response to his expressive conduct on the plane (shaking his head in displeasure), Clarke retaliated against him by sending his deputies to question him. ***

To prevail on a First Amendment retaliation claim, the plaintiff must show that "(1) he engaged in activity protected by the First Amendment; (2) he suffered a deprivation that would likely deter First Amendment activity in the future; and (3) the First Amendment activity was at least a motivating factor in the defendant's decision to take the retaliatory action." *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009) (citations and internal marks omitted).

As to the second factor, retaliatory speech is generally actionable "only in situations of threat, coercion, or intimidation that punishment, sanction, or adverse regulatory action will immediately follow." *Novoselsky v. Brown*, 822 F.3d 342, 356 (7th Cir. 2016) (quotation and internal marks omitted). A common fact pattern for retaliation cases is in the employment context, where an employer threatens to terminate, or actually terminates, an employee in retaliation for the employee's protected (but unpopular) speech. *See, e.g., Valentino v. Vill. of S. Chicago Heights*, 575 F.3d 664, 674 (7th Cir. 2009) (municipal employee stated First Amendment claim against mayor, municipal administrator who terminated her, and municipality claiming she was fired in retaliation for speaking out against their practices of nepotism and ghost payrolling).

***

A public official may also face liability for retaliatory speech that is not threatening, but is humiliating or harassing. "But this is a high bar, usually limited to the release of highly personal and extremely humiliating details to the public." *Novoselsky*, 822 F.3d at 356

(quotation omitted). The Seventh Circuit has pointed to *Bloch v. Ribar*, a Sixth Circuit case, as an example. *Id.* (citing *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998)). In that case, a sheriff responded to a rape victim's criticism of his investigation of her rape by revealing to the media intimate, humiliating, and undisclosed details about the rape.*Bloch,* 156 F.3d at 679–80. The court found that the victim stated a claim against the sheriff for First Amendment retaliation. *Id.*

Finally, a public official can be held liable for First Amendment retaliation by subjecting the speaker to a "campaign of petty harassment." *See, e.g., Bart v. Telford,* 677 F.2d 622, 624 (7th Cir. 1982). In *Bart,* the Court of Appeals found a cognizable First Amendment retaliation claim in the employment context based on the defendants' concerted, prolonged campaign of harassment. *Id.* This included such things as baseless reprimands and ridicule for bringing a birthday cake to the office on the occasion of the birthday of another employee although the practice was common. *Id.* Although the harassment allegations carried "a certain air of the ridiculous," the court held that they presented a question of fact as to "whether the campaign reached the threshold of actionability under section 1983." *Id.* at 625.

Similarly, in *Wallace v. Benware*, the Court of Appeals affirmed a jury's finding that the defendant county sheriff violated the First Amendment by engaging in a campaign of retaliatory harassment directed at the plaintiff deputy who had announced that he would run against the sheriff in an upcoming election. 67 F.3d 655, 662 (7th Cir. 1995). The harassment included taking away the deputy's portable radio and radar unit, ordering the deputy (but no one else) to leave his squad car at the station on weekends, inhibiting the deputy's ability to fulfill his responsibilities in the department's D.A.R.E. program, giving the deputy a series of atypical cleaning assignments, and, in the most serious instance, putting the deputy in harm's way during an armed robbery by ordering him to leave the scene from a concealed position for no sensible reason. *Id.* at 656–58; *see also Bridges*, 557 F.3d at 551–52 (prisoner sufficiently pled retaliation by alleging that, after he filed an affidavit in the wrongful death action of a deceased inmate's mother, he experienced delays in his incoming and outgoing mail, harassment by a guard kicking his cell door, turning his cell light off and on, and opening his cell trap and slamming it shut in order to startle him, unjustified disciplinary charges, and improper dismissal of his grievances).

In contrast, an isolated instance of public ridicule will not amount to actionable retaliatory harassment unless it is egregious enough to deter a person of ordinary firmness from exercising his right of free speech. For example, the same defendant in this case skirted a claim of retaliatory harassment in *Hutchins v. Clarke*, where the Seventh Circuit found that Clarke's statements on a radio show about a deputy who had criticized Clarke did not amount to First Amendment retaliation. 661 F.3d 947, 956–57 (7th Cir. 2011). In that case, Clarke called into a radio show to respond to the deputy's on-air criticism by calling the deputy "a 'slacker' who did not deserve to be an employee of the sheriff's department," and "express[ing] the view that [the deputy] was bitter and carried a grudge against him because of a disciplinary action" that Clarke had taken against the deputy. *Id.* at 950. Clarke identified the disciplinary action on-air "as a step taken as a result of [the deputy's] 'sexual harassment' of another employee. In actuality, the disciplinary action was for [the

deputy's] violation of a department rule that prohibited offensive conduct or language toward the public or toward county officers or employees." *Id.*

The Court of Appeals found that Clarke's statements did not threaten punishment, and that "[e]ven if some 'harassment and ridicule' might be retaliatory speech under § 1983, Sheriff Clark[e]'s statements did not rise to that level." *Id.* at 956–57 (quotation omitted). After all, the Court must take into account the defendant speaker's own right to free speech. *Id.* at 956; *see also Novoselsky*, 822 F.3d at 356 ("Unconstitutional retaliation by a public official requires more than criticism or even condemnation.").

Having surveyed the landscape of applicable First Amendment jurisprudence, the Court turns now to the two incidents of alleged retaliation in this case.

4.2.1 The airport encounter

Black first alleges that Clarke retaliated against him by directing his deputies to stop and interview him at the airport in response to Black having stared and shaken his head in displeasure at Clarke on the plane. The defendants do not contest that Black's expressive gesture on the plane was protected speech or that Clarke's directive for the interview was motivated by that speech. *See* (Docket # 29 at 12). The only question, then, is whether the retaliatory action would "deter a person of ordinary firmness" from exercising his First Amendment rights in the future. *Bridges*, 557 F.3d at 552.

As discussed above, Black voluntarily submitted to an interview with deputies at the airport. He was not "deprived" of anything, or made to do something he did not agree to do. Black cites no authority for the proposition that being asked to submit to voluntary questioning by police, in response to a protected speech act, would deter a person from exercising his speech rights in the future.

The analysis might be different if Black had been issued a citation and/or fined for his on-board glare. *See, e.g., Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 348, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."). Different, too, if Black had been arrested. *See, e.g., Thayer v. Chiczewski,* 705 F.3d 237, 252–53 (7th Cir. 2012) (recognizing that an arrest is a deprivation for purposes of a First Amendment retaliatory claim, but noting that the case law is unsettled as to whether the existence of probable cause would be a complete bar to such a claim). On the facts presented, however, Black has not shown that being stopped for fifteen minutes in order to voluntarily respond to deputies' questions would likely deter First Amendment activity in the future. The defendants' motion for summary judgment must be granted on this claim.

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2013 WL 5798989
Only the Westlaw citation is currently available.
United States District Court,
M.D. Louisiana.

Royce Denton McLIN
v.
Jason Gerald ARD, in his Capacity as Sheriff of Livingston Parish, et al.

Civil Action No. 13–538–SDD–RLB.
|
Oct. 28, 2013.

SHELLY D. DICK, District Judge.

Before the Court is Defendants', James R. Norred, Jr., Cynthia G. Wale, and Chance McGrew Parent (collectively "Defendants") *Motion to Dismiss*[1] on the grounds of Qualified Immunity or alternatively Motion to Dismiss Plaintiff's vicarious liability claims. For the reasons that follow, the Defendants' Motion is GRANTED.

I. FACTUAL BACKGROUND

Plaintiff, Royce Denton McLin, brings this action pursuant to 42 USC § 1983 and § 1988 alleging violations of the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.[2] Plaintiff contends that his Constitutional rights were violated by the Defendants, members of the Livingston Parish Council, when the Defendants swore out criminal complaints for Criminal Defamation[3] which resulted in the issuance of three (3) misdemeanor arrest warrants. Upon learning of the warrants, Plaintiff voluntarily surrendered to the Livingston Parish Sherriff.[4] Plaintiff alleges that the "summons remained extant" for four (4) months before ultimately being rejected by the Assistant District Attorney.[5] Essentially, the Plaintiff is claiming that he was maliciously prosecuted by the Defendants because of anonymous Facebook posts critical of the movants, which were ultimately traced to the Plaintiff. It is well settled that a § 1983 malicious prosecution claim does not implicate the Fourteenth Amendment's substantive due process standards.[6] However, the Fourth Amendment prohibition against unreasonable searches and seizures can be the basis of a § 1983 malicious prosecution claim.[7] Likewise, prosecution in retaliation for free speech violates the First Amendment and can be the basis of § 1983 liability.[8]

Plaintiff contends that his "receipt of a misdemeanor summons comports with an arrest" for the purpose of maintaining his constitutional tort claims.[9] Plaintiff claims that this "arrest" was based on false warrant affidavits in violation of the Fourth Amendment. Plaintiff claims that this allegedly unlawful "arrest" was made in retaliation for his exercise of First Amendment free speech. The Plaintiff makes conclusory allegations of a Fifth Amendment violation but pleads no facts tending to support a Fifth Amendment claim.[10] Plaintiff's Fifth Amendment claims against the movants, if any, are not addressed herein.

II. LAW AND ANALYSIS

The first step in analyzing claims brought pursuant to 42 USC § 1983 is to identify the specific constitutional right allegedly infringed. *** Section 1983 provides a federal cause of action for the "deprivation of any rights, privileges or immunities secured by the Constitution and laws" against any person acting under color of State Law.

***

C. First Amendment

To prevail on a First Amendment retaliation claim, the plaintiff must prove that: (1) he was engaged in a constitutionally protected activity, (2) that the defendant's actions caused him to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that protected activity, and (3) that the defendant's adverse actions were substantially motivated by the plaintiff's exercise of constitutionally protected conduct.[34]

The freedom to criticize public officials is unquestionably protected by our Constitution, and the First Amendment prohibits government officials from taking retaliatory action against individuals exercising this protected right.[35] The Plaintiff's *Complaint* satisfies the first element of a First Amendment retaliation claim. Plaintiff's criticism of government officials posted on a social media site is constitutionally protected activity. Taking the well-pleaded facts as true and viewed in a light most favorable to the Plaintiff, the *Complaint* also satisfies the third prong of a First Amendment retaliation claim; namely, the Defendants' adverse actions were substantially motivated by the Plaintiff's exercise of constitutionally protected conduct. The question then becomes whether the Defendants' actions caused the Plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity.

Reprisal in the form of a criminal arrest and/or prosecution violates the First Amendment.[36] As noted above, the Plaintiff herein was not prosecuted, nor was he arrested or seized within the meaning and protection of the Fourth Amendment. The question thus becomes: Is the fact that the Plaintiff was cited with a misdemeanor summons, and thereafter voluntarily surrendered to the Sherriff's office on charges that were dismissed 4 months later, an "injury that would chill a person of ordinary firmness"? The Court thinks not, The focus is upon whether a person of ordinary firmness would be chilled, rather than whether the particular Plaintiff is chilled.[37] Did these Defendants, by their actions, cause an injury sufficient to chill the speech of a person of ordinary firmness? The analysis necessarily turns on the nature and extent of the injury. Reading the Plaintiff's *Complaint* liberally, the injury in this case arguably includes: learning the Plaintiff's identity as the anonymous poster,[38] swearing out a criminal complaint against the Plaintiff, and the resulting issuance of the misdemeanor summons which remained extant for four months before the charges were ultimately dropped.

