

Courts Continue to Grapple with Online Student Speech Cases; Supreme Court Chose Not to Weigh In

Schools and universities nationwide are struggling with how far they can go to punish online student speech that takes place off campus.

The University of Minnesota defended its right to punish students for online, off-campus speech before the Minnesota Supreme Court on April 2, 2012, in a case in which a student was disciplined for posting allegedly disrespectful and threatening comments on Facebook.

“The fundamental problem here is that [the University] is asking to adopt a speech code for professional students that applies not only on campus, but off campus,” argued Jordan Kushner, the attorney for student Amanda Tatro, who was disciplined for some posts she made on Facebook. This was the second time the Minnesota Supreme Court had heard the case. It was initially argued on Feb. 8, 2012, but Kushner asked for a re-hearing when a fourth justice recused himself after the initial oral arguments.

The case, *Tatro v. University of Minnesota*, arose after the University disciplined Tatro, a mortuary science student, in April 2010. It reflects courts’ struggles with how to balance students’ First Amendment rights with schools’ ability to maintain a distraction-free environment, even if the speech occurs away from school. First Amendment advocates argue that blurring the line between on-campus and off-campus speech jeopardizes students’ ability to speak their minds on the important issues of the day.

Tatro, who was taking laboratory courses and working with human cadavers, had participated in an orientation program that addressed appropriate conduct regarding anatomy-bequest-program donors, and had signed a disclosure form indicating that she understood and agreed to abide by the program’s rules, according to the Minnesota Court of Appeals opinion, 800 N.W.2d 811 (Minn. Ct. App. 2011).

One of the Facebook posts at issue was directed toward a man who had just broken up with her, according to the court of appeals. Tatro wrote that she was tempted to “stab a certain someone in the throat” with a “trocar” — a sharp surgical instrument — and added that she would perhaps “spend the evening updating my ‘Death List #5’ and making friends with the crematory guy.” In another post, the opinion said, she said she was “looking forward to Monday’s

embalming therapy as well as a rumored opportunity to aspire. Give me room, lots of aggression to be taken out with a trocar.” In a third, she discussed saying good-bye to “Bernie,” the name she had given to the cadaver on which she worked. “Realized with great sadness that my best friend, Bernie, will no longer be with me as of Friday next week. ... Bye, bye Bernie. Lock of hair in my pocket.”

Tatro told *The Minnesota Daily* for a February 13 story that when she had written the Facebook posts, her fiancé had “dumped” her the night before and she had been up all night, crying. She posted on Facebook as a way of telling her family and friends that the relationship was over, she said.

The court of appeals opinion said that after another student reported her posts to the University, the school gave her a failing grade in her anatomy class, required her to undergo a psychiatric evaluation, and placed her on academic probation for the rest of her undergraduate career. Tatro appealed the decision through the University’s disciplinary system, and continued through the courts.

The Minnesota Court of Appeals ruled on July 11, 2011 that the University’s punishment of Tatro did not violate her First Amendment rights because her posts on Facebook “materially and substantially disrupt[ed] the work and discipline of the university.” Judge Louise Bjorkman said that “in a long line of cases, beginning with *Tinker*, the Supreme Court has held that schools may limit or discipline student expression if school officials ‘reasonably conclude that it will materially and substantially disrupt the work and discipline of the school.’” Tatro appealed to the Minnesota Supreme Court.

In 1969, the Supreme Court of the United States held in *Tinker v. Des Moines Independent School District* that K-12 schools can punish student speech when the speech materially disrupts classwork or involves substantial disorder. 393 U.S. 503 (1969). At the February oral arguments in front of the Minnesota Supreme Court, Kushner argued that Tatro’s conduct did not violate that standard. She was simply “engaging in literary expressions and venting some emotions.” He also argued that “she was venting her feelings and made some vague references to dissection. ... She’s expressing herself, expressing her feelings, and she has a right to do that.” Kushner argued that if the “limit of the University’s reach extends to what Ms. Tatro did,” students would face “real danger” where they are not allowed to express themselves online.

Kushner also argued that there was no “substantial interference” with the school environment, under the *Tinker* test because no class was delayed, and no students missed class because of the incident, except for Tatro, when she was barred from being on campus. “What does ‘substantial disruption’ on a major

university campus have to look like?” he asked. “If this is it, it is overbroad authority for the university to regulate off-campus speech in the Internet age.”

In both the February and April oral arguments, University General Counsel Mark Rotenberg countered by citing 1988 U.S. Supreme Court decision *Hazelwood School District v. Kuhlmeier*, where the court held that K-12 school administrators have a certain amount of leeway to censor student speech when the school itself is sponsoring it, as long as the censorship is reasonably related to their legitimate pedagogical concerns. 484 U.S. 260 (1988).

