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Eleventh Circuit upholds disciplinary process addressing text message communications and off-campus conduct

By Steven M. Richard

Respondents in sexual misconduct disciplinary matters are challenging in both federal and state courts the fairness of the school's process and appropriateness of the result. Their cases often plead many legal theories such as claims of gender discrimination, racial discrimination, disability discrimination, constitutional due process violations and First Amendment challenges (in cases involving public institutions), breach of contract, tortious conduct and defamation. Such cases are increasingly reaching appellate courts, which clarify the application of the relevant legal norms through binding precedents.

On September 13, 2018, the United States Court of Appeals for the Eleventh Circuit issued a ruling in an appeal brought by a disciplined student, which affirmed a federal district court's judgment in favor of Valencia College. The plaintiff alleged constitutional free speech violations, procedural and substantive due process challenges and a Title IX erroneous outcome claim. The appellate court's ruling is important because it analyzes conduct that occurred largely through text messages and off-campus interactions. *Koeppel v. Valencia College, et al.*, No. 17-12562 (11th Cir. 9/13/2018).

In its unanimous opinion written by Chief Judge Ed Carnes and joined by Judges Stanley Marcus and David Ebel, the Eleventh Circuit summarized its analysis and rulings as follows:

Accused robbers, rapists, and murderers have statutory and constitutional rights. So does a college student who is accused of stalking and sexually harassing another student. The question in this case is whether Valencia College violated Jeffrey Koeppel's statutory or constitutional rights when it suspended him for his conduct toward another student at the college. The district court did not think so, and neither do we.

Background

During a summer session at Valencia College ("Valencia"), a public state college in Orlando, Jeffrey Koeppel ("Koeppel") met a fellow student, Jane Doe, in a biology lab group. Koeppel took an attraction to Doe, who responded that she wished to interact only as classmates and that she had a boyfriend. The two students completed the summer session without incident.

Before the start of Valencia's fall semester, Koepfel saw a posting on Doe's Facebook page leading him to believe wrongly that she was no longer in a relationship. Koepfel texted Doe about his continuing attraction to her, which Doe rebuffed. Undeterred, Koepfel sent Doe a series of graphic and lewd text messages, some of which were accompanied by inappropriate pictures. Doe and her boyfriend reported the communications to the Seminole County Sheriff's Office. Doe also reported the matter to Valencia's Dean of Students. The dean informed Koepfel that he was under a no-contact order (which he violated) and was removed from a fall semester class in which Doe enrolled. Koepfel admitted to sending the messages but attempted to justify his conduct. The dean concluded that Koepfel had likely violated the college's code of conduct and convened a student conduct committee hearing.

Koepfel appeared at the hearing, but Doe did not attend and Koepfel did not object to her absence. While contending that Doe's complaint was mostly false, he did not deny sending the text messages, even after Doe told him to stop doing so. The committee found that Koepfel was responsible for code violations and recommended a one-year suspension, which the dean accepted.

After Koepfel's internal appeal was denied, he filed a federal court lawsuit against Valencia, the dean and other college officials in their individual capacities. Following discovery, the United States District Court for the Middle District of Florida entered summary judgment in defendants' favor. Koepfel appealed the judgment to the Eleventh Circuit, resulting in the ruling addressed below affirming the result in favor of the Valencia defendants.

First Amendment challenges

Koepfel contended that Valencia's policies violated his First Amendment right to free speech and were unconstitutionally overbroad and vague on their face. In a famous case addressing student protests during the Vietnam War era, the United States Supreme Court ruled in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969), that public schools may regulate student expression when it "substantially interfere[s] with the work of the school or impinge[s] upon the rights of other students." Five decades later, courts are examining *Tinker's* scope in today's era of expanding social media and text message communications outside of the campus setting. Koepfel argued that Valencia's policies violated his First Amendment rights because his messages to Doe were private, non-threatening speech, which did not cause a substantial interference at school. The Eleventh Circuit rejected Koepfel's incomplete reliance on *Tinker*, given that his conduct invaded Doe's rights "to be secure and to be let alone" and free from another student's persistent advances and insults.