The seminal case in this Circuit on the question of injurious acts sufficient to maintain a First Amendment retaliation claim is *Keenan v. Tejada.*[39] After expressing criticism of the local Constable's office, the plaintiffs in *Keenan* were detained "for an inordinate period of time" at a traffic stop by officers with guns drawn and "ultimately being issued only a minor traffic citation that was later dismissed". Mr. Keenan, one of the named plaintiffs, was charged with "deadly conduct," a state law misdemeanor and was forced to spend thousands of dollars to exonerate himself at trial. Plaintiff also suffered the seizure of his handgun and revocation of his concealed handgun license.[40] Reversing the District Court, the Fifth Circuit held that there was a sufficient showing of injury to maintain a First Amendment retaliation claim. Unlike the facts in *Keenan,* absent in this case is any meaningful detention or prosecution.

The Eastern District of Texas recently surveyed the case law addressing the types of injuries found sufficient to chill the speech of a person of ordinary firmness.[41] That Court stated:

> Courts have found the following acts sufficiently severe to chill the speech of a person of ordinary firmness: drawing guns on plaintiffs during a routine traffic stop and separately charging plaintiffs with "deadly conduct"; refusing to grant a land permit in violation of local laws; public release of "irrelevant, humiliating, and confidential" details of a rape of the plaintiff; and arresting plaintiff, handcuffing him, placing him in leg irons, and holding him overnight in the coldest cell in the jail. On the other hand, courts have found the following acts not sufficient to chill the speech of a person of ordinary firmness: calling the manager of a state office where the plaintiff was doing research in order to litigate his case against the federal government and encouraging the manager to not allow plaintiff to use the office's resources for that purpose; preventing access to newsworthy information about a university athletics program; criticism of a student's speech and presentation in a speech class; a brief traffic stop resulting in a speeding ticket, for which probable cause existed; falsifying a police report, refusal to interview witnesses, and failure to enforce a temporary restraining order; and failure to investigate plaintiffs criminal complaint and failure to enforce a protection order.

This Court concludes that, although the conduct of the Defendant-movants is troubling, the Plaintiff did not suffer a harm caused by these movants sufficient to chill the speech of a person of ordinary firmness. The Court is mindful that the Defendant movants seemingly get a "pass" because the justice system worked as it should, in that the Plaintiff was not detained; the charges, which were based on an unconstitutional statute,[42] were ultimately dismissed; and there is no allegation that the Plaintiff incurred costs to defend the questionable charges. Finding no First Amendment violation, the Movants' *Motion to Dismiss* the Plaintiff's First Amendment § 1983 Civil Rights violation on the grounds of qualified immunity is GRANTED.

III. CONCLUSION

For the reasons herein, the Defendants' *Motion to Dismiss* Plaintiff's First Amendment and Fourth Amendment civil rights claims is GRANTED and the Plaintiff's 42 USC § 1983 First Amendment and Fourth Amendment claims against Defendants, James R. Norred, Jr., Cynthia G. Wale and Chance McGrew Parent, are hereby DISMISSED with prejudice.

***

8 Hartman v. Moore, 547 U.S. 250, 256, 126 S.Ct. 1695, 1701, 164 L.Ed 2d 441 (2006).

***

34 Keenan v. Tejeda, 290 F.3d 252, 258 (5th Cir.2002).

35 Criticism of public officials lies at the very core of speech protected by the First Amendment. New York Times Co. v. Sullivan, 376 U.S. 254, 269–70, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (stating that this country enjoys "a profound national commitment to the principle that debate on

public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"); See also, Colson v. Grohman, 174 F.3d 498, 507 (5th Cir.1999).

36 Hartman v. Moore, 547 U.S. 250, 256, 126 S.Ct. 1695, 1701, 164 L.Ed.2d 441 (2006).

37 Smith v. Plati, 258 F.3d 1167, 1177 (10th Cir.2001).

38 The Court does not consider the search of Plaintiff's home and the seizure of his computers and electronics as injuries attributable to the acts of the Defendant-movants presently before the Court.

39 290 F 3d 252 (5th Cir.2002).

40 Keenan v. Tejeda, 290 F.3d 252, 259 (5th Cir.2002).

41 Bailey v. City of Jasper, Tex., 112–CV–153, 2012 WL 4969126 (E.D.Tex. Sept. 24, 2012) report and recommendation adopted, 1:12–CV–153, 2012 WL 4970809 (E.D.Tex. Oct. 17, 2012), appeal dismissed (Jan. 18, 2013).

42 Simmons v. City of Mamou, WL 912858 (W.D La., 2012) finding La. R.S. 14:47 unconstitutional as applied under similar circumstance.

139 S.Ct. 1715
Supreme Court of the United States.

Luis A. NIEVES, et al., Petitioners
v.
Russell P. BARTLETT

No. 17-1174
|
Argued November 26, 2018
|
Decided May 28, 2019

ROBERTS, C.J., delivered the opinion of the Court, in which BREYER, ALITO, KAGAN, and KAVANAUGH, JJ., joined, and in which THOMAS, J., joined except as to Part II–D. THOMAS, J., filed an opinion concurring in part and concurring in the judgment. GORSUCH, J., filed an opinion concurring in part and dissenting in part. GINSBURG, J., filed an opinion concurring in the judgment in part and dissenting in part. SOTOMAYOR, J., filed a dissenting opinion.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Chief Justice ROBERTS delivered the opinion of the Court.

Respondent Russell Bartlett sued petitioners—two police officers—alleging that they retaliated against him for his protected First Amendment speech by arresting him for disorderly conduct and resisting arrest. The officers had probable cause to arrest Bartlett, and we now decide whether that fact defeats Bartlett's First Amendment claim as a matter of law.

***

II

We are asked to resolve whether probable cause to make an arrest defeats a claim that the arrest was in retaliation for speech protected by the First Amendment.

* * *

A

"[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for engaging in protected speech. *Hartman v. Moore*, 547 U.S. 250, 256, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006). If an official takes adverse action against someone based on that forbidden motive, and "non-retaliatory grounds are in fact insufficient to provoke the adverse consequences," the injured person may generally seek relief by bringing a First Amendment claim. *Ibid.* (citing *Crawford-El v. Britton*, 523 U.S. 574, 593, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998); *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 283–284, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)).

To prevail on such a claim, a plaintiff must establish a "causal connection" between the government defendant's "retaliatory animus" and the plaintiff's "subsequent injury." *Hartman*, 547 U.S. at 259, 126 S.Ct. 1695. It

is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must *cause* the injury. Specifically, it must be a "but-for" cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive. *Id.,* at 260, 126 S.Ct. 1695 (recognizing that although it "may be dishonorable to act with an unconstitutional motive," an official's "action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway").

For example, in *Mt. Healthy*, a teacher claimed that a school district refused to rehire him in retaliation for his protected speech. We held that even if the teacher's "protected conduct played a part, substantial or otherwise, in [the] decision not to rehire," he was not entitled to reinstatement "if the same decision would have been reached" absent his protected speech. 429 U.S. at 285, 97 S.Ct. 568. Regardless of the motives of the school district, we concluded that the First Amendment "principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the [protected speech]." *Id.,* at 285–286, 97 S.Ct. 568.

For a number of retaliation claims, establishing the causal connection between a defendant's animus and a plaintiff's injury is straightforward. Indeed, some of our cases in the public employment context "have simply taken the evidence of the motive and the discharge as sufficient for a circumstantial demonstration that the one caused the other," shifting the burden to the defendant to show he would have taken the challenged action even without the impermissible motive. *Hartman*, 547 U.S. at 260, 126 S.Ct. 1695 (citing *Mt. Healthy*, 429 U.S. at 287, 97 S.Ct. 568; *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270, n. 21, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)). But the consideration of causation is not so straightforward in other types of retaliation cases.

In *Hartman*, for example, we addressed retaliatory prosecution cases, where "proving the link between the defendant's retaliatory animus and the plaintiff's injury ... 'is usually more complex than it is in other retaliation cases.' " *Lozman*, 585 U.S., at ––––, 138 S.Ct., at 1952–1953 (quoting *Hartman*, 547 U.S. at 261, 126 S.Ct. 1695). Unlike most retaliation cases, in retaliatory prosecution cases the official with the malicious motive does not carry out the retaliatory action himself—the decision to bring charges is instead made by a prosecutor, who is generally immune from suit and whose decisions receive a presumption of regularity. *Lozman*, 585 U.S., at –––– – ––––, 138 S.Ct., at 1952–1953. Thus, even when an officer's animus is clear, it does not necessarily show that the officer "induced the action of a prosecutor who would not have pressed charges otherwise." *Hartman*, 547 U.S. at 263, 126 S.Ct. 1695.

To account for this "problem of causation" in retaliatory prosecution claims, *Hartman* adopted the requirement that plaintiffs plead and prove the absence of probable cause for the underlying criminal charge. *Ibid.*; see *id.,* at 265–266, 126 S.Ct. 1695. As *Hartman* explained, that showing provides a "distinct body of highly valuable circumstantial evidence" that is "apt to prove or disprove" whether retaliatory animus actually caused the injury: "Demonstrating that there was no probable cause for the underlying criminal charge will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution,

while establishing the existence of probable cause will suggest that prosecution would have occurred even without a retaliatory motive." *Id.,* at 261, 126 S.Ct. 1695. Requiring plaintiffs to plead and prove the absence of probable cause made sense, we reasoned, because the existence of probable cause will be at issue in "practically all" retaliatory prosecution cases, has "high probative force," and thus "can be made mandatory with little or no added cost." *Id.,* at 265, 126 S.Ct. 1695. Moreover, imposing that burden on plaintiffs was necessary to suspend the presumption of regularity underlying the prosecutor's charging decision—a presumption we "do not lightly discard." *Id.,* at 263, 126 S.Ct. 1695; see also *id.,* at 265, 126 S.Ct. 1695. Thus, *Hartman* requires plaintiffs in retaliatory prosecution cases to show more than the subjective animus of an officer and a subsequent injury; plaintiffs must also prove as a threshold matter that the decision to press charges was objectively unreasonable because it was not supported by probable cause.

B

Officers Nieves and Weight argue that the same no-probable-cause requirement should apply to First Amendment retaliatory arrest claims. Their primary contention is that retaliatory arrest claims involve causal complexities akin to those we identified in *Hartman*, and thus warrant the same requirement that plaintiffs plead and prove the absence of probable cause. Brief for Petitioners 20–30.

