

Management Alert



Tenth Circuit Leaves Unresolved First Amendment Doctrine Applicable to Define When Off-Campus Social Media Posts Can Subject Students to Discipline

By Marjorie C. Soto, Kay J. Hazelwood, and Mary Kay Klimesh

Seyfarth Synopsis: *The U.S. Court of Appeals for the Tenth Circuit's recent opinion in [Yeasin v. Durham, No. 16-3367, 2018 WL 300553 \(10th Cir. Jan. 5, 2018\)](#) addresses the "tension between some students' free-speech rights and other students' Title IX rights to receive an education absent sex discrimination in the form of sexual harassment." The Court of Appeals did not specify a test to be applied when a student's alleged First Amendment right to free speech intersects another student's alleged right to be free from harassment in a university community, but did affirm the district court's decision that a KU administrator did not violate clearly established law when she expelled Yeasin for misconduct related to an off-campus incident and tweets. The court specifically refrained from deciding "whether Yeasin had a First Amendment right to post his tweets without being disciplined by the university." The Court's analysis in this case is of particular interest to public colleges, universities and schools who grapple with managing and balancing student First Amendment rights and the responsibility to maintain an educational environment free from harassment.*

Background and Procedural History

In November, 2013, Dr. Tammara Durham, Vice Provost for Student Affairs, made a decision to expel Navid Yeasin from the University of Kansas ("KU") after her review of a hearing panel's findings of fact based on a preponderance of the evidence that Yeasin had violated KU's sexual harassment policy by engaging in conduct which included posting off-campus social media tweets making derogatory statements about his ex-girlfriend's body, but not naming her.

Yeasin proceeded to contest the expulsion in Kansas state court which concluded that the findings, adopted by Dr. Durham, "were not supported by substantial evidence" and that "KU and [Dr.] Durham erroneously interpreted the Student Code of Conduct by applying it to off-campus conduct." KU appealed, arguing that its interpretation of KU's Code of Conduct was "consistent with the obligations imposed on it under Title IX" and allowed for the University to expel Yeasin since its student code allowed for students to be punished for off-campus conduct that violates federal, state, or local law. In September 2015, that court affirmed the lower state court's findings and Yeasin subsequently re-enrolled at KU.

Thereafter, Yeasin brought suit in federal court against Dr. Durham under 42 U.S.C. Section 1983 alleging her action to expel him from KU for the content of his on-line, off campus speech violated his First Amendment right to free speech and his Fourteenth Amendment right to substantive due process. He sought monetary damages claiming that KU's wrongful expulsion delayed completion of his education, cost him lost employment and wages, and caused him emotional distress and mental anguish. Dr. Durham moved to dismiss both of Yeasin's claims on qualified-immunity grounds. The federal district court granted Dr. Durham's motion to dismiss, concluding that she did not violate Yeasin's clearly established rights under the First and Fourteenth Amendments. On January 5, 2018, the Tenth Circuit Court of Appeals affirmed.

The Tenth Circuit Court of Appeals Analysis and Findings

Qualified immunity protects government officials from liability for civil damages if their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." In order to overcome this defense, a plaintiff must show (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established. The Court of Appeals here found that Yeasin's claim failed the second prong of this analysis.

In reaching its conclusion, the Court analyzed free speech cases in secondary school and college/university settings including consideration of *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (finding that, while secondary-school students retained free-speech rights, schools can still prohibit actions that "would materially and substantially disrupt the work and discipline of the school..."); *Morse v. Frederick*, 551 U.S. 393 (2007) (allowing a K-12 school to discipline a student for flying a banner reading "BONG HiTs 4 JESUS" at an off-campus, school-approved activity because the banner could reasonably be viewed as promoting drug use); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (K-12 schools can restrict lewd, vulgar, or indecent speech even without a forecast of disruption); and *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (allowing public officials to restrict K-12 school-sponsored speech).

Yeasin argued that First Amendment cases which allow for the restriction of student speech in the secondary school context cannot be applied in the university context in the same way. Rather, Yeasin argued that cases including *Papish v. Bd. of Curators of the Univ. of Missouri*, 410 U.S. 667 (1973) (addressing distribution of newspaper in the university setting "containing forms of indecent speech"); *Widmar v. Vincent*, 454 U.S. 263 (1981) (addressing a university's refusal to allow a registered religious student group to meet in university buildings); and *Healy v. James*, 408 U.S. 169 (1972) (addressing a state college's refusal to officially recognize a student group known because of its potential affiliation with a national organization known for campus disruption) should be applied. The Tenth Circuit Court of Appeals distinguished the cases advanced by Yeasin noting that the cases didn't concern "university-student conduct that interferes with the rights of other students or risks disrupting campus order." The Court also countered with language from *Widmar*, quoting *Healy*, which "suggests that the Supreme Court believes that the material-and-substantial-disruption test applies in the university setting." Ultimately, the Tenth Circuit Court of Appeals concluded that Yeasin could not establish that Dr. Durham had violated clearly established law when she took action to expel him, in part, for his off-campus social media tweets.

The Court considered Yeasin's substantive due process argument, and found that it was flawed. The Court reasoned that Yeasin needed to show that the school's decision to expel him was arbitrary, lacked a rational basis, or shocked the conscience. *Butler v. Rio Rancho Pub. Sch. Bd. of Educ.*, 341 F.3d 1197, 1200 (10th Cir. 2003). The court declined to resolve the question of whether Dr. Durham's decision to expel Yeasin violated his right to substantive due process, and limited its opinion to a finding that she violated no clearly established law in doing so.

The need for college and university administrators and school officials to navigate their legal obligations when addressing decisions to discipline a student for off-campus speech on social media will no doubt remain a prevailing issue, especially when such conduct implicates the rights of another student to be educated in a harassment-free learning environment. Not surprisingly, KU modified its student code of conduct after this incident to explicitly extend its disciplinary jurisdiction to off-campus incidents.

Seyfarth Shaw continues to monitor the developments in the battle between the First Amendment right to freedom of speech and rights under Title IX to an educational environment free of sexual harassment. We will keep our readers apprised.

If you would like further information, please contact [Marjorie C. Soto](mailto:msoto@seyfarth.com) at msoto@seyfarth.com, [Kay J. Hazelwood](mailto:khazelwood@seyfarth.com) at khazelwood@seyfarth.com, or [Mary Kay Klimesh](mailto:mklimesh@seyfarth.com) at mklimesh@seyfarth.com.

www.seyfarth.com

Attorney Advertising. This Management Alert is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

Seyfarth Shaw LLP Management Alert | January 30, 2018

©2018 Seyfarth Shaw LLP. All rights reserved. "Seyfarth Shaw" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.