

Criticize the Coach at Your Peril: Recent Cases Clarify Boundaries of First Amendment Free Speech

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Legal aspects
Abstract 2009-152

May 30, 2009
1:00 PM

25 minute oral
(Lexington B)

During the past two years, students and parents petitioned courts to resolve disputes over the extent to which First Amendment free speech rights apply to both students in public schools, and their parents. These cases continue a recent trend of relying on the courts to resolve disagreements over the extent to which free speech is available to students and their parents, and establish guidelines for administrators responding to complaints about coaches. This presentation will highlight three recent cases involving free speech rights. The U.S. Supreme Court has recognized that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." (*Shelton v. Tucker*, 364 U.S. 279, 487 (1960)). The Court has further acknowledged, "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government. It is therefore understandable that the constitutional prohibitions encounter their severest test when they are sought to be applied in the school classroom." (*School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 230, (1963)).

In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Court confirmed that freedom of speech established in the First Amendment applies to both students and teachers in public schools, saying "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years." While this fundamental constitutional principle has not changed in the 40 years since *Tinker*, courts continue to be confronted with disputes over the extent of free speech rights.

In *Pinard v. Clatskanie School District* 6J, 467 F.3d 755 (9th Cir. 2006), members of the varsity men's basketball team signed a petition requesting that the team's coach resign due to his abusive, intimidating and generally inappropriate treatment of the players. The players subsequently boycotted a regularly scheduled game. Those who signed the petition and boycotted the game were permanently suspended from the team. The players filed suit under authority of 42 U.S.C. § 1983, alleging that the school violated their First Amendment free speech rights, and retaliated against them by suspending them for speaking out. While acknowledging the *Tinker* standard allowing protests as long as they do not materially and substantially interfere with appropriate discipline in the operation of the school, the court found that the boycott was a substantial disruption. However, the court also recognized that if the suspension was motivated by retaliation for preparing and circulating the petition rather than the boycott, it would be a violation of the players' free speech rights. The presentation will review the standard for a successful retaliation claim set forth by the court.

In *Cunningham v. Lenape Regional High District Board of Education*, 492 F.Supp.2d 439 (D. N.J. 2007), a parent criticized the qualifications and coaching methods of the wrestling coach, and wrote a petition attempting to have the coach removed. While there was a factual disagreement about the statements and actions used by the parent, the school administrators banned the plaintiff from school property for "a persistent pattern of abuse, harassment and threats towards staff members." The parent brought a § 1983 action, claiming that his banishment was not for legitimate reasons, but as retaliation for exercising his constitutional right to free speech. After reviewing the requirements for a successful § 1983 claim, the court held that the plaintiff provided no evidence that there was a causal connection between his speech and the alleged retaliation. Recognizing that free speech is not limitless, the court reiterated that "the Constitution does not leave the government powerless to protect against disruptive conduct, even speech, in public places such as schools." The court found that the school's determination that the plaintiff's actions constituted a potential danger was reasonable, and reiterated that schools do not need to wait to act until perceived threats become actual harm.

In *O'Connor v. Burningham*, 165 P.3d 1214 (Utah, 2007), the women's basketball coach came under fire from parents of players who thought the coach was granting preferential treatment to the star player. The parents' "undertook a persistent and multifaceted campaign of complaints" against the coach, alleging inappropriate coaching demeanor, preferential treatment in favor of the new player, financial misconduct, and improper recruiting of the player. After an investigation, the principal and school administrators determined that O'Connor had done nothing wrong. Not satisfied, the complainants took their grievances to the school board. The board took no action, but the administration ultimately dismissed O'Connor as coach when he refused to promise that he would not retaliate by denying team membership and playing time to certain players. The coach sued the complainants for defamation. Because "in the realm of defamation law all persons are not treated equally," the court's initial inquiry was to determine if the coach was a public official. The court declined to so classify the coach, holding that the

2009 North American Society for Sport Management Conference (NASSM 2009)

constitutional standard for public officials is limited to those persons "whose scope of responsibilities are likely to influence matters of public policy in the civil, as distinguished from the cultural, educational, or sports realms." Going further, however, the court also adopted the conditional privilege for intra-family relationships set forth in Restatement (Second) of Torts, § 597, allowing family members "breathing space" to criticize actions that affect the well-being of the family member (the players in this case). The presentation will review defamation law as it relates to coaches, and highlight the requirements for a successful defamation defense based on Restatement § 597.