As a general matter, we agree. As we recognized in *Reichle* and reaffirmed in *Lozman*, retaliatory arrest claims face some of the same challenges we identified in *Hartman*: Like retaliatory prosecution cases, "retaliatory arrest cases also present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury." *Reichle*, 566 U.S. at 668, 132 S.Ct. 2088. The causal inquiry is complex because protected speech is often a "wholly legitimate consideration" for officers when deciding whether to make an arrest. *Ibid.*; *Lozman*, 585 U.S., at ——, 138 S.Ct., at 1953. Officers frequently must make "split-second judgments" when deciding whether to arrest, and the content and manner of a suspect's speech may convey vital information—for example, if he is "ready to cooperate" or rather "present[s] a continuing threat." *Id.*, at ——, 138 S.Ct., at 1953 (citing *District of Columbia v. Wesby*, 583 U.S. ——, ——, 138 S.Ct. 577, 587–588, 199 L.Ed.2d 453 (2018) ("suspect's untruthful and evasive answers to police questioning could support probable cause")). Indeed, that kind of assessment happened in this case. The officers testified that they perceived Bartlett to be a threat based on a combination of the content and tone of his speech, his combative posture, and his apparent intoxication.

In addition, "[l]ike retaliatory prosecution cases, evidence of the presence or absence of probable cause for the arrest will be available in virtually every retaliatory arrest case." *Reichle,* 566 U.S. at 668, 132 S.Ct. 2088. And because probable cause speaks to the objective reasonableness of an arrest, see *Ashcroft v. al-Kidd*, 563 U.S. 731, 736, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011), its absence will—as in retaliatory prosecution cases—generally provide weighty evidence that the officer's animus caused the arrest, whereas the presence of probable cause will suggest the opposite.

To be sure, *Reichle* and *Lozman* also recognized that the two claims give rise to

complex causal inquiries for somewhat different reasons. Unlike retaliatory prosecution cases, retaliatory arrest cases do not implicate the presumption of prosecutorial regularity or necessarily involve multiple government actors (although this case did). *Reichle*, 566 U.S. at 668–669, 132 S.Ct. 2088; *Lozman*, 585 U.S., at ——, 138 S.Ct., at 1953–1954. But regardless of the source of the causal complexity, the ultimate problem remains the same. For both claims, it is particularly difficult to determine whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct. See *id.*, at ——, 138 S.Ct., at 1953 (referring to "the complexity of proving (or disproving) causation" in retaliatory arrest cases). Because of the "close relationship" between the two claims, *Reichle*, 566 U.S. at 667, 132 S.Ct. 2088, their related causal challenge should lead to the same solution: The plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest.

***

Adopting *Hartman*'s no-probable-cause rule in this closely related context addresses those familiar concerns. Absent such a showing, a retaliatory arrest claim fails. But if the plaintiff establishes the absence of probable cause, "then the *Mt. Healthy* test governs: The plaintiff must show that the retaliation was a substantial or motivating factor behind the [arrest], and, if that showing is made, the defendant can prevail only by showing that the [arrest] would have been initiated without respect to retaliation." *Lozman*, 585 U.S., at ——, 138 S.Ct., at 1952–1953 (citing *Hartman*, 547 U.S. at 265–266, 126 S.Ct. 1695).[1]

* * *

Because there was probable cause to arrest Bartlett, his retaliatory arrest claim fails as a matter of law. Accordingly, the judgment of the United States Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

2020 WL 687614
Only the Westlaw citation is currently available.
United States District Court, N.D. Texas, Dallas Division.

Albert E. WOOLUM, Plaintiff,
v.
The CITY OF DALLAS, TEXAS, Samuel Digby, and Officer Does 1-9, Defendants.

No. 3:18-cv-2453-B-BN
|
Signed 01/22/2020

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

DAVID L. HORAN, UNITED STATES MAGISTRATE JUDGE

Plaintiff Albert E. Woolum, through counsel, brought this civil rights action against the City of Dallas, one named Dallas police officer [Samuel Digby], and several John Doe Dallas police officers.

***

Woolum filed this action based on his arrest in September 2017 while attending a counter-protest against those protesting the City's removal of the Robert E. Lee statute from Oak Lawn Park. *See generally* Dkt. No. 1.

***

"The Fourth Amendment protects citizens from false arrests – that is, arrests unsupported by probable cause." *Defrates v. Podany,* -- F. App'x --, *** citing *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 204 (5th Cir. 2009). ***

"An officer may conduct a warrantless arrest based on probable cause that an individual has committed even a minor offense, including misdemeanors." *Deville*, 567 F.3d at 165 (citing *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001)). And

> "[p]robable cause exists when the totality of facts and circumstances within a police officer's knowledge *at the moment of the arrest* are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense." *Flores*, 381 F.3d at 402 (quotation omitted). The probable cause can be for any crime, not just the one the officer subjectively considered at the time. *Davidson*, 848 F.3d at 392.

Defrates, 2019 WL 6044869, at *3 (citation modified).

Woolum's best version of the material facts regarding his September 16, 2017 arrest as "reflected by proper summary judgment evidence," *Haggerty*, 391 F.3d at 655, not mere allegations, is set out in his December 5, 2019 declaration:

> On September 16, 2017, I put on my Black Lives Matter shirt and went to Lee Park, to counter-protest those protesting the removal of a confederate statue. I arrived at about 10:40am. At the time, there were only about 20 protesters present and no other counter-demonstrators that I could see. There were no designated "zones" and the park and statue are were open without restriction.
>
> I decided to just walk around to observe. I

talked to three people. The first was a Marine Vietnam Vet who was there to support the protesters. I told him "Welcome Home" and thanked him for his service and sacrifice. I told him we may not agree on the Robert E. Lee statue, but I would never dishonor him by arguing about it. We shook hands and went our separate ways.

My second encounter was with a woman holding a sign that said "PROTECT OUR HERITAGE." I asked her what that heritage was. We exchanged a few comments and she was getting irritated, so I walked away toward a shady area to prepare my white "confederate surrender" flag.

That's when I rendered first aid to a militia gentleman who had cut the back of his hand. After that, I took my white flag up to the Lee Pedestal to express my opinion and point of view. That's when the press asked me for comments and tried to interview me. Three different people with confederate or Texas flags tried to block the media's view and waved their flags in my face.

After that, I moved back towards the perimeter/fence area but was followed by a few angry people who were yelling and harassing me. I did manage a few more quick interviews before moving about fifteen feet away into the shade where I had previously helped with the first aid.

That's when the angry confederate sympathizer confronted me, got in my face yelling about where was Black Lives Matter when Houston needed help during Hurricane Harvey. I tried to explain that I had helped load some of the trucks that BLM-Dallas sent to Houston under another name but those facts set him off. I was on a slope with my back facing downhill when he pushed me hard. I stepped back for balance and felt he had grabbed my walking stick and was trying to wrestle it from me to use as a weapon. I struggled to hang on and at that instant several nonuniformed individuals knocked my hat off and wrestled me backwards towards a vehicle on the curb.

Next thing I know I had my arms twisted behind back and was being place in handcuffs. I heard a spectator on my left, who was only five feet away, screaming to the police that the guy in the Texas Flag shirt with the beard started assaulting me.

I did nothing wrong. I had committed no crimes. I did not use profane language. I did not fight anyone. I was simply exercising my right to free speech and I was attacked by protesters who disagreed with my views. I didn't even have an opportunity to defend myself before I was further victimized by Dallas Police by being handcuffed and falsely arrested.

Dkt. No. 37-1 at 1-2.

Neither this evidence nor the three videos Woolum that includes with his opposition, *see* Dkt. Nos. 38, 39, & 40, address probable cause – that is, "the totality of facts and circumstances within [Digby's] knowledge at the moment of the arrest" and whether those known facts and circumstances "are sufficient for a reasonable person to conclude that [Woolum] had committed or was committing an offense." *Flores*, 381 F.3d at 402 (emphasis omitted). But Digby does offer his own evidence as to the facts and circumstances known to him at the time of Woolum's arrest:

At the protest, I was aware there were plain clothes DPD officers at Robert E. Lee Park interspersed in the crowd. It is my understanding that DPD officers at the scene witnessed Mr. Woolum using abusive and profane language in a public place, however I did not witness this behavior by Mr. Woolum. I did observed Mr. Woolum in a shoving type fight with protesters at Robert E. Lee Park. To help de-escalate the situation, I assisted plain clothes DPD officers in removing Mr. Woolum from the area of the fight.

I approached as Mr. Woolum was being pulled away from the fight by plain clothes officers. Mr. Woolum who was carrying a cane with a white flag attached, thrust the cane into my face. I quickly reacted and seized Mr. Woolum's cane before he hit me in the face.

Based on the facts and circumstances I knew at the time Mr. Woolum was arrested, I believed there was probable cause to arrest Mr. Woolum for the penal offense of disorderly conduct. The Texas Penal Code offense section 42.01 defines the offense of disorderly conduct as "a person commits an offense if he intentionally, or knowingly: (1) uses abusive, indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace" or "(6) fights with another in a public place."

I also know section 14.01 of the Texas Code of Criminal procedure authorizes a peace officer to arrest an offender without warrant for any offense committed in his presence or within his view. Because I witnessed Mr. Woolum fighting with others in a public place, I believed the decision to arrest Mr. Woolum for disorderly conduct was lawful.

Dkt. No. 30-1 at 5.

The Court is therefore not faced with controverted facts as to probable cause. *See, e.g., Salazar-Limon*, 826 F.3d at 277 ("[A]lthough '[w]e resolve factual controversies in favor of the nonmoving party,' we do so only 'when there is an *actual controversy*, that is, when both parties have submitted evidence of contradictory facts.' Accordingly, we do not, 'in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts' to survive summary judgment." (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc))).

And Digby's "uncontradicted testimony ... could establish probable cause for the arrest" and therefore show that he is entitled to qualified immunity as to Woolum's Fourth Amendment claim. *Deville*, 567 F.3d at 165 ("Tarver stated in his deposition testimony that he detected Deville going 50mph in a 40mph zone using his radar gun, which he said he was operating correctly. Plaintiffs have offered Deville's deposition testimony, in which she testified that she was in fact not speeding, as evidenced by the fact that she set her vehicle's cruise control at the 40mph speed limit. However, evidence that the arrestee was innocent of the crime is not necessarily dispositive of whether the officer had probable cause to conduct the arrest because 'probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.' Thus, Tarver's uncontradicted testimony that his radar gun indicated that Deville was speeding could establish probable cause for the arrest." (citations and footnote omitted)); *see also Ikhinmwin*, 2017

WL 10768508, at *3 ("While the summary judgment evidence does not establish beyond dispute that Plaintiff actually violated Tex. Pen. Code § 42.03 prior to her arrest, it does establish beyond dispute that a reasonable officer in Defendant Rendon's position could have suspected that she had, and could have believed he had probable cause to arrest." (citing *Gibson v. Rich*, 44 F.3d 274, 277-78 (5th Cir. 1995))).[3]

The Court should therefore dismiss this claim as against Digby with prejudice.

