DARIANO v. MORGAN HILL UNIFIED SCHOOL DISTRICT
United States District Court, N.D. California,San Francisco Division
822 F.Supp.2d 1037
November 8, 2011

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

JAMES WARE, Chief Judge.

I. INTRODUCTION

Plaintiffs bring this action...alleging...that Defendants violated their federal and state constitutional rights to freedom of expression, due process, and equal protection by disallowing them from wearing American flag shirts in a public high school [within the Morgan Hill Unified School District] on Cinco de Mayo Day.

Presently before the Court are: (1) Defendants' Motion for Summary Judgment...[and] (2) Plaintiffs' Motion for Summary Judgment...

> In laymen's terms, a motion for summary judgment can be filed, as in this case, when all parties agree on the underlying facts and simply want the judge to rule on what the law says about each position based upon those facts. No need to call witnesses...no need for a "trial" per se..."we agree on what happened, but disagree on how our rights are affected."

II. BACKGROUND...

A. *Undisputed Facts*

Plaintiffs are three students who attended Live Oak High School..., a public school district in the state of California. On May 5, 2010, Plaintiffs and two other students wore clothing including images of the American flag to school at Live Oak. Defendant Rodriguez was an assistant principal at Live Oak on that date. During "brunch break"...Defendant Rodriguez asked Plaintiffs to either remove their shirts or turn them inside out. When Plaintiffs refused to comply with this request, Defendant Rodriguez asked Plaintiffs to come to his office. Plaintiffs complied with this request.

Shortly thereafter Dianna Dariano, the mother of Plaintiff M.D., arrived at the school office.

> No, her son is not a doctor...they are using his initials to protect his privacy. Duh! I think that horse left the barn long before any lawsuit was filed, don't you?

Immediately thereafter, Defendant Boden met with Plaintiffs and the two other students in a conference room in the school's office. The students remained in the office for approximately ninety minutes. Over the course of the meeting, Defendant Boden let two of the five students, including Plaintiff M.D., return to class without changing their shirts. These two students were wearing "Tap Out" shirts. Defendant Boden told Plaintiffs D.M. and D.G. that they had to either turn their shirts inside out or go home for the day. He told them that if they chose to go home for the day, they would receive excused absences and it would not count against their attendance

record. Both Plaintiffs left school at that time. Although Plaintiff M.D. had been allowed to return to class, Dianna Dariano removed her son from school for the rest of that day...

III. STANDARDS*...*

IV. DISCUSSION

Defendants move for summary judgment on the grounds that...Plaintiffs' cause of action for free speech violations fails because school administrators reasonably forecast that Plaintiffs' clothing would cause a substantial disruption at school [and] Plaintiffs' equal protection claim fails because Plaintiffs have not offered any evidence that they were discriminated against [and] Plaintiffs' cause of action for violation of due process fails because as a matter of law Defendant Morgan Hill's dress code policy provides adequate notice to students of what attire is prohibited...

So, in a nutshell, the defendants (school personnel) contend that students' free speech rights can be abridged by a school if the school reasonably believes there will be a substantial disruption, the facts do not support the conclusion the boys were discrimintated against and the dress code provides adequate notice to students to support the school's decision.

Plaintiffs counter that they must prevail on all claims as a matter of law because: (1) Plaintiffs' attire did not cause any disruption of school activities, rendering its suppression a violation of the First Amendment; (2) Plaintiffs were denied the equal protection of the law because undisputed evidence demonstrates that they were treated differently than students wearing Mexican flags and flag colors; and (3) the undisputed evidence shows that [the school] provides no guidelines for administrators in determining when clothing is disruptive, rendering [the] dress code policy unconstitutionally vague in violation of their right to due process...

B. ***First Amendment Claim***

...Courts have long struggled to balance the First Amendment rights of students with the need of school administrators to maintain a safe and educational environment in our nation's schools. *See Morse v. Frederick* (2007)[1]. Though *Tinker v. Des Moines*[2] made clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," the Supreme Court has also consistently recognized that these rights are not co-extensive with those of adults or even of children outside of a public school setting.

Please read Tinker v. Des Moines to fully understand why the concept of not "shedding constitutional rights at schoolhouse gates" was so misleading.

