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J.M. and R.M., individually and as parents and natural guardians of R.E.M., a minor	:	
v.	:	
SPRINGFIELD TOWNSHIP SCHOOL DISTRICT, NANCY HACKER and CHARLES RITTENHOUSE and SCOTT ZGRAGGEN	:	18-cv-04082-GJP

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF ANSWER TO MOTION OF ALL DEFENDANTS TO DISMISS AMENDED COMPLAINT

Plaintiffs, J.M. and R.M., through their undersigned counsel, submit this memorandum of law in support of their answer to defendants' motion to dismiss plaintiffs' amended complaint under F.R.C.P. 12(b)(6), and defendants' motion to strike averments under F.R.C.P. 12(f), and in support thereof, it is averred as follows:

CASE OVERVIEW

Essentially, this case deals with a social media posting of R.E.M., a high-school student, who indicated in a private, off-campus message to another person that "she did not like black people, especially girls". This was the entire message. This was a private Snapchat posting at a minor's home to the home of another minor, of limited duration. A third party apparently discovered the message and brought it to the attention of school officials at Springfield Township School District, who sanctioned R.E.M. for holding an opinion which they apparently believed to be "offensive". There is no credible evidence of imminent disruption of the educational process, except the bald statement in defendants' motion to dismiss that the Snapchat was disruptive and emotionally hurtful to

some students. There is also no evidence that minor plaintiff intended to disrupt the educational process in any way, or even that her message be transmitted to the school. There is no nexus set forth in defendants' brief between the social media post and anyone at the school, or the educational function therein.

The overarching legal issue here is the balance between freedom of expression and censorship in public schools. The First Amendment to the United States Constitution protects citizens right to speech against state control. For students, however, speech has been limited in order to ensure a safe learning environment. The United States Supreme Court in *New Jersey v. T.L.O.*, 393 U.S. 503 (1969), held that "the rights of students in public schools are not automatically coextensive with the rights of adults in other settings." However, former Supreme Court Justice Abe Fortas reminds the public in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), that neither students nor teachers "shed their Constitutional right to freedom of speech or expression at the schoolhouse gate."

The critical issue in the instant case is how does this general standard apply to students' speech in cyberspace. *Layshock v. Hermitage School Dist.*, 650 F. 3d 205 (2011), a Third Circuit en banc, unanimous decision, is the guiding law for the instant case. The courts have long since indicated, under the First Amendment, that there is no such thing as hate speech, and the censorship of such is proscribed based on content. *See Matal v. Tam*, 137 S. Ct. 1744, 198 L. Ed. 2d 366 (2017).

Springfield Township School District officials apparently believe they have unlimited authority over student speech, simply because a student attends their school. The Principal and other officials in the Springfield Township School District decided to

punish R.E.M. because they believed that the content of her off-campus message was "politically incorrect" and that it may offend their students, teachers and parents. This off-campus censorship of a private Snapchat is a flagrant violation of the First Amendment.

An overview of the case can be found in paragraphs 8 through 14 of the amended complaint, titled "General Allegations". They read as follows:

> 8. This lawsuit arises out of the adverse administrative actions of defendants and punishment of R.E.M., a student enrolled in Springfield Township School District, on or about April 3, 2018, arising from a private Snapchat video by R.E.M., which was forwarded to school administrators by a third party. R.E.M. said that she said that "I hate black people, especially girls" in the private Snapchat video, which was not directed to anyone at the school.This video did not take place on school property or at a school-related activity, nor did it cause a substantial and material disruption of school activities. *See Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). The Snapchat of R.E.M. was protected conduct under the First Amendment, since the school cannot exercise any disciplinary authority over private speech, not made in school, which is not school-related or directly implicates school safety issues. The actions of the Springfield School District and its administrators indicated a policy to censor freedom of expression by R.E.M. based upon its content. Such censorship strikes at a core value protected by the First Amendment, the protection of unpopular or politically incorrect speech. The School District does not have unlimited authority to censor the opinions of its students, which it may find offensive, at any time or any place.
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> 9. R.E.M. was suspended by the School District according to its policy designed to punish politically incorrect speech through its administrator defendants, and arising out of the opinion expressed in the video by minor plaintiff. *See* Exhibit A, which is a suspension notice dated 04/03/18, with the identity of plaintiffs redacted. Exhibit A indicates that minor plaintiff was suspended for "inappropriate behavior", which is void for vagueness, since it gives the school district almost unlimited power to suspend, in violation of R.E.M.'s due process rights. In this context, "inappropriate behavior" is a pretext for the School District to censor any speech, which it deems inappropriate.
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> 10. In June 2017, the Supreme Court affirmed in an unanimous decision in *Matal v. Tam, 137 S. Ct. 1744 (2017)* that the disparagement clause of the Lanham Act violates the First Amendment's free speech clause. The issue was about