Koepfel claimed that Valencia could not punish him because his conduct occurred off-campus and during a break between summer and fall classes. The Eleventh Circuit rejected his justification, citing to *Tinker's* teachings that "conduct by the student, in class or out of it" that results in the "invasion of the rights of others is, of course, not immunized by the constitutional guarantee of free speech." The court noted that the pervasive reach of the Internet has "obfuscated the on-campus/off-campus distinction." Facing this vexing issue, the court did not have to determine precisely how far *Tinker's* boundaries may extend because Koepfel's conduct clearly burdened Doe's education at the college.

Koepfel also attacked the provisions in Valencia's code of conduct about physical abuse, sexual harassment, stalking and disorderly or lewd conduct. He argued that the provisions are unconstitutionally overbroad and vague. The Eleventh Circuit focused on Valencia's stalking

provision, which prohibits willful, malicious or repeated conduct that “alarms, torments or terrorizes” another person. The court found that the stalking provision, when read as a whole, appropriately covers conduct that *Tinker* allows schools to regulate, both in the manner of its conduct and its frequency. The code’s stalking provision requires that the victim’s reaction must be both reasonable and serious, not solely an entirely subjective standard. Consequently, it is not unconstitutionally overbroad. Furthermore, it rejected Koepfel’s “vagueness” contentions because his conduct was clearly proscribed under the upheld stalking provision.

Due process challenges

Koepfel argued that the process Valencia applied to him and the discipline he received violated his procedural and substantive due process rights. Procedural due process requires that a public college must give a student notice and a hearing before imposing a suspension or expulsion. Substantive due process protects against a college acting in a constitutionally arbitrary and capricious manner.

Koepfel attacked the adequacy of his disciplinary hearing, arguing that he was denied procedural due process because the committee assumed that Doe told the truth in her unsworn complaint, denied him the opportunity to cross-examine her and applied the wrong standard of proof. Valencia responded that Koepfel’s federal procedural due process claim failed because he did not exhaust his available state remedies. Under Florida law, Koepfel could have sought review of the public college’s decision as a matter of right through a state *certiorari* proceeding. His failure to do so precluded his federal procedural due process challenge.

In a footnote stating dicta, the Eleventh Circuit expressed concerns with the dean’s deposition testimony that the committee “had taken as true,” or assumed to be true, the statements in Jane’s complaint and resulting incident report. The court noted that it “would have serious doubts about the constitutionality of this type of proceeding basing a decision on an assumption about either side telling the truth. The decision should be based on a fact finding, and if it is impossible to determine what the truth is, it should be based on the burden of persuasion. Not on assumptions.” While troubled by this assumption, the court recognized that its impact was minimal, if at all, because Koepfel admitted to the material facts underlying the charges against him.

The Eleventh Circuit easily rejected Koepfel’s substantive due process claim, emphasizing that students at a public institution do not have a fundamental right to continued enrollment. Applying deference to Valencia’s disciplinary determination, the court found nothing to suggest that the disciplinary result was arbitrary or capricious.

Title IX challenge

Koepfel also raised a Title IX erroneous outcome claim. The Eleventh Circuit applied the Second Circuit’s framework in *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994). The *Yusuf* framework requires a plaintiff to show that he was “innocent and wrongly found to have committed an offense” and that there is “a causal connection between the flawed outcome and gender bias.” Koepfel’s erroneous outcome claim failed to pass muster under the first prong. He admitted to the underlying conduct, which met the school’s definition of stalking and was therefore subject to the sanction of suspension under the code. Consequently, there was no need for the court to review whether there was any causal connection between the outcome and gender bias.

Takeaways

This case exemplifies the broad range of claims that colleges and universities often face in lawsuits brought by respondents challenging sexual harassment or misconduct disciplinary proceedings. To ensure the strength of their defenses in litigation, institutions must recognize early and proactively the wide range of relevant legal considerations (not just Title IX) applicable to the drafting and implementation of their codes and complaint processes.

The administration of a well-crafted set of legally defensible standards is still vulnerable to challenge if those implementing them are unfamiliar or uncertain with the legal requirements. Institutions should continually train those involved in the adjudicative process to ensure that relevant legal principles are followed.

Within the past two years, several federal and state appellate courts have issued rulings covering a broad array of claims in respondent lawsuits, and several more appeals will be heard soon. How these rulings reconcile or conflict will define which, if any, issues may ultimately reach the United States Supreme Court. Of immediate significance is how future rulings will be impacted by the procedural and substantive changes expected under the United States Department of Education's impending Title IX regulations.

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