[1] Case 1A-S-47 on this website.

[2] Case 1A-S-18 on this website.

Student speech which is not obscene, and which does not bear the imprimatur of the school, is governed by the standard set forth in *Tinker.* **This standard allows officials to suppress speech only on the basis of "facts which might have reasonably have led school authorities to forecast substantial disruption of or material interference with school activities."** The Ninth Circuit has noted that while simple in theory, this standard is difficult to apply across the myriad possible disruptive situations faced by school administrators. *Karp v. Becken* (9th Cir.1973). For that reason, in determining whether the *Tinker* standard has been satisfied, courts must look to "the totality of the relevant facts" present in every case. *Karp,* however, provides useful guidance as to what constitutes an adequate factual basis for believing a disruption will occur.

First, in *Karp,* the Ninth Circuit clarified that *Tinker* does not require that school officials wait until disruption occurs before they act. To the contrary, school officials generally have a duty to prevent such occurrences when possible. Second, *Tinker* "does not demand a certainty that disruption will occur, but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption."

In real terms, the "law" places a duty upon schools to prevent violence, then asks them to possess the wisdom of Solomon in making a decision that might also result in constitutional violations of free speech. What nonsense! See my Blog article posted on this web site on October 22, 2013, entitled "Judicial Arrogrance And Educational Negligence: Enablers Of Bad Behavior In Children."

Third, in evaluating the adequacy of an official's justification for suppression, "the level of disturbance required to justify official intervention is relatively lower in a public school than it might be on a street corner." Finally, school officials may be justified in suppressing speech on campus in order to prevent a disturbance even if punishing a student for that same speech would not pass constitutional muster...

The Ninth Circuit has not directly confronted the question of when a perceived threat of violence by other students against a student speaker may justify the suppression of that student's speech.

Did you catch that? In the land of the not-so-free, constitutionally protected student speech can be silenced if other students' threats of violence rise to a level of concern for the safety of the innocent student. In other words, as the threat of violence from Student A increases, the free speech rights of Student B decreases, even to a point of being silenced. Really??? When kids with an agenda get that message, their tactics are a foregone conclusion. You don't like the message of your fellow students – just threaten them and you won't have to put up with it. Such a wonderful lesson for our children.

Those circuits to confront the question, however, have demonstrated broad deference to the decisions of school administrators with regards to student safety. The Sixth, Tenth and Eleventh Circuits have all upheld bans on the Confederate flag in schools with a history of racial tensions leading to disturbances.

Query? What would these same schools do with the Union flag? An Earth Day flag? A Global Warming flag? An Anti-Obamacare flag? A Pro-Obamacare flag? Are we really to the point where the only speech that is protected is speech the government likes? Is that what Jefferson had in mind?

Similarly, the Second Circuit, in considering the propriety of suspending a student after his comments led to multiple threats of violence against him, explained that "while *Tinker* was not entirely clear as to what constitutes 'substantial interference,' violence or the threat of violence would undoubtedly qualify." Recognizing the critical importance of maintaining a safe environment, courts consistently review "with deference...schools' decisions in connection with the safety of their students even when freedom of expression is involved."

In this case, the following undisputed evidence is before the Court:

(1) In the six years that Defendant Boden was principal at Live Oak, he personally observed at least thirty fights on campus. Some...between Caucasian and Hispanic students...

(2) On Cinco de Mayo in 2009, a verbal exchange and altercation arose between a group of predominantly white and a group of Mexican students. This altercation involved an exchange of profanities and threats were made. A makeshift American flag was put on one of the trees on campus. A group of Caucasian students began clapping and chanting "USA" as this flag went up. This was in response to a group of Mexican students walking around with the Mexican flag. One Mexican student shouted "fuck them white boys, fuck them white boys." Vice–Principal Rodriguez directed the minor to stop using such profanity. The minor responded by saying "But Rodriguez, they are racist. They are being racist. Fuck them white boys. Let's fuck them up." Vice–Principal Rodriguez removed the minor from the area.

(3) **When Plaintiff M.D. wore an American flag shirt to school on Cinco de Mayo 2009, he was approached by a male student who shoved a Mexican flag at him and said something in Spanish expressing anger at Plaintiffs' clothing.**

(4) Many of the students involved in the May 2009 altercation were still students at Live Oak in May of 2010.

