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The Tenth Circuit Reverses Qualified Immunity for University Official Under Rule 12(B)(6) in Student Speech Case

On appeal, circuit court holds that First Amendment protection of student speech is clearly established for purposes of qualified immunity.

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In *Thompson v. Ragland*, No. 21-1143, 2022 U.S. App. LEXIS 2427, at *1, *18 (10th Cir. Jan. 26, 2022), the U.S. Court of Appeals for the Tenth Circuit held that it is clearly established in this circuit that a university official cannot impose “discipline” on a student for their speech “without good reason.” Because the law was clearly established at the time of the university official's conduct—even if there was not applicable “precedent with identical facts”—the court reversed the district court's decision to grant qualified immunity to the official who had disciplined the student. Id. at *18.

The Classroom Dispute

A student at Metropolitan State University (MSU), Rowan Thompson, had a classroom dispute with her chemistry professor. Thompson has an eye condition that makes her sensitive to light. As a result, she must sit in the first three rows of a classroom to see the board. In her chemistry class, however, she arrived late on two occasions, and there were no seats left in the first three rows. In order to see, Thompson chose to sit on the floor in the front row. The professor, unhappy with having Thompson sitting on the floor, instructed Thompson to either take a seat or leave. Thompson left.

Believing that the seating dispute wasn't likely to be resolved, Thompson chose to drop the class. Thompson also requested mediation of the dispute through MSU. During the mediation, MSU encouraged Thompson to submit an evaluation of the chemistry professor through the school's class-rating forms. But Thompson later learned that, because she had dropped the class, she would not be permitted to submit an evaluation. She then sent an email to her former classmates, encouraging them to submit “honest” reviews of the chemistry professor.

Learning of Thompson's email to the other students, Thomas Ragland, MSU's Associate Director for Student Conduct, allegedly stopped Thompson from contacting the professor or discussing the professor with any other students. Ragland sent Thompson a letter, informing her that the email “may have violated the Student Code of Conduct” and that, as a result, Thompson was under a “No Contact Directive,” meaning that

Thompson was “restricted from discussing [the chemistry professor] with any student in the … course or any of the [chemistry professor's other] classes[.]” Id. at *6.

Thompson's Lawsuit

Thompson sued Ragland under §1983, alleging a First Amendment violation and seeking compensatory and punitive damages. Ragland moved to dismiss, arguing that he was entitled to qualified immunity because he had not violated any clearly established law. The district court agreed with Ragland and dismissed Thompson's complaint under Rule 12(b)(6). Thompson appealed.

Qualified Immunity

“Public officials are entitled to qualified immunity under §1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time.” Id. at *7 (citing *District of Columbia v. Wesby*, 138 S. Ct. 577, 589, 199 L. Ed. 2d 453 (2018)). “To establish that the law was clearly established in this context, the plaintiff must point to Supreme Court or Tenth Circuit precedents in point, or to the clear weight of authority from other circuit courts deciding that the law was as the plaintiff maintains.” Id. Although existing precedent “must have placed the constitutionality of the [public official's] conduct beyond debate,” “a general constitutional rule already identified in decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful.” Id. (citing *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)).

Student Speech Under the First Amendment

In *Tinker v. Des Moines Independent Community School*, 393 U.S. 503 (1969), the Supreme Court held that “students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'” *Thompson*, 2022 U.S. App. LEXIS 2427, at *8-9 (quoting *Tinker*, 393 U.S. at 506). Even so, student speech is subject to a different test than otherwise protected speech. “[T]he Court also recognized that 'conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.'” Id. at *9 (quoting Tinker, 393 U.S. at 513. The Supreme Court has also held that Tinker's holding applies to public universities and colleges. *Healy v. James*, 408 U.S. 169 (1972); *Papish v. Board of Curators of Univ. of Missouri*, 410 U.S. 667 (1973).

And the Tenth Circuit has applied *Tinker* to student speech cases in this circuit. For example, in *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996), a high school football player sued a school under Tinker after he was disciplined for his speech. The student athlete had been hazed by his fellow teammates, and he reported their actions to school administrators, the principal, and his coach. Rather than disciplining the teammates who

hazed him, the school demanded that he apologize to his teammates for betraying them. After he refused, he was kicked off the football team. The court in *Seamons* held that “a school could restrict a student's speech only if the speech would substantially interfere with the work of the school or impinge upon the rights of other students.” *Thompson*, 2022 U.S. App. LEXIS 2427, at *14 (quotations omitted) (quoting *Seamons*, 84 F.3d at 1237).

Application of 'Tinker' to Thompson's Speech

In *Thompson*, the circuit court held that under both Supreme Court and Tenth Circuit precedent, “at the time of Ragland's letter to Thompson, the law was clearly settled that Thompson could not be disciplined for sending her email to fellow students[.]” Id. at *18. Even without “precedent with identical facts,” “the law was clear that discipline cannot be imposed on student speech without good reason.” Id. “And when, as here, that discipline takes the form of a prior restraint on student speech, the law is especially clear: such prospective, content-based restricts carry a presumption of unconstitutionality.” Id. (quotations omitted) (quoting *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 42 (10th Cir. 2013)).

As a result, the Tenth Circuit reversed the district court's order granting Ragland's motion to dismiss under Rule 12(b)(6). The court also noted, however, that “Ragland may be entitled to qualified immunity at the summary-judgment stage, when a clearer picture of what happened will have emerged.” Id. at *23.

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