government prohibiting the registration of trademarks that are "racially disparaging." Justice Samuel Aliti wrote:

"Speech that demeans the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.' *United States v. Schwimmer, 279 U.S. 644, 655 (1929)* (Holmes, J., dissenting).

Justice Anthony Kennedy also wrote:

"A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society."

Effectively, the Supreme Court unanimously reaffirmed that there is no 'hate speech' exception to the First Amendment.

11. Springfield, acting through its agents, servants, and employees, not only suspended R.E.M. for violating School policy, but proceeded to defame her by publishing implied references to the Snapchat video on electronic media throughout the School, via "Smart Board" to hundreds of students. An email to school parents addressing the incident was sent on or about 04/04/18. *See* Exhibit B. Given the nature of a high school, R.E.M. was easily identified by her classmates, ostracized and subjected to threats and severe emotional distress, as a result of the School District's actions.

12. R.E.M. was identified by her classmates as the person involved in the underlying incident arising out of the actions of defendants.

13. Such actions by the School defamed minor plaintiff, and placed her in a false light, as well as caused her emotional distress, embarrassment, humiliation, and loss of life's pleasure. These actions by the School have and will affect her ability to receive an education at Springfield, and to be admitted to a college or university of her choosing and may impact future earning capacity.

14. Dr. Charles Rittenhouse, the Principal of Springfield Township High School, was a person directly involved in suspending R.E.M., and he was a policy maker and policy enforcer for the District.

PROCEDURAL POSTURE

A brief procedural synopsis of the case is as follows. A complaint was filed on 09/04/18 against the Springfield Township School District, its Superintendent, the Principal, and the Assistant Principal of the high school which R.E.M. attended. They were directly involved in the discipline of plaintiff pursuant to school district policy. A motion to dismiss was filed by defendants under Rule 12(b)(6) on 12/17/18. On 04/17/19, the Court granted defendants' motion to dismiss, in part, and denied the motion, in part. Plaintiff filed an amended complaint on 05/03/19, which was answered by a second motion to dismiss and to strike on 05/22/19. Plaintiff was granted an extension until 06/20/19 by the Court to respond to defendants' motion.

It should be noted that the Court, in its Order of 04/17/19, set forth an 8-page Opinion on the motion to dismiss. Pursuant to the Court's Order, plaintiff has specified the nature of the Snapchat video in the amended complaint; not pursued the claim for substantive due process; and not responded to defendants' arguments on defamation, false light, and invasion of privacy. It is respectfully noted that the Court's Order does not appear to discuss the fact that there is no dispute that this was off-campus speech. Furthermore, the Court's Opinion does not discuss the en banc, *Layshock* Opinion of the Third Circuit Court of Appeals of 2011 which appears to be a critical case in this area.

Perhaps the latest United States Supreme Court case to directly apply to the instant case is *Matal v. Tam*, 137 S. Ct. 1744, 198 L. Ed. 2d 366 (2017). It involved speech that allegedly demeaned on the basis of ethnicity. While *Matal* was a plurality Opinion, because there were eight Justices on the bench at the time, its pronunciations were persuasive. *Matal* found that to discriminate on viewpoint is itself "an egregious

form of discrimination" which is presumptively unconstitutional. *Matal* also found that the idea that the government may restrict speech expressing ideas that offend strikes at the heart of the First Amendment. This includes speech that demeans on the basis of race, ethnicity, gender, religion, age, disability or any similar ground which is considered hateful. Finally, the Justices in *Matal* made clear that speech that some view as racially offensive is not just protected against outright prohibition but against lesser restrictions.