(5) **On the morning of Cinco de Mayo 2010, a female student approached Plaintiff M.D., motioned to his shirt, and said "why are you wearing that, do you not like Mexicans?" Plaintiffs D.G. and D.M. were also confronted about their clothing by female students before brunch break.**

(6) As Defendant Rodriguez was leaving his office before brunch break on May 5, 2010, a Caucasian student approached him and said, "You may want to go out to the quad area. There might be some...issues."

(7) During brunch break on May 5, 2010, another student called Vice–Principal Rodriguez over to a group of Mexican students and said that she was concerned about a group of students wearing the American flag and said that "there might be problems." Vice–Principal Rodriguez took her statement to mean that there might be some sort of physical altercation. A group of

Mexican students also asked Defendant Rodriguez **"why do they get to wear their flag when we don't get to wear our flag?"**

(8) Defendant Rodriguez was directed by Defendant Boden to have the students either turn their shirts inside out or take them off. Plaintiffs refused to do so.

(9) While meeting with Plaintiffs about their attire, Defendant Rodriguez explained that he was concerned for their safety. Plaintiffs did not dispute that their attire put them at risk of violence. Plaintiff D.M. stated that he was "willing to take on that responsibility" in order to continue wearing his shirt.

(10) Following Plaintiffs' departure from school they received numerous threats from other students. Plaintiff D.G. received a threat of violence via text message on May 6th. He received another threatening call from a male saying he was outside of D.G.'s home that same night. Plaintiffs D.M. and M.D. also were threatened with violence. A student at Live Oak overheard a group of male students saying that some gang members would come down from San Jose to "take care of" Plaintiffs. Based on these threats, Plaintiffs did not go to school on May 7.

Although Plaintiffs do not dispute that any of these incidents occurred, Plaintiffs contend that as a matter of law, the events prior to the school officials' intervention do not constitute a sufficient basis to forecast a substantial disruption with school activities. In support of this contention, **Plaintiffs emphasize the facts, also undisputed, that no classes were delayed or interrupted by Plaintiffs' attire, no incidents of violence occurred on campus that day, and prior to asking Plaintiffs to change Defendant Rodriguez had heard no reports of actual disturbances being caused in relation to Plaintiffs' apparel.**

Upon review, the Court finds that based on these undisputed facts, the school officials reasonably forecast that Plaintiffs' clothing could cause a substantial disruption with school activities, and therefore did not violate the standard set forth in *Tinker* by requiring that Plaintiffs change. In contrast to *Tinker*, in which the Supreme Court specifically noted that no threats of violence were made, here Defendant Rodriguez was warned by two different students that they were concerned that Plaintiffs' clothing would lead to violence.

I beg to differ. See Tinker v. Des Moines.

These warnings were made in a context of ongoing racial tension and gang violence within the school, and after a near-violent altercation had erupted during the prior Cinco de Mayo over the display of an American flag. While Plaintiffs are correct that no actual violence had erupted prior to the school officials' intervention, *Tinker* unequivocally did not establish an "actual disruption" standard. To require the school officials to ignore warnings of violence until they reached fruition would, as the Sixth Circuit noted, place school officials "between the proverbial rock and hard place: either they allow disruption to occur, or they are guilty of a constitutional violation." Although no school official can predict with certainty which threats are empty and which will lead to true violence, the Court finds that these school officials were not unreasonable in forecasting that Plaintiffs' clothing exposed them to significant danger. Because the school officials were responsible for the safety of Plaintiffs on a day-to-day basis, the Court finds that

they did not violate the First Amendment by asking Plaintiffs to turn their shirts inside out to avoid physical harm.

In truth, there is no significant difference between Tinker and this case; that is, except for the outcome.

Accordingly, the Court GRANTS Defendants' Motion as to Plaintiffs' First Cause of Action against Defendant Rodriguez.

C. *Equal Protection Claim*

At issue is whether Plaintiffs' right to equal protection was violated by the requirement that they change clothing.