2. <u>First Amendment Retaliation</u>

The finding that Digby could have arrested Woolum with probable cause not only entitles Digby to qualified immunity as to Woolum's Fourth Amendment claim (under the constitutional violation prong), it entitles Digby to qualified immunity as Woolum's First Amendment retaliation claim (under the clearly established law prong).

***

"[T]he Court held most recently in *Nieves* that a plaintiff generally cannot bring a retaliation claim if the police had probable cause to arrest. Though *Nieves* also created an exception to that general rule ..., the exception does not apply here because the officers would not have been aware of it at the time of Novak's arrest since the case was decided later." (citing *Nieves*, 139 S.Ct. at 1725)).

The Court should therefore dismiss this claim as against Digby with prejudice.

41 Wis.2d 497
Supreme Court of Wisconsin.

STATE of Wisconsin, Respondent,
v.
Robert K. ZWICKER, Appellant.
STATE of Wisconsin, Respondent,
v.
Robert WEILAND, Appellant.
STATE of Wisconsin, Respondent,
v.
Michael OBERDORFER, Appellant.
STATE of Wisconsin, Respondent,
v.
William SIMONS, Appellant.
STATE of Wisconsin, Respondent,
v.
Gregor SIROTOF, Appellant.

State Nos. 73, 77—80.
|
Feb. 13, 1969.
|
Rehearing Denied April 1, 1969.

These cases arise out of two student demonstrations on the campus of the University of Wisconsin at Madison, on February 21, 1967, and October 18, 1967. The ***502** defendants were protesting against the American policy in Vietnam. The arrests were made in a university building in which the university had arranged for a chemical manufacturer to conduct employment interviews. One of the products the manufacturer produced was napalm. The defendants were arrested and convicted, ****515** after jury trials, of a violation of the disorderly conduct statute.[1]

The defendants have appealed from their judgments of conviction and the cases were consolidated for purposes of appeal.

CONNOR T. HANSEN, Justice.

THE FEBRUARY 21, 1967, DEMONSTRATION

(Zwicker)

The appellant Zwicker was arrested at this demonstration. It was preceded by a meeting on February 17, 1967, in the office of the Dean of Student Affairs, at which the Dean, the Chief of University Protection and Security, Ralph Hanson, and others were present. Those present agreed upon certain rules for the anticipated ***503** demonstration on February 21, 1967, including a rule that demonstrators were not to be allowed to take signs into campus buildings.

The rule was made by persons having authority to make rules respecting the use of university buildings for student activities.

On the morning of February 21, 1967, Chief Hanson specifically advised the defendant and others assembled of the rule against taking signs into campus buildings. The demonstrators, including the defendant, were informed of this rule on two occasions before they entered the building. A group estimated at 60 to 70 persons, and including Zwicker, then entered the building in apparent compliance with the rule against carrying or displaying signs. They took up positions in a corridor adjacent to the room where the interviews were to be conducted.

Approximately 10 or 15 minutes later, signs appeared in the hands of the demonstrators and they were again advised that signs were not permitted.

Following the arrest of another demonstrator and the confiscation of a number of signs, the demonstration continued in an orderly fashion until defendant raised a sign over his head and allegedly told other demonstrators to raise their signs. Defendant refused to surrender or put down the sign when told to do so.

He was then arrested and when officers attempted to remove him from the building, he 'went limp' and other demonstrators physically prevented his removal. Thereafter, 40 to 50 other signs appeared, but the police officers made no further arrests or attempts to enforce the rule because, as one officer testified, it had become 'impossible to control the situation.' Later that day, a warrant was issued for defendant's arrest on charges of disorderly conduct. He was served with the warrant on February 23, 1967.

THE OCTOBER 18, 1967, DEMONSTRATION

(Weiland, Oberdorfer, Simons & Sorotof)

During the morning of October 18, 1967, a group of approximately 200 persons entered a university building and took positions in a corridor adjacent to rooms in which the chemical manufacturer was to interview persons seeking employment. The presence of the group filled the corridor making passage difficult. They sat on the ****516** floor of the corridor, and there was testimony that they were 'packed just as tight as they could be,' taking up all available space. There is also testimony that persons attempting to pass through the corridor had to walk over the seated demonstrators.

Later in the morning, three demonstrators were arrested when they refused to move. They could not be physically removed as other demonstrators held onto those arrested.

Chief Hanson then called the city of Madison police department for assistance. Chief Hanson also testified that on three different occasions between 1:00 and 1:30 p.m. he informed the demonstrators that their assembly was unlawful and ordered them to disperse.

The order to disperse was not obeyed and at approximately 1:30 p.m. a combined force of university and city police forcibly removed them.

Testimony was given at the defendants' joint trial showing that defendants, during the demonstration, conducted themselves as follows:

Robert Weiland

He blocked the door to the business office by maintaining a sitting position and joining arms with two other demonstrators. He refused to move when asked to do so ***505** by the Chief and he could not be removed as other demonstrators held onto him.

There is also testimony that he attempted to strike an officer but missed because other demonstrators restrained him.

Michael Oberdorfer

He struck out at officers who were attempting to move the demonstrators away from the building and spat at an officer several times. He called the officers 'f—-ing cops', 'bastards', 'swine', 'fascist', 'Nazi storm trooper', and 'a dirty, rotten c—k-s—-er.'

William Simons

There is testimony that he used a bullhorn amplifier in the building to lead the demonstrators in chants and yells; advised them to allow no one to enter or leave an adjacent room; and advised them to 'shove the cops out,' to 'lock their arms and legs together,' and 'to kick policemen between the legs.'

There is also testimony that he advised fellow demonstrators to block an entrance to a corridor, attempted to bar a student from entering the building by blocking him physically, and used the following language: 'Cops are fascist pigs and bastards', 'Kauffman is a bastard', 'Bronson Laf—-er', 'f—-'em' and 'f—- the University.'

Assistant Dean of Student Affairs, Cipperly, who was present during the entire demonstration, testified that he did not hear Simons use any vulgarity and that Simons helped in the attempt to keep the passageways clear and had a calming effect on the rest of the demonstrators.

***506** *Gregor Sirotof*

There is testimony that when Sirotof learned the police were going to clear the building he said 'If they come in, kick them right in the b——, right between the legs.' There is testimony that in a loud voice he called the officers 'f—-ing, fascist pigs,' and that when an officer allegedly attempted to take hold of his shoulder he threatened to kill the officer and then spat upon him.

The transcript of Zwicker's trial, in which he was a codefendant with another person, exceeds 450 pages and in the other cases 725 pages. Suffice it to say, that all of the conduct of the appellants set forth occurred within the view and hearing of the other demonstrators. In the Weiland, Oberdorfer, Simons and Sirotof cases the crowding of the passageways and the noise generated by the demonstration prevented students from reaching their classrooms and ****517** disrupted class activity to the extent that at least one class had to disband. All traffic to and from a dean's office was blocked and the demonstration upset the routine carried on in the building.

In seeking reversal of their convictions of disorderly conduct under sec. 947.01, Stats., appellants contend, [among other things] that: (1) the statute is so vague *** as to deprive them of due process of law under the fourteenth amendment to the United States Constitution; (2) the statute is unconstitutional as applied to their conduct; * * * We have given consideration to all the issues raised by the defendants.

I.

VAGUENESS & OVERBREADTH

Appellants contend that the language of sec. 947.01, Stats., is so vague and overly-broad that the defendants were deprived of due process of law as afforded them under the fourteenth amendment to the United States

Constitution.

The distinction between a challenge of vagueness and a challenge of overbreadth is well stated in Landry v. Daley (N.D.Ill.1968), 280 F.Supp. 938, 951:

'The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. The primary issues involved are whether the provisions of a penal statute are sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise judge and jury of standards for the determination of guilt. If the statute is so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability, it is unconstitutional.

* * *

(a) VAGUENESS

[5] This statute has previously been challenged for vagueness. In State v. Givens (1965), 28 Wis.2d 109, 135 N.W.2d 780, we determined that the statute sufficiently identified the type of behavior which the legislature intended to be contrary to law and that the statute was not subject to an attack for vagueness. Appellants present no ***508** convincing arguments or authorities which would indicate that the holding in Givens should not continue to prevail.

It seems obvious that the great and varied number of offenses which come within the category of disorderly conduct defy precise definition in a statute. 'Impossible standards of specificity are not required.' Jordan v. De George (1951), 341 U.S. 223, 231, 71 S.Ct. 703, 708, 95 L.Ed. 886, rehearing denied 341 U.S. 956, 71 S.Ct. 1011, 95 L.Ed. 1377.

Wisconsin's disorderly conduct statute proscribes conduct in terms of results which can reasonably be expected therefrom, rather than attempting to enumerate the limitless number of anti-social acts which a person could engage in that would menace, disrupt or destroy public order. The statute does not imply that all conduct which tends to annoy another is disorderly conduct. Only such conduct as unreasonably ****518** offends the sense of decency or propriety of the community is included. The statute does not punish a person for conduct which might possibly offend some hypercritical individual. The design of the disorderly conduct statute is to proscribe substantial intrusions which offend the normal sensibilities of average persons or which constitute significantly abusive or disturbing demeanor in the eyes of reasonable persons.

In addition to our ruling in Givens, the United States Supreme Court has passed on the constitutionality of the Wisconsin disorderly conduct statute. Zwicker v. Boll (1968), 391 U.S. 353, 88 S.Ct. 1666, 20 L.Ed.2d 642. We are of the opinion that in affirming Zwicker v. Boll, the United States Supreme Court made a determination that the Wisconsin statute was not vague.

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II.

THE DISORDERLY CONDUCT STATUTE AS APPLIED TO THE APPELLANTS

The appellants assert that sec. 947.01(1), Stats., as applied to their conduct violated their first amendment rights to freedom of speech and peaceable assembly.

***512** Some of the evidence relating to the conduct of each of the defendants has heretofore been set forth. It would serve no useful purpose to repeat it.

It is contended that Zwicker 'was convicted for nothing more than peacefully holding a sign in a public building.' The record does not support such a statement. Zwicker knew of the rule against displaying signs in the building during the demonstration. In deliberate defiance of the rule he raised a sign over his head, and there is evidence that he told other demonstrators that they should display signs. He was heard to say, 'Are we going to let the University administration tell us how to run a protest?' Later, when arrested, he 'went limp' and the officers took no further action at that time because in the judgment of Chief Hanson it 'was a pretty tense moment and a pretty difficult thing for us to accomplish the actual manual arrest of Zwicker without actually having to hurt somebody.'

Picketing and parading is conduct 'subject to regulation even though intertwined ****520** with expression and association.' Cox v. Louisiana (1965), 379 U.S. 559, 563, 85 S.Ct. 476, 480, 13 L.Ed.2d 487, rehearing denied 380 U.S. 926, 85 S.Ct. 879, 13 L.Ed.2d 814.

As to the other defendants, we find no basis for the contention that their conduct and speech under the circumstances of this case is protected by the first amendment.