EVIDENTIARY STANDARD FOR A MOTION TO DISMISS

A court should only dismiss a suit under F.R.C.P. 12(b)(6) if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, (1957). Similarly, "The district court must construe the complaint in a light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. … When an allegation is capable of more than one inference, it must be construed in the plaintiff's favor. … Hence, a judge may not grant a Rule 12(b)(6) motion based on a disbelief of a complaint's factual allegations." *Columbia Nat Resources, Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir.1995)."

The *Conley* standard above was replaced by the United States Supreme Court in the case of *Bell Atlantic Corporation v. Twombly*, 127 S.Ct. 1955, 550 (2007). *Twombly* is somewhat more restrictive, but it still requires that the Court take the well-pled allegations of the complaint as true, along with any reasonable inferences thereof. The Court is required to determine whether the complaint alleges facts which give rise to relief, as opposed to mere speculation.

Plaintiff argues that the complaint is sufficiently specific to apprise defendant of the nature of this lawsuit and enunciates plausible claims sufficient to overcome a motion to dismiss. A plaintiff is not required to plead all the evidence necessary to prove their case in the complaint. *H.M. Bickford Company V. Speigle*, 120 A.2d 167, 384 Pa. 227 (1956). While *Bickford* is a state case, it is averred that federal law, with respect to a motion to dismiss, is substantially the same.

A defendant moving to dismiss under F.R.C.P. 12(b)(6) bears the burden of proving that the plaintiff has failed to state a claim for relief. See F.R.C.P. 12(b)(6); see also, e.g., *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005). To survive a Rule 12(b)(6) motion, the complaint must contain sufficient factual matter, accepted as true, to state a facially plausible claim to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. *Southeastern Pennsylvania Transportation Authority v. Gilead Sciences, Inc.*, Civil Action 14-6978 (E.D.Pa. 05/04/2015). As such, "[t]he touchstone of the pleading standard is plausability." *Bistrian v. Levi*, 696 F.3d 352, 365 (3d Cir. 2012).

Dismissal is appropriate only if, accepting as true all the facts alleged in the complaint, a plaintiff has not pleaded "enough facts to state a claim to relief that is plausible on its face," *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955, meaning enough factual allegations "to raise a reasonable expectation that discovery will reveal evidence of “each necessary element. *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955).” The plausibility standard is not

akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id*. at 679, 129 S.Ct. 1937.

In deciding a motion to dismiss, the Court should consider the allegations in the complaint, exhibits attached to the complaint, and matters of public record. *See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

Exhibit "A" to the complaint is a letter from the Principal indicating a 5-day suspension punishing R.E.M. for violation of the school discipline policy due to "inappropriate behavior" with a copy to her official school file. Not only is "inappropriate behavior" overbroad, but is arguably void for vagueness. The term "inappropriate behavior" essentially amounts to any behavior that the school dislikes. Exhibit "B" to the complaint is an email from the Principal's administrative assistant to the parents of minor plaintiff indicating that a video by R.E.M. contained "racially insensitive comments". Nowhere in the email does it mention any disruption of the school function let alone substantial disruption. Defendants' attempt to transmogrify this situation into a substantial disruption is disingenuous and without a factual basis.

Thus, plaintiff makes a plausible claim that she was punished by her public school district based on comments in a video which school officials found to be "racially insensitive". *See* Exhibit "B". There is no indication that the video was not made outside of school or has any nexus to the school. In defendants' motion to dismiss, it is argued that they can prove effective defenses to the allegations in plaintiff's complaint. However, this is not the standard for a motion to dismiss.

