



#QualifiedImmunity: Kansas federal court rejects First Amendment challenges to student's expulsion for sexually harassing tweets

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Nationally, federal and state courts are adjudicating lawsuits filed by students who have been expelled or disciplined by colleges and universities due to sexual misconduct offenses. The cases present diverse causes of action including Title IX, constitutional challenges (where the matter concerns a public institution), and state law claims such as breach of contract, negligence, estoppel theories and defamation. The judicial landscape is evolving while courts address the often-novel claims and define their precise role in their review of college and university disciplinary proceedings.

Last year, we published an Alert analyzing a Kansas Court of Appeals ruling that the University of Kansas (UK) wrongfully expelled a male student, Navid Yeasin (Yeasin), for sexual misconduct partly based upon his posting of lewd and vulgar tweets directed at his former girlfriend, which UK found violated a no contact order.¹ The state court held that the expulsion was improper because UK's student code provisions applied only to conduct occurring on campus or at a university-sponsored event.

Background

Seeking to build off his successful result in state court, Yeasin filed a lawsuit against a UK administrator, Tammara Durham (Dr. Durham), UK's Vice Provost for Student Affairs, in her personal or individual capacity. In this lawsuit, Yeasin alleged that the no contact order was an unconstitutional content-based restriction on his speech and that Dr. Durham violated his First Amendment rights in her review of a disciplinary panel's findings and decision to expel him. As a result of his expulsion, Yeasin claimed damages in the form of delay in completing his education,

¹ [#NoExpulsion: Kansas court rules that university cannot expel student for sexually harassing tweets](#), Nixon Peabody Higher Education Alert dated October 7, 2015, (analyzing *Navid Yeasin v. University of Kansas*, No. 113,098, 2015 Kan. App. Lexis 64 (Sept. 25, 2015)).

lost employment and wages, emotional distress and mental anguish, attorney fees and litigation costs.

In this Alert, we analyze a recent Kansas Federal District Court ruling dismissing Yeasin's constitutional challenge.²

Defendant's qualified immunity defense

Filing suit under 42 U.S.C. § 1983, Yeasin alleged that Dr. Durham violated his First Amendment rights by expelling him for his tweets and that her disciplinary actions were arbitrary and lacked a rational basis in violation of substantive due process. Dr. Durham moved to dismiss the complaint on the basis of her qualified immunity from Yeasin's claims. Dr. Durham argued that there were no constitutional violations, and alternatively, even if any such violations occurred, they were not so clearly established under the law to lead her to understand that her actions would violate federal law. The court stated that "qualified immunity gives governmental officials breathing room to make reasonable but mistaken judgments about open legal questions." This shield applies unless the plaintiff shows (1) the defendant's violation of a constitutional right; and (2) the right that the official violated was "clearly established" at the time of the challenged conduct.

Applying this two-part test, the court determined that, even accepting the truth of his complaint's allegations, Yeasin's claims that Dr. Durham violated his constitutional rights could not pass legal muster.

Context matters

First, the court addressed Yeasin's argument that the no contact order was a content-based, subject-matter restriction, which requires a strict scrutiny analysis. The court noted that this line of reasoning ignores the context in which the tweets occurred. Finding no case law to support disapproval of content-based restrictions in the context of a college or university, the court cited to *Healy v. James*, a Supreme Court decision, which holds that "a college has a legitimate interest in preventing disruption on campus" and further noted that multiple district courts have found that the less rigorous student-speech standards apply to college students.

In determining that Yeasin's alleged right to protected speech was not "clearly established," the court noted that the circuit courts have come to conflicting conclusions about whether a school can regulate off-campus, online speech where that speech could foreseeably cause a material disruption to the administration of the school. More importantly, the Tenth Circuit has not had an opportunity to rule on such a case at the public school or university level and recent case law in the Ninth Circuit post-dates the conduct in question. Again, the court noted that context matters because the Supreme Court cases that govern school student speech cases do not address Title IX sexual misconduct proceedings.

Even assuming that Yeasin had a First Amendment right to post the tweets, the court found that it was not objectively unreasonable for Dr. Durham to believe that the UK Student Code of Conduct extended her ability to discipline off-campus conduct that affected the victim on campus. And even if Dr. Durham made a mistake regarding her jurisdiction, qualified immunity allowed her to make such a mistake.

² *Navid Yeasin v. Tammara Durham*, Case No. 2:16-cv-2010-JAR, 2016 WL 7014027 (D. Kan. Dec. 1, 2016).

Yeasin received sufficient process

The court noted that although it will permit challenges on due process grounds to student dismissals, “[a]bsent certain factors ... we will uphold a school’s decision to suspend a student in the face of a substantive due process challenge if the decision is not arbitrary, lacking a rational basis[] or shocking to the conscience of federal judges.” Here, Yeasin failed to allege sufficient facts to demonstrate a substantive due process violation because he was provided significant process in the form of an investigation, formal hearing and appeals process. The court also found that it was not “shocking to the conscience” that Yeasin was expelled given the threatening tweets and his failure to comply with the no contact order. Again, as with the First Amendment issues, Dr. Durham was afforded qualified immunity because at the time of the conduct, the law did not clearly establish that she could not expel Yeasin for the threatening statements, criminal restraint and tweets.

Takeaways from the case

Colleges and universities should stay abreast of this developing area of the law. As more cases are litigated, opportunities to claim qualified immunity under the “no clearly established law” defense may diminish. Schools should also take note of the way in which the proliferation of social media may impact no contact orders. Complicating factors included the fact that the tweets in question did not explicitly name the victim, the victim was blocked by Yeasin from viewing the tweets and the tweets were made off campus. However, the effect of the tweets (which were lewd and vulgar) was negative and felt by the victim on campus and this made a difference for the court. Finally, no contact orders should be written to take into account the changing landscape of social media and the various ways in which it could be used to harass or retaliate against a victim. At the same time, schools should be aware that the same rules must apply to all parties to avoid any perception of gender bias.

Yeasin has continued with his judicial challenge by filing an appeal of the judgment to the United States Court of Appeals for the Tenth Circuit. We will monitor the proceedings and report on developments in this litigation, which raises evolving and important issues relating to sexual misconduct investigations and disciplinary proceedings.

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