In Cox. v. Louisiana (1965), 379 U.S. 536, 555, 85 S.Ct. 453, 464, 13 L.Ed.2d 471, the United States Supreme Court stated:

> 'A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations. * * *'

The fact that the conduct of these defendants took place during a demonstration does not give their speech ***513** and actions any special standing under the first amendment. 'It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now. * * *' Giboney v. Empire Storage and Ice Co. (1949), 336 U.S. 490, 498, 69 S.Ct. 684, 688, 93 L.Ed. 834.

The acts for which the defendants were convicted were beyond the protection of the constitution, and sec. 947.01(1), Stats., was properly applied to their conduct. It cannot be said that there has been any abridgement of the rights of the defendants under the first or fourteenth amendments.

***

The conduct of the defendants, as revealed by the evidence presented to the jury, has been hereinbefore briefly set forth. We have reviewed the rather lengthy records in these cases and considerably more could be written about the conduct of the respective defendants in these incidents. To do so would serve no useful purpose. The appellants' brief sets forth an attempt to rationalize and minimize the conduct of the defendants. They make no assertion that the evidence was inherently incredible.

[24] The evidence adduced, believed and

rationally considered by the jury was sufficient to prove the guilt of each defendant beyond a reasonable doubt.

Judgments affirmed.

Footnotes

[1] Sec. 947.01 Disorderly conduct. Whoever does any of the following may be fined not more than $100 or imprisoned not more than 30 days:
(1) In a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance.

964 F.3d 170
United States Court of Appeals, Third Circuit.

B.L., a minor, BY AND THROUGH her father Lawrence LEVY and her mother Betty Lou Levy
v.
MAHANOY AREA SCHOOL DISTRICT, Appellant

No. 19-1842
|
Argued November 12, 2019
|
(Filed: June 30, 2020)

Before: AMBRO, KRAUSE, and BIBAS, Circuit Judges

OPINION OF THE COURT

KRAUSE, Circuit Judge.

***175** Public school students' free speech rights have long depended on a vital distinction: We "defer to the school[ ]" when its "arm of authority does not reach beyond the schoolhouse gate," but when it reaches beyond that gate, it "must answer to the same constitutional commands that bind all other institutions of government." *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1044–45 (2d Cir. 1979). The digital revolution, however, has complicated that distinction. With new forms of communication have come new frontiers of regulation, where educators assert the power to regulate online student speech made off school grounds, after school hours, and without school resources.

This appeal takes us to one such frontier. Appellee B.L. failed to make her high school's varsity cheerleading team and, over a weekend and away from school, posted a picture of herself with the caption "f*** cheer" to Snapchat. J.A. 484. She was suspended from the junior varsity team for a year and sued her school in federal court. The District Court granted summary judgment in B.L.'s favor, ruling that the school had violated her First Amendment rights. We agree and therefore will affirm.

I. BACKGROUND

B.L. is a student at Mahanoy Area High School (MAHS). As a rising freshman, she tried out for cheerleading and made junior varsity. The next year, she was again placed on JV. To add insult to injury, an incoming freshman made the varsity team.

B.L. was frustrated: She had not advanced in cheerleading, was unhappy with her position on a private softball team, and was anxious about upcoming exams. So one Saturday, while hanging out with a friend at a local store, she decided to vent those frustrations. She took a photo of herself and her friend with their middle fingers raised and posted it to her Snapchat story.[1] The snap was visible to about 250 "friends," many of whom were MAHS students and some of whom were cheerleaders, and it was accompanied by a puerile caption: "F*** school f*** softball f*** cheer f*** everything." J.A. 484. To that post, B.L. added a second: "Love how me and [another student] get told we need a year of jv before we make varsity but that's [sic] doesn't matter to anyone else? 🙃."[2] J.A. 485.

One of B.L.'s teammates took a screenshot of her first snap and sent it to one of MAHS's two cheerleading coaches. That coach brought the screenshot to the attention of her co-coach, who, it turned out, was already in the know: "Several students, both cheerleaders and non-cheerleaders," ***176** had approached her, "visibly upset," to "express their concerns that [B.L.'s] [s]naps were inappropriate." J.A. 7 (citations omitted).

The coaches decided B.L.'s snap violated team and school rules, which B.L. had acknowledged before joining the team, requiring cheerleaders to "have respect for [their] school, coaches, ... [and] other cheerleaders"; avoid "foul language and inappropriate gestures"; and refrain from sharing "negative information regarding cheerleading, cheerleaders, or coaches ... on the internet." J.A. 439. They also felt B.L.'s snap violated a school rule requiring student athletes to "conduct[ ] themselves in such a way that the image of the Mahanoy School District would not be tarnished in any manner." J.A. 486. So the coaches removed B.L. from the JV team. B.L. and her parents appealed that decision to the athletic director, school principal, district superintendent, and school board. But to no avail: Although school authorities agreed B.L. could try out for the team again the next year, they upheld the coaches' decision for that year. Thus was born this lawsuit.

B.L. sued the Mahanoy Area School District (School District or District) in the United States District Court for the Middle District of Pennsylvania. She advanced three claims under 42 U.S.C. § 1983: that her suspension from the team violated the First Amendment; that the school and team rules she was said to have broken are overbroad and viewpoint discriminatory; and that those rules are unconstitutionally vague.

The District Court granted summary judgment in B.L.'s favor. It first ruled that B.L. had not waived her speech rights by agreeing to the team's rules and that her suspension from the team implicated the First Amendment even though extracurricular participation is merely a privilege. Turning to the merits, the Court ruled that B.L.'s snap was off-campus speech and thus not subject to regulation under *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986). And, finding that B.L.'s snap had not caused any actual or foreseeable substantial disruption of the school environment, the Court ruled her snap was also not subject to discipline under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). The Court therefore concluded that the School District had violated B.L.'s First Amendment rights, rendering unnecessary any consideration of her overbreadth, viewpoint discrimination, or vagueness claims. It entered judgment in B.L.'s favor, awarding nominal damages and requiring the school to expunge her disciplinary record. This appeal followed.

II. DISCUSSION[3]

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech." U.S. Const. amend. I. Over time, those deceptively simple words have spun off a complex doctrinal web. The briefs here are a testament to that complexity, citing a wealth of cases involving not only student speech but also public employee speech, obscenity, indecency, and many other doctrines.

At its heart, though, this appeal requires that we answer just two questions. The first is whether B.L.'s snap was protected speech. If it was not, our inquiry is at an end. But if it was, we must then decide ***177** whether B.L. validly waived that protection. Although navigating those questions requires some stopovers along the way, we ultimately conclude that B.L.'s snap was protected and that she did not waive her right to post it.

A. B.L.'s Speech Was Entitled to First Amendment Protection

We must first determine what, if any, protection the First Amendment affords B.L.'s snap. To do so, we begin by canvassing the Supreme Court's student speech cases. Next, we turn to a threshold question on which B.L.'s rights depend: whether her speech took place "on" or "off" campus. Finally, having found that B.L.'s snap was off-campus speech, we assess the School District's arguments that it was entitled to punish B.L. for that speech under *Fraser*, *Tinker*, and several other First Amendment doctrines.

1. Students' broad free speech rights and the on- versus off-campus distinction

For over three-quarters of a century, the Supreme Court has recognized that although schools perform "important, delicate, and highly discretionary functions," there are "none that they may not perform within the limits of the Bill of Rights." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). And the free speech rights of minors are subject to "scrupulous protection," lest we "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Id.*

In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), the Court reiterated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506, 89 S.Ct. 733. Expanding on *Barnette*, *Tinker* also held that student speech rights are "not confined to the supervised and ordained discussion" of the classroom; instead, they extend to all aspects of "the process of attending school," whether "in the cafeteria, or on the playing field, or on the campus during authorized hours." *Id.* at 512–13, 89 S.Ct. 733. Without "a specific showing of constitutionally valid reasons to regulate their speech," then, "students are entitled to freedom of expression," *id.* at 511, 89 S.Ct. 733, and cannot be punished for "expressions of feelings with which [school officials] do not wish to contend," *id.* (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

To these broad rights, *Tinker* added a narrow exception "in light of the special characteristics of the school environment." 393 U.S. at 506, 89 S.Ct. 733. Some forms of speech, the Court recognized, can "interfere[ ] ... with the rights of other students to be secure and to be let alone." *Id.* at 508, 89 S.Ct. 733. So as part of their obligation "to prescribe and control conduct in the schools," *id.* at 507, 89 S.Ct. 733, school officials may regulate speech that "would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' " *id.* at 509, 89 S.Ct. 733 (quoting *Burnside*, 363 F.2d at 749). To exercise that regulatory power, however, schools must

identify "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" and more than "undifferentiated fear or apprehension of disturbance." *Id.* at 508–09, 89 S.Ct. 733.

Tinker thus struck a balance, reaffirming students' rights but recognizing a limited zone of heightened governmental authority. But that authority remains the ***178** exception, not the rule. Where *Tinker* applies, a school may prohibit student speech only by showing "a specific and significant fear of disruption," *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 926 (3d Cir. 2011) (en banc) (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001)), and where it does not, a school seeking to regulate student speech "must answer to the same constitutional commands that bind all other institutions of government," *Thomas*, 607 F.2d at 1045.

***

The Court's case law therefore reveals that a student's First Amendment rights are subject to narrow limitations when speaking in the "school context" but "are coextensive with [those] of an adult" outside that context. *J.S.*, 650 F.3d at 932.

2. B.L.'s snap was "off-campus" speech

To define B.L.'s speech rights with precision, therefore, we must ask whether her snap was "on-" or "off-campus" speech—terms we use with caution, for the schoolyard's physical boundaries are not necessarily coextensive with the "school context," *J.S.*, 650 F.3d at 932. After reviewing the line separating on- from off-campus speech, we hold B.L.'s speech falls on the off-campus side.

It is "well established" that the boundary demarcating schools' heightened authority to regulate student speech "is not constructed solely of the bricks and mortar surrounding the school yard." *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir. 2011) (en ***179** banc). That is the only conclusion to be drawn from the fact that the Supreme Court, in defining the scope of schools' authority, has consistently focused not on physical boundaries but on the extent to which schools control or sponsor the forum or the speech. *See Morse*, 551 U.S. at 400–01, 127 S.Ct. 2618; *Kuhlmeier*, 484 U.S. at 270–71, 108 S.Ct. 562; *Fraser*, 478 U.S. at 677, 680, 106 S.Ct. 3159. And that focus makes sense: Just as the school context "is not confined to ... the classroom," *Tinker*, 393 U.S. at 512, 89 S.Ct. 733, neither can it be confined to the school's physical grounds because exclusive dependence on "real property lines," *Layshock*, 650 F.3d at 221 (Jordan, J., concurring), would exclude "part[s] of the process of attending school" that occur beyond those lines, *Tinker*, 393 U.S. at 512, 89 S.Ct. 733.