DEFENDANTS' BRIEF AND CASELAW

A key case cited by both parties, in the complaint and in the motion to dismiss, is *J.S. v. Blue Mountain School District*, No. 08-4138 (3d Cir. June 13, 2011). This case involves a social post by a student with the Principal's picture demeaning the Principal sexually, and in other ways in most stark terms. The post was off-campus. The Third Circuit held that sanctioning the plaintiff was a violation of her First Amendment rights, because while the post was extremely offensive, it was not substantially disruptive. As the Third Circuit of Appeals stated in paragraph 52 of *J.S.*: "There is no dispute that J.S.'s **speech did not cause a substantial disruption in the school**." (emphasis supplied). *J.S.* was decided on summary judgment. Defendants have not been able to point to any objectively substantial disruption of the school arising out of R.E.M.'s post.

Defendants cite another case, *A.N. v. Upper Perkiomen School District*, 228 F. Supp. 3d 391 (E.D. Pa. 2017). They claim "Save for the request for injunctive relief, A.W. [sic] is factually identical on the merits such as to be considered controlling precedent for the instant matter." (defendants' brief at 8). The *A.N.* case, which is miscited by defendants as *A.W.*, is readily distinguishable from the instant case. The *A.N.* case dealt with a student who put a video online which caused the police to be called. There were potential signs of school violence, and a part of the video depicts a student who drops a duffle bag and cocks a semiautomatic rifle. Lyrics to the video state "You'd better run, better run, out run my gun", as well as a caption that reads "See you next year, if you're still alive." Obviously, this is far afield and distinguishable from the instant case. In the R.E.M. case, there were no threats, the police were not called, the school was not closed, classes were not interrupted, or anything of the like. There was no police report or

investigation in this case. The elements of violence in the *A.N.* case substantially distinguish it from the instant case.

Defendants also cite the case of *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). This is a United States Supreme Court case, and is readily distinguishable from the instant case. The holding was that a school can impose sanctions on lewd speech at a required high school assembly. The scenario here and the basic legal principles are not comparable to R.E.M.'s case.

School officials do not have unfettered discretion to censor any social media posts they deem offensive or politically incorrect. The test here is an objective one, not the visceral reaction of school officials. This is particularly so with a nonviolent post outside of school with little nexus to any school function.

QUALIFIED IMMUNITY

Individuals are immune from damages unless their conduct violated rights which are clearly established at the time their conduct occurred, but the test involved is an objective one, focusing on the state of the law at the time, not the motive of the defendant. Qualified immunity is unavailable where defendants' conduct violates clearly established statutory rights. If the law is clearly established, the immunity defense should fail if a reasonably competent public official should know the law governing his conduct. *Harlow v. Fitzgerald*, 475 U.S. 800, 102 S.Ct. 2727 (1982). *Mitchell v. Forsythe*, 472 U.S. 511 (1985). Municipalities, unlike individuals, have no qualified immunity from mistakes in unclear areas of law. *Owen v. City of Independence*, 455 U.S. 662, 100 S.Ct. 1398 (1980).

The *Tinker* case was decided by the United States Supreme Court in 1969. It describes the parameters governing the instant case. School officials should have known that the principles invoked in *Tinker* proscribed their unconstitutional conduct.

The Court, in its Opinion, indicated that qualified immunity is usually best left for summary judgment.

INCORPORATION

Plaintiffs hereby incorporate their complaint, their amended complaint, their answer to defendants' initial motion to dismiss, and all of their exhibits and documents filed of record, as though set forth at length and fully incorporated herein.

CIVIL RIGHTS CLAIM

The School District of Springfield Township, a governmental body, is liable for plaintiff's injuries under Section 1983, as set forth in plaintiff's complaint, because defendants' employees or agents executed a governmental policy that directly resulted in the deprivation of plaintiff's civil rights. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978). If a city official causes a deprivation of life or liberty upon another because he was following a city policy reflecting the policymakers' deliberate indifference to constitutional rights, then the city is directly liable under Section 1983 for causing a violation of plaintiff's Fourteenth Amendment rights. *Fagan v. City of Vineland*, 22 F.3d at 17 (3d Cir. 1993) Liability may be based on actions of an official with final policy-making authority (such as a School District Superintendent), which is then attributed to the municipality, and even a *single action* by the policy maker may be enough to trigger municipal liability. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292 (1986). (emphasis supplied)

It is not required to find that individual defendants violated the rights of plaintiff to find that the government bodies and corporate entities named in plaintiff's complaint had a policy whose implementation violated those civil rights. *Pembaur*, *supra*; *Tennessee v. Guiner*, S. Ct. 1694 (1985); *Simmons v. City of Philadelphia*, 947 F. 2d 1042 (3rd Cir. 1991). In his excellent analysis at p. 28–45 of *Simmons v. Philadelphia*, *supra*, Judge Becker rejects the City's argument that an employee must have primary liability for a constitutional violation. The Supreme Court in both *Pembaur* and *Guiner*, *supra*, considered civil rights liability of the municipality alone, where all individual defendants had been dismissed.