Rotenberg argued that it does not matter that Tatro’s speech was not “on campus,” because, he said, the on-campus/off-campus dichotomy does not apply when the issue is whether the student is interfering with legitimate pedagogical objectives. Rotenberg said that the “legitimate pedagogical objectives” disturbed in this case were teaching students how to be successful mortuary science students and funeral directors: Minnesota state regulations prohibit funeral directors from acting “unprofessionally,” for example. Rotenberg also said that those objectives include protecting the anatomy-bequest program from being undermined, and that there is a “substantial risk” that these programs would be undermined if the public refused to donate.

“This is not a general free speech case,” Rotenberg said during the April arguments. “The University has a substantial, ... even compelling interest in educating professionals.”

Although this case has focused on the applicability of *Tinker* and *Hazelwood* to online, off-campus speech, the U.S. Supreme Court has never applied these cases — both of which involved high school students — to speech taking place in a collegiate setting.

The Student Press Law Center (SPLC), an advocate for student speech rights, filed an *amicus curiae* brief in support of Tatro. “Whatever [the Minnesota Supreme Court] may think about Amanda Tatro’s sense of humor, unleashing colleges and schools to punish their students’ speech — no matter when and where it is uttered — because of a belief that the speech may damage the school’s image in the eyes of its supporters sweeps far beyond any legitimate conception of school authority,” the SPLC argued in its friend-of-the-court brief. “A license to punish off-campus expression will unavoidably become a vehicle for some schools and colleges to pursue illegitimate ends.”

The court did not say when it plans to issue its decision. In an interview with *The Minnesota Daily* for a Feb. 13, 2012 story, Tatro said that if the state Supreme Court does not rule in her favor, she will try to get the U.S. Supreme Court to hear her case. She said she wants to clear her name, as she has had

trouble getting jobs and internships since the case began. “I hope that I’ll finally get closure to what I didn’t start and that the University will finally leave me alone,” she said. (For more on the Tatro case, see “Student Speech: Off-Campus, Online and in Trouble” in the Summer 2011 issue of the *Silha Bulletin*.)

Minnesota Middle School Student Sues School District Over Facebook Search

On March 6, 2012, with the help of the American Civil Liberties Union of Minnesota, a mother filed a lawsuit against Minnewaska Area School District in U.S. District Court for the District of Minnesota for disciplining her daughter for two Facebook posts she made while away from school. The girl is identified as “R.S.” in the court filings.

According to the complaint, the district violated R.S.’s First Amendment right to free speech after she posted on Facebook that she “hated” a school hall monitor who had been mean to her. The school’s principal received a copy of the post, which had been made on the girl’s own computer away from school. The principal, however, said that the Facebook post constituted “bullying,” and sent her to detention for being “rude” and “discourteous” and had her write an apology to the adult hall monitor.

The complaint also alleged that in a separate incident, the school violated her First Amendment rights as well as her Fourth Amendment right to be free of unreasonable searches and seizures. After the first incident, she made a Facebook post that said “I want to know who the f%\$# [sic] told on me.” She was disciplined for “insubordination” and other offenses and given a one-day, in-school suspension and forbidden to go on her class ski trip.

Soon afterward, when a parent complained that her son was communicating with R.S. about sex via Facebook, school employees and the Pope County Deputy Sheriff demanded that R.S. give them her e-mail and Facebook login information and passwords, and went through her accounts while she was in the room “but ... could not see the computer or control what the three adults were viewing.” “[The deputy] and school officials did not have a warrant to search R.S.’s private accounts for speech and communications made off-campus, outside of school hours, and without a school computer. ... R.S. continued to be detained and sat in the room humiliated while Deputy Mitchell, Counselor Walsh, and [an unnamed person] scoured her Facebook account and private information.” The complaint is available at http://www.aclu-mn.org/index.php/download_file/view/306/.

In a March 9, 2012 statement on the school district’s website, Superintendent Gregory F. Ohl said that the district “did not violate R.S.’s civil

rights, and disputes the one-sided version of events set forth in the complaint written by the ACLU. The district is confident that once all facts come to light, the district's conduct will be found to be reasonable and appropriate."

He said that "R.S. participated in Facebook conversations that contributed to a disruption of the learning environment and caused some people within the school community to feel unsafe. The actions taken by the school district to R.S. were intended to prevent suspected harm to self or others and to prevent disruption."

Amy Bissonette, a Richfield, Minn.-based attorney and author of *Cyber Law: Maximizing Safety and Minimizing Risk in Classrooms* told Minnesota Public Radio (MPR) for an April 4, 2012 report that "we don't have great law right now in regard to student free speech and the internet." MPR reported that she has advised schools across the country on their social media policies, telling schools to make clear that students will be held responsible for what they write online, on and off campus.

Charles Samuelson, executive director of the ACLU of Minnesota, said in a March 6, 2012 press release that "students do not shed their First Amendment rights at the school house gate. The Supreme Court ruled on that in the 1970s, yet schools like Minnewaska seem to have no regard for the standard."

