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THE LATEST STUDENT DISCIPLINE/FREE EXPRESSION CASE

REMOVING STUDENTS FROM THE HIGH SCHOOL CHEERLEADING TEAM FOR PROTESTING AGAINST AN ABUSIVE COACH VIOLATED THE STUDENTS' FIRST AMENDMENT RIGHTS

It is axiomatic that school administrators strive to maintain a non-disruptive educational environment at their schools. In doing so, however, it is critical that they recognize when a circumstance involves a student's First Amendment rights and understand the limits of their authority in such a circumstance. Among other rights, through the First Amendment, individuals, including students, have the right of freedom of speech and to petition the government (including school districts) for redress of grievances.

In the federal District Court case titled *Gonzales v. Burley High Sch.*,¹ a group of high school cheerleaders staged a brief and peaceful sit-in at the school gymnasium to protest bullying and favoritism by their cheer coach. The sit-in ultimately resulted in the school removing many of them from the cheerleading team. This response prompted a First Amendment retaliation claim against the school district and individual school administrators.

The cheerleaders prevailed against the school district. Additionally, the Court determined that the individual school administrators involved were not entitled to qualified immunity. Consequently, the cheerleaders also prevailed against the district superintendent, assistant superintendent, and high school principal.

I. Background

The cheerleaders staged a peaceful "sit-in" during an early morning cheer practice at the gymnasium to protest their coach's temperament, behavior, safety concerns, and harsh, unevenly enforced policies. The protest consisted of cheerleaders not dressing out for practice and instead silently sitting on the gymnasium bleachers.

¹ *Gonzales v. Burley High Sch.*, 404 F.Supp.3d 1269 (D. Idaho 2019)

There was apparently a factual basis for their concerns. The protest followed numerous complaints to school administration and the coach had been placed on a “performance improvement plan,” which was apparently to little or no avail. The protest lasted about two minutes after which they were escorted to the library by the athletic director (AD). One of the cheerleaders argued with the AD by reading a passage from the student handbook regarding student rights and asking why they were being forced to leave the gym.

Initially, the protesting cheerleaders were suspended from the team for three weeks, but allowed to return upon completion of a litany of designated corrective actions. All the cheerleaders agreed, but several advised that they nevertheless intended to use the district’s grievance procedures in order to contest their punishment. At that point, the school responded by simply straight out terminating their participation on the cheerleading team altogether and without recourse to rejoin. The students then brought a First Amendment retaliation claim pursuant to 42 U.S.C. section 1983.

The claim was that the school unlawfully retaliated against the students for engaging in the constitutionally protected right to peacefully protest and then again for asserting their right to engage in the district’s grievance process. The form of retaliation was initially the three-week suspension from the cheer squad and other punitive corrective actions required in order to rejoin the cheerleading team, and then ultimately their dismissal from the cheerleading team altogether without an opportunity to rejoin.

II. Why Removing the Protesting Students From the Cheerleading Team Violated Their First Amendment Rights

To substantiate a First Amendment retaliation claim, it must be shown that: (1) the students were engaged in a constitutionally protected activity; (2) the school’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 school’s conduct. The District Court determined that the “substantial disruption” rule set out by *Tinker v. Des Moines Indep. Comty. Sch. Dist.*,² and its progeny applied to the first prong of the legal analysis. In short, if the gymnasium sit-in likely could have disrupted school activities in a substantial way, then it was not a constitutionally protected activity and the retaliation claim dissolves.

A. The Court’s Application of *Tinker’s* Substantial Disruption Rule

In the *Tinker* case, the U.S. Supreme Court held that a school district violated a student’s First Amendment rights when it suspended him from school for wearing a black armband to protest the Vietnam war. In *Tinker*, the nature of the protest was a silent, passive expression of opinion, unaccompanied by any disorder or disturbance. The rule which arose from the *Tinker* case is that school officials could not restrain students’ speech without showing facts which might

² *Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503 (1969)

reasonably have led school authorities to forecast substantial disruption of school activities or a material interference with the lives or rights of others. The Supreme Court elaborated by explaining that a decision to discipline an expressive activity must be supported by specific facts that would reasonably lead school officials to forecast a disruption that will substantially interfere with the operation of the school or materially interfere with the rights of others. The desire to avoid the discomfort and unpleasantness that always accompanies an unpopular opinion or the undifferentiated apprehension of a disturbance are not a basis upon which student expression may be censored or punished by school authorities.

Discussing the circumstances at hand, the Court concluded that the difficult discussion which the AD had with the protesting cheerleaders as he escorted them from the gym did not establish a substantial disruption of the educational process. Citing the *Tinker* case, the Court reminded that a classroom is a “marketplace of ideas.” The Court asserted that the nation’s future depends upon leaders trained through a wide exposure to a robust exchange of a wide variety of ideas.

Further discussing the “substantial disruption” component of the rule, the Court noted that the protest caused the rest of the cheerleading team to adjust its practice routine and that in doing so, the practice was ineffective for a few minutes while the adjustments were made. Also, the non-protesting cheerleaders were distracted for a few minutes while the protesting cheerleaders were ushered out of the gym by the AD. The Court concluded that such disruptions were immaterial and insubstantial. The Court further ruled that a temporary interruption of class time, standing alone, is always too de minimis as a matter of law to establish a material or substantial disruption.

In short, the Court concluded that the sit-in was an expressive activity protected by the First Amendment.

B. The “Chilling Effect” Prong of the First Amendment Retaliation Claim

During litigation, the district conceded that the students had a constitutional right under the First Amendment to engage in the district’s grievance process. Therefore, use of the district’s grievance process was also an expressive activity protected by the First Amendment.

The district, however, argued that the aggrieved cheerleaders did in fact engage in the district’s grievance procedure. Consequently, there was no actual chilling effect on the students engaging in this particular constitutionally protected activity.

However, the Court reminded that the proper inquiry was whether a government official’s actions would chill or silence “a person of ordinary firmness” from future First Amendment activities. Consequently, the school cannot escape liability for retaliation simply because these particular students persisted in grieving their punishment.

The Court reminded that the Ninth Circuit has previously held that suspension from extra-curricular activities would chill a person of ordinary firmness from continuing to engage in protected activities. Consequently, the Court concluded that the acts of suspending the students from the cheerleading team for the sit-in, and then removing them from the team because they intended to use the grievance process, each served to “chill” a person of ordinary firmness from continuing to engage in a protected activity.

C. The “Substantial and Motivating Factor” Prong

In order to undercut this prong of the retaliation claim, the district listed a myriad of reasons for suspending and then dismissing the students from the cheerleading team, other than the sit-in and their intention to use the district’s grievance process. The Court discussed the other purported reasons and concluded that they were just after-the-fact justifications and that they were unable to withstand any serious scrutiny. The Court advised that in this case, the evidence showed a direct and immediate relationship between the protected activities and the retaliatory conduct of the school administrators.

If you have questions regarding imposing discipline or any other sort of corrective action in a circumstance that may involve a student’s First Amendment rights, please contact Schools Legal Service for guidance.

- Alan B. Harris

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