Equally well established, however, is that "the 'school yard' is not without boundaries and the reach of school authorities is not without limits." *Layshock*, 650 F.3d at 216. School officials, in other words, may not "reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities." *Id.* Permitting such expansive authority would twist *Tinker*'s limited accommodation of the "special characteristics of the school environment," 393 U.S. at 506, 89 S.Ct. 733, into a broad rule reducing the free speech rights of all young people who happen to be

enrolled in public school.

The courts' task, then, is to discern and enforce the line separating "on-" from "off-campus" speech. That task has been tricky from the beginning. *See, e.g.*, *Thomas*, 607 F.2d at 1045–47, 1050–52 (declining to apply *Tinker* to a student publication because, although a few articles were written and stored at school, the publication was largely "conceived, executed, and distributed outside the school"). But the difficulty has only increased after the digital revolution. Students use social media and other forms of online communication with remarkable frequency. Sometimes the conversation online is a high-minded one, with students "participating in issue- or cause-focused groups, encouraging other people to take action on issues they care about, and finding information on protests or rallies." Br. of Amici Curiae Electronic Frontier Foundation et al. 13. Other times, that conversation is mundane or plain silly. Either way, the "omnipresence" of online communication poses challenges for school administrators and courts alike. *Layshock*, 650 F.3d at 220–21 (Jordan, J., concurring); *see* *J.S.*, 650 F.3d at 940 (Smith, J., concurring).

***

Updating the line between on- and off-campus speech may be difficult in the social media age, but it is a task we must undertake.

Thankfully, significant groundwork has been laid. In 2011, we decided two appeals as a full Court, *J.S.* and *Layshock*, both of which involved a student's fake MySpace profile ridiculing a school official using crude language. Although the profiles were created away from school, they were not far removed from the school environment: They attacked school officials, used photos copied from the schools' websites, were shared with students, caused gossip at school and, in *Layshock*, were viewed on school computers. *J.S.*, 650 F.3d at 920–23; *Layshock*, 650 F.3d at 207–09. Even so, in both decisions we treated the profiles as "off-campus" speech. In *J.S.*, we emphasized that the speech occurred "outside the school, during non-school hours," and deemed irrelevant that a printout of the profile had been brought into the school at the principal's request. 650 F.3d at 932–33. We went further in *Layshock*, rejecting the arguments that the profile was "on-campus" speech because the profile was "aimed at the School District Community and ... accessed on campus," 650 F.3d at 216, and because the student had "enter[ed]" the school's website to copy the principal's photo, *id.* at 214–16.

J.S. and *Layshock* yield the insight that a student's online speech is not rendered "on campus" simply because it involves the school, mentions teachers or administrators, is shared with or accessible to students, or reaches the school environment. That was true in the analog era, *see, e.g.*, *Thomas*, 607 F.2d at 1050–52; *see also* *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 611–12, 616–17 (5th Cir. 2004), and it remains true in the digital age.

Applying these principles to B.L.'s case, we easily conclude that her snap falls outside the school context. *** B.L. created the snap away from campus, over the weekend, and without school resources, and she shared it on a social media platform unaffiliated with the school. And while the snap mentioned the school and reached MAHS students and officials, *J.S.* and *Layshock* hold that those few points of contact are not enough. B.L.'s snap, therefore, took ***181** place "off campus."[4]

3. The punishment of B.L.'s off-campus speech violated the First Amendment

We next ask whether the First Amendment allowed the School District to punish B.L. for her off-campus speech. The District defends its decision under *** *Tinker*.

***

ii. Nor can B.L.'s punishment be justified under *Tinker*

The School District falls back on *Tinker*, arguing that B.L.'s snap was likely to substantially disrupt the cheerleading program. But as we have explained, although B.L.'s snap involved the school and was accessible to MAHS students, it took place beyond the "school context," *J.S.*, 650 F.3d at 932. We therefore confront the question whether *Tinker* applies to off-campus speech.

***

c. Our approach

We hold today that *Tinker* does not apply to off-campus speech—that is, speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur. In so holding, we build on a solid foundation, for in his concurrence in *J.S.*, now Chief Judge Smith, joined by four colleagues, embraced this rule, explaining "that the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large." 650 F.3d at 936. That rule is true to the spirit of *Tinker*, respects students' rights, and provides much-needed clarity to students and officials alike.

From the outset, *Tinker* has been a narrow accommodation: Student speech within the school context that would "materially and substantially interfere[ ] with the requirements of appropriate discipline," *Tinker*, 393 U.S. at 505, 89 S.Ct. 733 (citation omitted), is stripped of the constitutional shield it enjoys "outside [that] context," *Morse*, 551 U.S. at 405, 127 S.Ct. 2618. *Tinker*'s focus on disruption makes sense when a student stands in the school context, amid the "captive audience" of his peers. *Fraser*, 478 U.S. at 684, 106 S.Ct. 3159. But it makes little sense where the student stands outside that context, given that any effect on the school environment will depend on others' choices and reactions.

Recent technological changes reinforce, not weaken, this conclusion. Like all who have approached these issues, we are "mindful of the challenges school administrators face," including the need to manage the school environment in the digital age. *Layshock*, 650 F.3d at 222 (Jordan, J., concurring). We are equally mindful, however, that new communicative technologies open new territories where regulators might seek to suppress speech they consider inappropriate, uncouth, or provocative. And we cannot permit such efforts, no matter how well intentioned, without sacrificing precious freedoms that the First Amendment protects. The consensus in the analog era was that controversial off-campus speech was not subject to school regulation, *see, e.g.*, *Porter*, 393 F.3d at 611–12, 615–16; *Thomas*, 607 F.2d at 1050–52, and *Reno* and *Packingham* require that we adhere to that principle even as the speech moves online.[12]

Holding *Tinker* inapplicable to off-campus

speech also offers the distinct advantage of offering up-front clarity to students and school officials. To enjoy the free speech rights to which they are entitled, students must be able to determine when they are subject to schools' authority and when not. A test based on the likelihood that speech will reach the school environment—even leaving aside doubts about what it means to "reach" the "school environment"—fails ***190** to provide that clarity. The same is true for a test dependent on whether the student's speech has a sufficient "nexus" to unspecified pedagogical interests or would substantially disrupt the school environment.[13] But a test based on whether the speech occurs in a context owned, controlled, or sponsored by the school is much more easily applied and understood. That clarity benefits students, who can better understand their rights, but it also benefits school administrators, who can better understand the limits of their authority and channel their regulatory energies in productive but lawful ways.

Nothing in this opinion questions school officials' "comprehensive authority" to regulate students when they act or speak within the school environment. *J.S.*, 650 F.3d at 925 (quoting *Tinker*, 393 U.S. at 507, 89 S.Ct. 733). *Tinker* applies, as it always has, to any student who, on campus, shares or reacts to controversial off-campus speech in a disruptive manner. That authority is not insignificant, and it goes a long way toward addressing the concern, voiced by the School District and our concurring colleague, that holding *Tinker* is limited to on-campus speech will "sow ... confusion" about what to do when a student's controversial off-campus speech "provoke[s] significant disruptions within the school," Concurr. 197. The answer is straightforward: The school can punish any disruptive speech or expressive conduct within the school context that meets *Tinker*'s standards—no matter how that disruption was "provoke[d]." It is the off-campus statement itself that is not subject to *Tinker*'s narrow recognition of school authority. But at least in the physical world, that is nothing new, and no one, including our colleague, has second-guessed that longstanding principle or suggested that a student who advocated a controversial position on a placard in a public park one Saturday would be subject to school discipline. We simply hold today that the "online" nature of that off-campus speech makes no constitutional difference. *See supra* pages 178–81.

Nor are we confronted here with off-campus student speech threatening violence or harassing particular students or teachers. A future case in the line of *Wisniewski*, *D.J.M.*, *Kowalski*, or *S.J.W.*, involving speech that is reasonably understood as a threat of violence or harassment targeted at specific students or teachers, would no doubt raise different concerns and require consideration of other lines of First Amendment law. *Cf. Layshock*, 650 F.3d at 209–10, 219 (holding that the student's parody MySpace page was protected speech even though the school had deemed it "[h]arassment of a school administrator"); *J.S.*, 650 F.3d at 922, 933 (holding the same even though the school's principal had contacted the police to press harassment charges). And while we disagree with the *Tinker*-based theoretical approach that many of our sister circuits have taken in cases involving students who threaten violence or harass others, our opinion takes no position on schools' bottom-line power to discipline speech in that category. After all, student speech falling into one of the well-recognized exceptions to the First Amendment is not protected, *cf.* *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616,

619, 621–27 (8th Cir. 2002) (en banc) (upholding a school's punishment of a student who wrote a threatening letter under the "true threat" doctrine); speech outside those exceptions may be regulated if the government can satisfy the appropriate ***191** level of scrutiny, *see, e.g.*, *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 135 S. Ct. 1656, 1665–72, 191 L.Ed.2d 570 (2015); *cf.* Oral Arg. Tr. 28 (exploring whether actions taken to prevent student-on-student harassment could satisfy strict scrutiny); and, perhaps most relevant, the Supreme Court has recognized that a sufficiently weighty interest on the part of educators can justify a narrow exception to students' broader speech rights, *see Morse*, 551 U.S. at 407–08, 127 S.Ct. 2618. We hold only that off-campus speech *not* implicating that class of interests lies beyond the school's regulatory authority.

True, our rule leaves some vulgar, crude, or offensive speech beyond the power of schools to regulate. Yet we return to *Tinker* and find in its pages wisdom and comfort:

> [O]ur Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

393 U.S. at 508–09, 89 S.Ct. 733 (internal citation omitted); *see Barnette*, 319 U.S. at 641, 63 S.Ct. 1178 (encouraging courts to "apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization").

Tinker's careful delineation of schools' authority, like these principles, is no less vital even in today's digital age to ensure "adequate breathing room for valuable, robust speech." *J.S.*, 650 F.3d at 941 (Smith, J., concurring). For these reasons, we hold that *Tinker* does not apply to off-campus speech and thus cannot justify the decision to punish B.L.

* * *

The heart of the School District's arguments is that it has a duty to "inculcate the habits and manners of civility" in its students. Appellant's Br. 24 (citation omitted). To be sure, B.L.'s snap was crude, rude, and juvenile, just as we might expect of an adolescent. But the primary responsibility for teaching civility rests with parents and other members of the community. As arms of the state, public schools have an interest in teaching civility by example, persuasion, and encouragement, but they may not leverage the coercive power with which they have been entrusted to do so. Otherwise, we give school administrators the power to quash student expression deemed crude or offensive—which far too easily metastasizes into the power to censor valuable speech and legitimate criticism. Instead, by enforcing the Constitution's limits and upholding free speech rights, we teach a deeper and more enduring version of respect for civility and the "hazardous freedom" that is our national treasure and "the basis of our national strength." *Tinker*, 393 U.S. at 508–09, 89 S.Ct. 733.

III. CONCLUSION

For the foregoing reasons, we will affirm the judgment of the District Court.

527 F.3d 41
United States Court of Appeals,
Second Circuit.

Lauren DONINGER, P.P.A as Guardian and Next Friend of Avery Doninger, a minor, Plaintiff–Appellant,
v.
Karissa NIEHOFF, Paula Schwartz, Defendants–Appellees.