In order to state a valid claim under Section 1983, plaintiff must allege the following: (1) that the conduct complained of was committed by a person acting under the color of state law; and (2) the conduct deprived plaintiff of rights, privileges or immunities secured by the United States Constitution. *Coates v. Jeffers*, 822 F. Supp. 1189 (E.D. Pa. 1993) citing *Parratt v. Taylor*, 451 U.S. 527, 535 101 S. Ct. 1908, 1912, 68 L. Ed.2d 420 (1980).

The Springfield School District and its defendant administrators, imply, if not actually state, that R.E.M. was being punished pursuant to school policy. The gravamen of plaintiff's complaint is that such policy is a violation of the First Amendment and plaintiffs' civil rights.

IMMUNITY UNDER STATE LAW

With respect to defendants' invocation of the *Political Subdivision Tort Claims Act* to attempt to insulate their liability, in the case of *Wade v. City of Pittsburgh*, 767 F.2d 405, 1985, the Court held that the *Political Subdivision Tort Claims Act* "has no

force when applied to suits under the Civil Rights Act. The result follows whether the suit to redress federal rights is brought in state or Federal Court. Were the rule otherwise, a state legislature would be able to frustrate the objectives of a Federal statute." In short, federal law "trumps" state law here. 42 USC 1983 is not abrogated by a state statute. *See Stoneking v. Bradford Area School District*, 856 F.2d 594 (3rd Cir. 02/03/1988).

Defendants also argue that Superintendent Hacker is entitled to common law immunity as a "High Public Official". The doctrine appears to be limited to torts in the nature of defamation, not First Amendment violations. It is further limited to "school district business", as defendants point out. The key point under the caselaw cited by plaintiff is that defendants have no business trying to punish speech which is neither disruptive nor related to the operation of a public school. This should not be school district business.

The Pennsylvania Supreme Court has ruled that a state trooper accused of using excessive force during a traffic stop was not immune from suit under sovereign immunity. The Court ruled 6-1 to overturn a Commonwealth Court ruling in *Justice v. Lombardo*, No. 17 EAP 2018, decided 05/31/19, that said sovereign immunity made irrelevant the details of an incident in which plaintiff was allegedly injured by Trooper Joseph Lombardo during an altercation following a traffic stop over a broken taillight.

Judge Donahue, writing for the Pennsylvania Supreme Court, said that the Commonwealth Court, in analyzing this case, misapplied the law "in holding that reasonableness and motive are irrelevant to the scope of employment inquiry in this matter. Both are plainly relevant and, based on this record, reasonable minds could have concluded that Trooper Lombardo's conduct was actuated in such a manner as to evince

entirely personal motives rather than a professional purpose, substantiating further the jury's conclusion that he acted outside the scope of his employment."

AFFIRMATIVE DEFENSES

Defendants have asserted several affirmative defenses, such as various types of immunity. These are affirmative defenses, and not the subject of the 12(b)(6) inquiry.

Under Federal Rules of Civil Procedure, an 8(a) complaint need not anticipate or overcome affirmative defenses. Thus, a complaint does not fail to state a claim simply because it omits facts that would defeat a statute of limitations defense. *See In re Adams Golf, Inc. Sec. Litig.*, 381 F.3d 267, 277 (3d Cir. 2004). Technically, the Federal Rules of Civil Procedure require a defendant to plead an affirmative defense, like a statute of limitations defense, in the answer, not in a motion to dismiss. *See Robinson v. Johnson*, 313 F.3d 128, 134-35 (3d Cir 2002).