The ACLU of Minnesota also prepared a handout to distribute to students outlining their privacy rights when using social networking sites. It addresses common questions students have like "Can I get in trouble for something I post online?" and "Can my school force me to log onto my Facebook (or email) to view my activity?" It can be found at http://www.aclu-mn.org/index.php/download_file/view/305/.

An Iowa Court's Anti-Hazelwood Ruling Encouraging to First Amendment Advocates

Advocates for student speech have been celebrating a November decision by the Iowa Court of Appeals that held that a school district could not discipline a high school newspaper adviser for allowing students to publish material that "upset the administration," according to a Nov.10, 2012 Associated Press (AP) report.

The case arose when a journalism teacher received reprimands from the school's principal for allowing students to publish what the administration thought were inappropriate articles in two issues of the high school newspaper, according to the opinion. One of the issues was the school's parody April Fools' Day Edition, complete with an article about a meth lab found in the biology lab

and quotes from a student who said he would “like to go to a Chippendale’s tryout” after graduation. Administrators also objected to another issue of the newspaper, which included an article about smoking and tobacco use accompanied by a picture of a baby smoking a cigarette. *Lange v. Diercks*, 808 N.W.2d 754 (Iowa Ct. App. 2011).

After *Hazelwood* was decided in 1998, several states — including Iowa — passed state statutes expanding the free expression rights of students, the opinion said. Iowa’s law grants public school students the right to publish without school administrators’ censoring the material as long as it is not obscene or libelous and does not encourage students to break the law, violate school regulations or disrupt school operations, according to the AP.

In its opinion, the Iowa court decided the content at issue did not fall under any exceptions listed under the law. The court found that the newspaper did not encourage students to break the law, violate school regulations or disrupt school operations. And it said the district was “imprecise regarding which materials they believe encouraged students to engage in undesirable acts.” The opinion is available at www.splc.org/pdf/lange.pdf.

The Iowa statute was the first of the seven state “anti-*Hazelwood*” statutes to be interpreted by American courts, according to the Student Press Law Center (SPLC).

“It’s a really good day for journalism teachers and journalism students everywhere,” Frank LoMonte, the group’s executive director, told the AP. “This is just an incredibly, incredibly important reaffirmation of the rights of students. It was an absolute must-win for the independence of student journalism and we’re very thankful the court got it right.”

In a Nov. 9, 2011 SPLC article, the attorney for teacher Ben Lange, Jay Hammond, said the Iowa decision recognizes the expanded rights student journalists receive in Iowa because of its “anti-*Hazelwood*” statute. “When Ben was reprimanded for allowing the publication of those two articles, we believed the articles were authorized under the Iowa law and that he was being sanctioned for something that he was required to let his students do,” Hammond said.

The Iowa Supreme Court decided not to hear the case on Jan. 19, 2012, which means the decision will stand. According to the court of appeals opinion, the school will have to remove the reprimands from Lange’s personnel file.

U.S. Supreme Court Rejects Student Speech Cases

This term, the U.S. Supreme Court declined to hear several student speech cases, despite divergent rulings in the lower courts.

The Court chose not to review the case of Avery Doninger, who criticized school officials online during a dispute about a battle-of-the-bands concert while she was a junior at Connecticut's Lewis B. Mills High School in 2007, according to a Oct. 31, 2011 SPLC blog post written by Executive Director Frank LoMonte. In the blog post, she said the "douchebags in central office" had cancelled the event. The school's principal then responded by disqualifying Doninger from running for secretary of her senior class, and from taking office when she won anyway as a write-in candidate. The U.S. Court of Appeals for the 2nd Circuit held that school officials were entitled to qualified immunity from the lawsuit, which is a doctrine that protects public officials from liability when the law is not clearly established. *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011).

The U.S. Supreme Court also declined to hear the cases of *J.S. v. Blue Mountain School District* and *Layshock v. Hermitage School District*, both involving students who ridiculed their principals with jokes on fake MySpace profile pages. The U.S. Court of Appeals for the 3rd Circuit found that the schools could not punish the students' off-campus speech without violating the constitution. *J.S. v. Blue Mountain School District*, 650 F.3d 915 (3d Cir. 2011); *Layshock v. Hermitage School District*, 650 F.3d 205 (3d Cir. 2011).

"That the Court has left lawyers, schools and students with no clear guidance — the same behavior that is constitutionally protected in Delaware today may be unprotected in Maryland — may understandably provoke frustration. But sometimes expedience is no value," LoMonte wrote in response to the court's refusal to hear the cases.

"America is in the grips of media-hyped hysteria over 'sexting,' 'cyberbullying,' and other acts of online stupidity, and yet little objective research confirms whether these phenomena are as widespread as the headlines — and the make-a-buck charlatans trying to sell 'prevention courses' to schools — would suggest. Writing policy for a generation — or a century — requires a reliable evidentiary foundation that doesn't yet exist," LoMonte concluded. (For more on student speech issues, see "Student Speech: Off-Campus, Online and in Trouble" in the Summer 2011 issue of the *Silha Bulletin*.)

— Emily Johns
Silha Research Assistant