Docket No. 07–3885–cv.
|
Argued: March 4, 2008.
|
Decided: May 29, 2008.

Before: SOTOMAYOR, LIVINGSTON, Circuit Judges, and PRESKA, District Judge.*

Opinion

LIVINGSTON, Circuit Judge:

Plaintiff–Appellant Lauren Doninger ("Doninger") appeals from the August 31, 2007 order of the United States District Court for the District of Connecticut (Kravitz, J.) denying her motion for a preliminary injunction. *Doninger v. Niehoff,* 514 F.Supp.2d 199 (D.Conn.2007). Doninger sued Defendants–Appellees Karissa Niehoff and Paula Schwartz, respectively the principal of Lewis Mills High School ("LMHS") and the superintendent of the district in which LMHS is located, when her daughter, Avery Doninger ("Avery"), was disqualified from running for Senior Class Secretary after she posted a vulgar and misleading message about the supposed cancellation of an upcoming school event on an independently operated, publicly accessible web log (or "blog"). Doninger, alleging principally a violation of her daughter's First Amendment rights, moved for a preliminary injunction voiding the election for Senior Class Secretary and ordering the school either to hold a new election in which Avery would be allowed to participate or to grant Avery the same title, honors, and obligations as the student elected to the position, including the privilege of speaking as a class officer at graduation. The district court denied the motion, concluding that Doninger had failed to show a sufficient likelihood of success on the merits. Because Avery's blog post created a foreseeable risk of substantial disruption at LMHS, we conclude that the district court did not abuse its discretion. ***44** We therefore affirm the denial of Doninger's preliminary injunction motion.

Background

LMHS is a public high school located in Burlington, Connecticut. At the time of the events recounted here, Avery Doninger was a junior at LMHS. She served on the Student Council and was also the Junior Class Secretary.

This case arises out of a dispute between the school administration and a group of Student Council members at LMHS, including Avery, over the scheduling of an event called "Jamfest," an annual battle-of-the-bands concert that these Student Council members helped to plan. The 2007 Jamfest, which had been twice postponed because of delays in the opening of LMHS's new auditorium, was scheduled for Saturday, April 28, in this newly constructed venue. Shortly before the event, however, Avery and her fellow

students learned that David Miller, the teacher responsible for operating the auditorium's sound and lighting equipment, was unable to attend on that date. The students proposed that LMHS hire a professional to run the equipment or that a parent supervise student technicians, so that Jamfest could still take place on April 28 in the auditorium. At a Student Council meeting on April 24, however, the students were advised that it would not be possible to hold the event in the auditorium without Miller, so that either the date or the location of the event would need to be changed.

This announcement distressed the Student Council members responsible for coordinating preparations, for they believed there were few dates remaining to reschedule Jamfest before the end of the school year. The students were also concerned that changing the date of the event for a third time might cause some of the bands to drop out. Holding the event in the proposed alternative venue, the school cafeteria, was not an acceptable solution because the bands would have to play acoustic instead of electric instruments. The students also feared there was not enough time for the bands to make the necessary modifications to their sets that this change of instrumentation would require.

Four Student Council members, including Avery, decided to take action by alerting the broader community to the Jamfest situation and enlisting help in persuading school officials to let Jamfest take place in the auditorium as scheduled. The four students met at the school's computer lab that morning and accessed one of their fathers' email account. They drafted a message to be sent to a large number of email addresses in the account's address book, as well as to additional names that Avery provided. The message stated, in substance, that the administration had decided that the Student Council could not hold Jamfest in the auditorium because Miller was unavailable. It requested recipients to contact Paula Schwartz, the district superintendent, to urge that Jamfest be held as scheduled, as well as to forward the email "to as many people as you can." All four students signed their names and sent the email. The message was sent out again later that morning to correct an error in the telephone number for Schwartz's office.

Both Schwartz and Niehoff received an influx of telephone calls and emails from people expressing concern about Jamfest. Niehoff, who was away from her office for a planned in-service training day, was called back by Schwartz as a result. Later that day, Niehoff encountered Avery in the hallway at LMHS. Avery claimed that Niehoff told her that Schwartz was very upset "and that [,] as a result, Jamfest had been ***45** cancelled." *Doninger,* 514 F.Supp.2d at 205. The district court found otherwise, however, crediting Niehoff's testimony denying that she ever told Avery the event would not be held.

According to Niehoff, she advised Avery that she was disappointed the Student Council members had resorted to a mass email rather than coming to her or to Schwartz to resolve the issue. She testified that class officers are expected to work cooperatively with their faculty advisor and with the administration in carrying out Student Council objectives. They are charged, in addition, with "demonstrat[ing] qualities of good citizenship at all times." *Id.* at 214. The district court found that Niehoff discussed these responsibilities with Avery in their conversation on April 24. She told Avery that the email contained inaccurate information

because Niehoff was, in fact, amenable to rescheduling Jamfest so it could be held in the new auditorium. Niehoff asked Avery to work with her fellow students to send out a corrective email. According to Niehoff, Avery agreed to do so.

That night, however, Avery posted a message on her publicly accessible blog, which was hosted by livejournal.com, a website unaffiliated with LMHS. The blog post began as follows:

> jamfest is cancelled due to douchebags in central office. here is an email that we sent to a ton of people and asked them to forward to everyone in their address book to help get support for jamfest. basically, because we sent it out, Paula Schwartz is getting a TON of phone calls and emails and such. we have so much support and we really appriciate it. however, she got pissed off and decided to just cancel the whole thing all together. anddd so basically we aren't going to have it at all, but in the slightest chance we do it is going to be after the talent show on may 18th. andd..here is the letter we sent out to parents.

The post then reproduced the email that the Student Council members sent that morning. The post continued:

> And here is a letter my mom sent to Paula [Schwartz] and cc'd Karissa [Niehoff] to get an idea of what to write if you want to write something or call her to piss her off more. im down.—

Avery then reproduced an email that her mother had sent to Schwartz earlier in the day concerning the dispute.

Avery testified before the district court that "im down" meant that she approved of the idea of others contacting Schwartz to "piss her off more." She stated that the purpose of posting the blog entry was "to encourage more people than the existing e-mail already encouraged to contact the administration" about Jamfest. The district court concluded that the content of the message itself suggested that her purpose was "to encourage her fellow students to read and respond to the blog." *Id.* at 206. The district court also noted that "[s]everal LMHS students posted comments to the blog, including one in which the author referred to Ms. Schwartz as a 'dirty whore.' " *Id.* at 206–07.

The following morning, Schwartz and Niehoff received more phone calls and email messages regarding Jamfest. The pair, along with Miller, Jennifer Hill, the students' faculty advisor, and David Fortin, LMHS's building and grounds supervisor, met with the Student Council members who sent the email the day before. They agreed during this meeting that Jamfest would be rescheduled for June 8, 2007. Niehoff announced this resolution in the school newsletter and the students notified the recipients of the April 24 email. In her testimony before the district court, Avery denied that Schwartz and

Niehoff also spoke to the students during this ***46** meeting about the impropriety of mass emails in this context and the proper conduct of student officers in resolving disputes with the administration. According to the district court, however, Schwartz and Niehoff "at the very least, made clear to the students that appealing directly to the public was not an appropriate means of resolving complaints the students had regarding school administrators' decisions." *Id.* at 207. The district court also found that, as a result of the Jamfest controversy, both Schwartz and Niehoff were forced to miss or arrived late to several school-related activities scheduled for April 24 and April 25. *Id.* at 206.

The April 25 meeting resolved the dispute over Jamfest's scheduling. Indeed, Jamfest was successfully held on June 8, with all but one of the scheduled bands participating. Even after this resolution, however, Schwartz and Niehoff, unaware of Avery's blog post, continued to receive phone calls and emails in the controversy's immediate aftermath. According to Schwartz's testimony, she learned of Avery's posting only some days after the meeting when her adult son found it while using an Internet search engine. Schwartz alerted Niehoff to the blog post on May 7, 2007. Niehoff concluded that Avery's conduct had failed to display the civility and good citizenship expected of class officers. She noted that the posting contained vulgar language and inaccurate information. In addition, Avery had disregarded her counsel regarding the proper means of addressing issues of concern with school administrators. After researching Connecticut education law and LMHS policies, Niehoff decided that Avery should be prohibited from running for Senior Class Secretary. Because Avery had Advanced Placement exams at that time, however, Niehoff chose not to confront her immediately.

On May 17, Avery came to Niehoff's office to accept her nomination for Senior Class Secretary. Niehoff handed Avery a printed copy of the April 24 blog post and requested that Avery apologize to Schwartz in writing, show a copy of the post to her mother, and withdraw her candidacy. Avery complied with the first two requests, but refused to honor the third. In response, Niehoff declined to provide an administrative endorsement of Avery's nomination, which effectively prohibited her from running for Senior Class Secretary, though Avery was permitted to retain her positions as representative on the Student Council and as Junior Class Secretary. According to the district court, Niehoff explained that her decision was based on: (1) Avery's failure to accept her counsel "regarding the proper means of expressing disagreement with administration policy and seeking to resolve those disagreements"; (2) the vulgar language and inaccurate information included in the post; and (3) its encouragement of others to contact the central office "to piss [Schwartz] off more," which Niehoff did not consider appropriate behavior for a class officer. *Id.* at 208.

As a result of Niehoff's decision, Avery was not allowed to have her name on the ballot or to give a campaign speech at a May 25 school assembly regarding the elections. Apart from this disqualification from running for Senior Class Secretary, she was not otherwise disciplined. Even though she was not permitted to be on the ballot or to campaign, Avery received a plurality of the votes for Senior Class Secretary as a write-in candidate. The school did not permit her to take office, however, and the second-place candidate became class secretary for the

Class of 2008.

Lauren Doninger filed a complaint in Connecticut Superior Court asserting claims under 42 U.S.C. § 1983 and state ***47** law. She principally alleged violations of her daughter's rights under the First Amendment to the United States Constitution and analogous clauses of the Connecticut Constitution. She also alleged violations of Avery's due process and equal protection rights under the Fourteenth Amendment, and asserted a cause of action for intentional infliction of emotional distress under state law. Doninger sought damages and an injunction requiring, among other things, that school officials hold new class secretary elections in which Avery would be allowed to run, and that Avery be permitted, as a duly elected class officer, to speak at the 2008 commencement ceremony.

Schwartz and Niehoff removed the action to the District of Connecticut. Doninger filed a motion for a preliminary injunction. The district court developed the facts outlined here from exhibits, affidavits, deposition testimony, and the hearing testimony of ten live witnesses, including students, faculty, administrators, and parents. The district court concluded that a preliminary injunction was not warranted because Doninger did not show a sufficient likelihood of success on the merits. This appeal followed.