"To decide a motion to dismiss, courts generally consider only the allegations contained in the complaint, exhibits attached to the complaint and matters of public record." *Pension Benefit Guar. Corp. V. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 199); *see also Mayer v. Belichick*, 605 F.3d 223, 230 (3d. Cir. 2010).

LAYSHOCK

Public school students cannot be punished for off-campus speech that fails to cause a substantial disruption to in-school activities, the Third Circuit Court of Appeals ruled in a unanimous, en banc decision.

In the majority opinions for *Layshock v. Hermitage School District* and *J.S. v. Blue Mountain School District, supra,* - two simultaneous opinions filed by the entire

Third Circuit in Pennsylvania - the judges held that administrators are limited in their ability to restrict student speech that occurs outside of school.

In *Layshock*, Justin Layshock, a former student at Hickory High School in Hermitage, Pa., used his grandmother's computer to create a fake profile for Principal Eric Trosch. On the parody profile, Layshock wrote that Trosch had used drugs, shoplifted and taken steroids.

Apart from a photo of Trosch that Layshock took from the school's website, all work on the page was unconnected with school.

Though a three-judge panel of the Third Circuit ruled in favor of Layshock in February 2010 - finding that the school's decision to suspend the student was a violation of his First Amendment rights - a separate panel came out with a simultaneous, conflicting decision in *J.S. v. Blue Mountain School District*.

In *J.S.*, a then-middle school student in Pennsylvania's Blue Mountain School District used an off-campus computer to a create a fake MySpace profile ridiculing her Principal, James McGonigle. Like Layshock's, the profile featured mock references to McGonigle's past behavior, including sexually explicit language.

The three-judge panel held in J.S. that the school district's suspension of the female student did not violate her First Amendment rights.

Because of the inconsistent opinions issued in the two similar cases, the Third Circuit ordered that both were to be reheard *en banc* - in front of the entire 14-judge court - in June 2010.

Chief Third Circuit Judge Theodore McKee wrote in the unanimous opinion in *Layshock* that "it would be an unseemly and dangerous precedent to allow the state, in the

guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control the child when he/she participates in school-sponsored activities. Allowing the [school] district to punish Justin for conduct he engaged in while at his grandmother's house using his grandmother's computer would create just such a precedent."

HATE SPEECH AND CONTENT-BASED SPEECH

In the Opinion by Justice Samuel Alito for four justices in *Matal v. Tam*, 137 S. Ct. 1744, 198 L. Ed. 2d 366, 582 US (2017), where the government refused trademark protection to a band called "The Slants".

"The idea that the government may restrict speech expressing ideas that offend … strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"

A law found to discriminate based on viewpoint is an "egregious form of content discrimination," which is "presumptively unconstitutional." A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.

And the United States Supreme Court Justices made clear that speech that some view as **racially offensive** is protected not just against outright prohibition but also against lesser restrictions. In *Matal*, the government refused to register "The Slants" as a

band's trademark, on the ground that the name might be seen as demeaning to Asian Americans. The government was not trying to forbid the band from using the mark; it was just denying it certain protections that trademarks get against unauthorized use by third parties. But even in this sort of program, the court held, viewpoint discrimination - including against allegedly racially offensive viewpoints - is unconstitutional. An this no-viewpoint-discrimination principle has been seen as applying exclusion of speakers from universities, denial of tax exemptions to nonprofits, and much more. (Justice Neil Gorsuch was not on the court when the case was argued, so it was a 4-4 plurality Opinion.)

DEFENDANTS' MOTION TO STRIKE UNDER RULE 12(f)

Defendants filed a motion to strike which is detailed at pages 6 and 7 of defendants' memorandum. Defendants supply no authority for having various paragraphs stricken as a remedy. In order to evaluate a motion to strike, it is argued that the complaint as a whole must be looked at and not just isolated paragraphs. Defendants argue under Rule (10)(b), that several paragraphs of the amended complaint are more akin to a brief. This is an exaggeration of the situation in which plaintiffs cited five cases on the First Amendment in their amended complaint. This is necessary because caselaw involving off-campus, cyberspace publications by students is not addressed in traditional First Amendment cases, but in recent cases such as *Layshock* decided by the Third Circuit, en banc, and *Matal*, authored by the United States Supreme Court in 2017.