Plaintiffs contend that they are entitled to summary judgment because the undisputed evidence shows that they were treated differently than students wearing the colors of the Mexican flag, and that this distinction was based on the unpopularity of their viewpoint. Defendants respond that Plaintiffs have offered no evidence demonstrating that students wearing the colors of the Mexican flag were likely to be targeted for violence, and that officials treated all students for whose safety they feared in the same manner.

So, the message to these boys is loud and clear. They should have threatened violence against those wearing Mexican colors. Then, their equal protection rights would have merit. We have lost our minds.

When the government infringes upon protected speech in a discriminatory manner, such conduct may constitute a violation of the Equal Protection Clause as well as the First Amendment. *See Police Dept. of the City of Chicago v. Mosley* (1972). "Under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny it those wishing to express less favored or more controversial views."

But how can one conclude otherwise on these facts?

Here, for the reasons discussed above, Defendants have provided a non-discriminatory basis for asking Plaintiffs to remove their American flag attire. Defendants have put forth significant evidence demonstrating that Plaintiffs were asked to change clothes in order to protect their own safety. Plaintiffs have not offered any evidence demonstrating that students wearing the colors of the Mexican flag were targeted for violence. To the contrary, the undisputed evidence shows that Plaintiffs were the only students on campus whose safety was threatened that day, at least to the knowledge of Defendants. In addition, Defendant Rodriguez has testified that he did not see any students wearing the Mexican flag on their clothing during the day. He also testified that he did not see any students with Mexican flags displayed on their person until he saw photos in the newspaper in the days following Cinco de Mayo. Plaintiffs offer no evidence to contradict Defendant Rodriguez's testimony in this regard.

In sum, the school officials have offered substantial evidence that all students whose safety was in jeopardy were treated equally. Plaintiffs offer no evidence to the contrary. Absent any evidence that the school officials treated students differently based on the content of the message they displayed, as opposed to concerns for their safety, the Court finds that the school officials are entitled to judgment as a matter of law.

Aren't you eager to know whether those that threatened violence against the plaintiffs were disciplined?

Accordingly, the Court GRANTS Defendants' Motion as to Plaintiffs' Third Cause of Action against Defendant Rodriguez.

D. *Due Process Claim*

In addition to seeking relief from Defendant Rodriguez in his individual capacity, Plaintiffs seek to permanently enjoin the use of the school district's dress code policy, which Plaintiffs contend is unconstitutionally vague and thus violates the Due Process Clause...Defendants do not dispute that the policy is their operative dress code and that Defendant Morgan Hill does not have any additional guidelines on which administrators are supposed to rely in administering the code. Defendants contend, however, that the policy provides adequate guidance to school officials under the diminished standards applicable to school disciplinary codes.

The Supreme Court has made clear that while students may challenge a school disciplinary policy for vagueness, the standards that apply to school disciplinary codes are vastly different than those governing criminal statutes. This is because of "the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process," which means that "the school disciplinary rules need not be as detailed as a criminal code." *Bethel Sch. Dist. No. 403 v. Fraser* (1986)[3]. Thus, "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures." Because of this need for flexibility, the *Fraser* Court found that the due process claim of a student who had been suspended on the basis of a policy forbidding "obscene" speech, when his speech was not legally obscene but merely overly lewd for a school setting, was "wholly without merit."

Here, the Court finds that the policy at issue does not violate the Due Process clause for lack of clarity. To the contrary, the disciplinary standard is no more vague than that at issue in *Fraser*, or than dress codes across the country that have been upheld against vagueness challenges. Plaintiffs do not cite to a single instance, in this circuit or any other, of a school dress code's ban on disruptive conduct or apparel being held overly vague, and the Court is aware of none. Thus, the Court finds that Plaintiffs' argument is precluded by *Fraser* and that the District's policy does not violate Plaintiffs' right to due process.

Accordingly, the Court GRANTS Defendants' Motion as to Plaintiffs' Second Cause of Action.

[3] Case 1A-S-33 on this website.

E. ***State Constitutional Claim****...*

V. CONCLUSION

The Court DENIES Plaintiffs' Motion for Summary Judgment and GRANTS Defendants' Motion for Summary Judgment...

> See my Blog article posted on this website on October 21, 2013, entitled "Judicial Arrogrance And Educational Negligence: Enablers Of Bad Behavior In Children."