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I. The First Amendment Claim

We begin with some basic principles. It is axiomatic that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). It is equally the case that the constitutional rights of students in public school "are not automatically coextensive with the rights of adults in other settings," *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986), but must instead be applied in a manner consistent with the "special characteristics of the school environment," *Tinker,* 393 U.S. at 506, 89 S.Ct. 733. Thus, school administrators may prohibit student expression that will "materially and substantially disrupt the work and discipline of the school." *Id.* at 513, 89 S.Ct. 733. Vulgar or offensive speech—speech that an adult making a political point might have a constitutional right to employ—may legitimately give rise to disciplinary action by a school, given the school's responsibility for "teaching students the boundaries of socially appropriate behavior." *Fraser,* 478 U.S. at 681, 106 S.Ct. 3159. ***

The Supreme Court has yet to speak on the scope of a school's authority to regulate expression that, like Avery's, does not occur on school grounds or at a school-sponsored event. We have determined, however, that a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct "would foreseeably create a risk of substantial disruption within the school environment," at least when it was similarly foreseeable that the off-campus expression might also reach campus. *Wisniewski v. Bd. of Educ.,* 494 F.3d 34, 40 (2d Cir.2007), *cert. denied,* 552 U.S. 1296, 128 S.Ct. 1741, 170 L.Ed.2d 540 (2008).[1] We are acutely attentive in this context to the need to draw a clear line between student activity that "affects matter of legitimate concern to the school

community," and activity that does not. *Thomas v. Bd. of Educ.,* 607 F.2d 1043, 1058 n. 13 (2d Cir.1979) (Newman, J., concurring in the result). But as Judge Newman accurately observed some years ago, "territoriality is not necessarily a useful concept in determining the limit of [school administrators'] ***49** authority." *Id.* True enough in 1979, this observation is even more apt today, when students both on and off campus routinely participate in school affairs, as well as in other expressive activity unrelated to the school community, via blog postings, instant messaging, and other forms of electronic communication. It is against this background that we consider whether the district court abused its discretion in concluding that Doninger failed to demonstrate a clear likelihood of success on the merits of her First Amendment claim.

A.

If Avery had distributed her electronic posting as a handbill on school grounds, this case would fall squarely within the Supreme Court's precedents recognizing that the nature of a student's First Amendment rights must be understood in light of the special characteristics of the school environment and that, in particular, offensive forms of expression may be prohibited. *See Fraser,* 478 U.S. at 682–83, 106 S.Ct. 3159. As the Supreme Court explained in *Fraser,* a school may regulate "plainly offensive" speech—that is, speech that is "offensively lewd and indecent"—in furtherance of its important mission to "inculcate the habits and manners of civility," both as values in themselves and because they are indispensable to democratic self-government. *Id.* at 681, 683, 685, 106 S.Ct. 3159. As the Court noted, "[t]he undoubted freedom to advocate unpopular and controversial views in schools must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Id.* at 681, 106 S.Ct. 3159. It is thus "a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." *Id.* at 683, 106 S.Ct. 3159.

To be clear, *Fraser* does not justify restricting a student's speech merely because it is inconsistent with an educator's sensibilities; its reference to "plainly offensive speech" must be understood in light of the vulgar, lewd, and sexually explicit language that was at issue in that case. We need not conclusively determine *Fraser*'s scope, however, to be satisfied that Avery's posting—in which she called school administrators "douchebags" and encouraged others to contact Schwartz "to piss her off more"—contained the sort of language that properly may be prohibited in schools. *See id. Fraser* itself approvingly quoted Judge Newman's memorable observation in *Thomas* that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket." *Fraser,* 478 U.S. at 682–83, 106 S.Ct. 3159 (quoting *Thomas,* 607 F.2d at 1057 (Newman, J., concurring in the result)); *cf. Cohen v. California,* 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971) (holding that adult could not be prosecuted for wearing jacket displaying expletive). Avery's language, had it occurred in the classroom, would have fallen within *Fraser* and its recognition that nothing in the First Amendment prohibits school authorities from discouraging inappropriate language in the school environment.

B.

It is not clear, however, that *Fraser* applies to off-campus speech. Doninger's principal argument on appeal is that because Avery's posting took place within the confines of her home, it was beyond the school's regulatory authority unless it was reasonably foreseeable that the posting would create a risk of substantial disruption within the school environment—the standard enunciated in *Tinker* and *Wisniewski,* and a standard, Doninger argues, that the present record does not ***50** satisfy. Appellees argue, in contrast, that the *Tinker* test is not the only standard for determining whether school discipline may properly be imposed for off-campus expressive activity. They contend that in *Wisniewski,* we implicitly affirmed that schools may regulate off-campus offensive speech of the sort in which Avery engaged, so long as it is likely to come to the attention of school authorities. We reject appellees' broad reading of *Wisniewski* on the ground that we had no occasion to decide in that case whether *Fraser* governs such off-campus student expression. We agree, however, with appellees' alternative argument that, as in *Wisniewski,* the *Tinker* standard has been adequately established here.[2] We therefore need not decide whether other standards may apply when considering the extent to which a school may discipline off-campus speech.

Tinker provides that school administrators may prohibit student expression that will "materially and substantially disrupt the work and discipline of the school." *Tinker,* 393 U.S. at 513, 89 S.Ct. 733. In *Wisniewski,* we applied this standard to an eighth grader's off-campus creation and Internet transmission to some fifteen friends of a crudely drawn icon that "depict[ed] and call[ed] for the killing of his teacher." 494 F.3d at 38. We recognized that off-campus conduct of this sort "can create a foreseeable risk of substantial disruption within a school" and that, in such circumstances, its off-campus character does not necessarily insulate the student from school discipline. *Id.* at 39. We determined that school discipline was permissible because it was reasonably foreseeable that the icon would come to the attention of school authorities and that it would create a risk of substantial disruption. *See id.* at 39–40.

Applying the framework set forth in *Wisniewski,* the record amply supports the district court's conclusion that it was reasonably foreseeable that Avery's posting would reach school property. Indeed, the district court found that her posting, although created off-campus, "was purposely designed by Avery to come onto the campus." *Doninger,* 514 F.Supp.2d at 216. The blog posting directly pertained to events at LMHS, and Avery's intent in writing it was specifically "to encourage her fellow students to read and respond." *Id.* at 206. As the district court found, "Avery knew other LMHS community members were likely to read [her posting]." *Id.* at 217. Several students did in fact post comments in response to Avery and, as in *Wisniewski,* the posting managed to reach school administrators. *See Wisniewski,* 494 F.3d at 39. The district court thus correctly determined that in these circumstances, "it was reasonably foreseeable that other LMHS students would view the blog and that school administrators would become aware of it." *Doninger,* 514 F.Supp.2d at 217.

Contrary to Doninger's protestations, moreover, the record also supports the conclusion that Avery's posting "foreseeably

create[d] a risk of substantial disruption within the school environment." *Wisniewski,* 494 F.3d at 40. There are three factors in particular on which we rely to reach this conclusion. First, the language with which Avery chose to encourage others to contact the administration was not only plainly offensive, but also potentially ***51** disruptive of efforts to resolve the ongoing controversy. Her chosen words—in essence, that others should call the "douchebags" in the central office to "piss [them] off more"—were hardly conducive to cooperative conflict resolution. Indeed, at least one LMHS student (the one who referred to Schwartz as a "dirty whore") responded to the post's vulgar and, in this circumstance, potentially incendiary language with similar such language, thus evidencing that the nature of Avery's efforts to recruit could create a risk of disruption.

Second, and perhaps more significantly, Avery's post used the "at best misleading and at wors[t] false" information that Jamfest had been cancelled in her effort to solicit more calls and emails to Schwartz. *Doninger,* 514 F.Supp.2d at 202. The district court found that Avery "strongly suggested in her [post] that Jamfest had been cancelled, full stop, despite the fact that Ms. Niehoff, even according to Avery's own testimony, offered the possibility of rescheduling Jamfest later in the school year." *Id.* at 214. This misleading information was disseminated amidst circulating rumors of Jamfest's cancellation that had already begun to disrupt school activities. Avery herself testified that by the morning of April 25, students were "all riled up" and that a sit-in was threatened because students believed the event would not be held. Schwartz and Niehoff had received a deluge of calls and emails, causing both to miss or be late to school-related activities. *Id.* at 206. Moreover, Avery and the other students who participated in writing the mass email were called away either from class or other activities on the morning of April 25 because of the need to manage the growing dispute, as were Miller, Hill, and Fortin. It was foreseeable in this context that school operations might well be disrupted further by the need to correct misinformation as a consequence of Avery's post.

Although Doninger argues that *Tinker* is not satisfied here because the burgeoning controversy at LMHS may have stemmed not from Avery's posting, but rather from the mass email of April 24, this argument is misguided insofar as it implies that *Tinker* requires a showing of actual disruption to justify a restraint on student speech. As the Sixth Circuit recently elaborated, "[s]chool officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place." *Lowery v. Euverard,* 497 F.3d 584, 596 (6th Cir.2007); *see also LaVine v. Blaine Sch. Dist.,* 257 F.3d 981, 989 (9th Cir.2001) ("*Tinker* does not require school officials to wait until disruption actually occurs before they may act."). The question is not whether there has been actual disruption, but whether school officials "might reasonably portend disruption" from the student expression at issue. *LaVine,* 257 F.3d at 989; *see also Nuxoll v. Indian Prairie Sch. Dist. # 204,* 523 F.3d 668, 673 (7th Cir.2008).[3] Here, given the circumstances surrounding the Jamfest dispute, Avery's conduct posed a substantial risk that LMHS administrators and teachers would be further diverted from their core educational responsibilities by the need to dissipate misguided anger or ***52** confusion over Jamfest's purported cancellation.

Finally, the district court correctly determined that it is of no small significance that the discipline here related to Avery's extracurricular role as a student government leader. The district court found this significant in part because participation in voluntary, extracurricular activities is a "privilege" that can be rescinded when students fail to comply with the obligations inherent in the activities themselves. *Doninger,* 514 F.Supp.2d at 214. We consider the relevance of this factor instead in the context of *Tinker* and its recognition that student expression may legitimately be regulated when school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school." *Tinker,* 393 U.S. at 513, 89 S.Ct. 733. More specifically, Avery's conduct risked not only disruption of efforts to settle the Jamfest dispute, but also frustration of the proper operation of LMHS's student government and undermining of the values that student government, as an extracurricular activity, is designed to promote. *Doninger,* 514 F.Supp.2d at 215; *cf.* *Hazelwood,* 484 U.S. at 273, 108 S.Ct. 562 (holding that educators may exercise control over school-sponsored expressive activities "so long as their actions are reasonably related to legitimate pedagogical concerns").

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Given the cumulative effect of these findings, clearly supported by the record, we conclude that the district court did not abuse its discretion in determining that Doninger failed to demonstrate a sufficient likelihood of success on her First Amendment claim. *** We decide only that based on the existing record, Avery's post created a foreseeable risk of substantial disruption to the work and discipline of the school and that Doninger has thus failed to show clearly that Avery's First Amendment rights were violated when she was disqualified from running for Senior Class Secretary.

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The judgment of the district court is therefore affirmed.