Defendants make some contradictory allegations. At one point, they claim that plaintiffs' complaint only contains legal conclusions, and then elsewhere they claim that averments of the complaint are a narrative with too many facts. To support defendants'

motion is a case, *Matthew B. v. Pleasant Valley School District*, 3:2017-cv-2380, from the District Court for the Middle District. Of course, this case is persuasive only on the instant case. Defendants state in their brief that this case was reviewed by the Court, but fail to give a citation to where that was. It should be noted that the *Matthew B.* case cited by defendants involved a "motion to dismiss for failure to state a claim upon which the relief can be granted, or in the alternative to replead". What the Court did in that case is to find for the plaintiff on the motion to dismiss with an admonition to plaintiff's counsel against the insertion of paragraphs that are purely legal argument or legal conclusions in the body of the complaint.

It is again averred that when viewed as a whole, plaintiffs' complaint has not violated the Federal Rules of Civil Procedure. In any event, the cases cited by defendants do not support their motion to strike as a remedy.

SUMMARY AND CONCLUSION

The Court should not dismiss the complaint under Rule 12(b)(6), since there are plausible claims by plaintiffs which could establish a cause of action for violation of plaintiffs' First Amendment rights.

1. In the instant case, not only was the post by minor plaintiff not on school property, but there was no virtually no nexus with the school itself. There is nothing in plaintiff's message that links it to her school. This is a case where school officials were made aware of a posting by minor plaintiff by a third party, and they found the posting to be offensive or politically incorrect, and decided to punish minor plaintiff for her views, substantially unrelated to anything that occurred at her school.

2. There is no issue of school safety, disruption, or implication of violence here. The police were not called. The educational process was not disrupted or was class cancelled as a result of the post. There is no indication in defendants' brief that anyone contacted the school and said that they viewed minor plaintiff's post and considered it threatening in any way. The test is an objective one. Under *Tinker*, and its progeny, the United States Supreme Court promulgated a standard for school speech requiring substantial disruption which interferes with appropriate school discipline or creates substantial disorder that invades the rights of others. The activity in the instant case does not fit within the ambit of this rubric.

3. Politically incorrect speech is not per se disruptive. Defendants give no specifics as to how the social media post by R.E.M. disrupted the school. Defendants cannot be allowed to censor speech which they consider to be politically incorrect or offensive, by mischaracterizing it as disruptive. No school directives were cited which minor plaintiff allegedly transgressed, except the catchall of "inappropriate behavior". Defendants' unsupported assertion that the posting of minor plaintiff was disruptive is insufficient. Substantial disruption, in this context, is not tantamount to speech which administrators disapprove or students find disturbing.

4. The 2011 unanimous en banc decision by the Third Circuit Court of Appeals in *Layshock* controls this case. The 14-judge panel found that a school district's attempt to punish a student for posting a false portrait of his school principal violated the First Amendment. The defendants in the case at bar do not have unlimited power to regulate the speech of their students outside the school context.

5. Finally, a 2017 United States Supreme Court plurality decision in *Matal v. Tam* clearly indicates that so-called "hate speech" is protected by the First Amendment even if it is **racially offensive** to many.

Because it is plausible that plaintiff's private social media posting did not disrupt school activities, but was viewed by the administration as inappropriate, the motion to dismiss the complaint should be denied. The school administration cannot use its subjective notion of disruption as a pretext for the sanctioning of off-campus speech, which has virtually no nexus to the function of the school. Whether the majority is disturbed by the content of the speech is not the test under the First Amendment. Speech which is censored based on content, generally violates the First Amendment.

The First Amendment was designed to protect the minority from the tyranny of the majority. It is not enough that the majority disapproves of or feels offended by the "politically incorrect" viewpoint of even one person. Content-based censorship in the form of suspension and notation in R.E.M.'s school records because of an out-of-school, non-violent Snapchat, deemed offensive by defendants, strikes at the core of the First Amendment.

Respectfully submitted,

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