

A10-1440

STATE OF MINNESOTA

IN SUPREME COURT

Amanda Tatro,

Appellant,

vs.

University of Minnesota,

Respondent.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Respondent University of Minnesota, along with its supporting amicus parties, has shifted the focus of its rationale for disciplining Appellant Amanda Tatro from claims that her off-campus speech constituted behavioral or “disruptive” misconduct to assertions that the discipline was an academic decision based on “pedagogical” or professional standards. The University cannot re-classify as an academic decision, its action which it previously described and handled as formal discipline through a process set up for behavioral misconduct where discipline was determined not by her course instructor but through a formal hearing process where all decision makers were from outside Tatro’s academic department, and the end result was characterized as discipline. The University’s “academic” explanation is nevertheless rationally and constitutionally deficient as a justification for punishing personal speech outside the classroom with no relationship to any course assignments, and where the University and its numerous supporting authoritative amicus parties have failed to set forth any specific professional rules or standards that Ms. Tatro violated by her pure speech.

The University and its supporting amicus parties further fail to provide constitutional justification for punishing Ms. Tatro for her speech based on assertions that it was disruptive or threatening. The applicable precedent compels a conclusion that Tatro’s internet speech fails to meet the standard that courts have deemed a “substantial disruption.” Merely upsetting people is insufficient. The Court must not be distracted by

alarmist suggestions that upholding Ms. Tatro's right to free speech will somehow jeopardize school security where she clearly had no intent to harm or threaten anyone with harm.¹

I. THE DISCIPLINE OF APPELLANT CANNOT BE JUSTIFIED AS A "PEDAGOGICAL" DECISION.

Although the University's attempts at justifying the constitutionality of its action before the court of appeals were focused strictly on the argument that Tatro's speech constituted a "substantial disruption" under Tinker and its progeny, it now asserts that its discipline of Ms. Tatro was an academic grading decision not subject to the required First Amendment scrutiny of restrictions on student speech. The extensive efforts by the University and amicus parties to re-characterize the discipline for alleged off-campus misconduct as an academic grading decision are wholly misplaced. First, the University characterized and treated its administrative action against Ms. Tatro as discipline for misconduct throughout its process, and the mere fact the disciplinary committee imposed sanctions that included academic consequences does not transform the nature of the process. Second, it is illegitimate and unconstitutional to academically punish Ms. Tatro's for speech that she expressed on her personal time in an off-campus setting that was unrelated to the performance of her course work. Third, the assertions by opposing

¹ Appellant rests on her original Brief in support of her arguments on the University's jurisdiction under its conduct code, the sufficiency of evidence for the violations found, and the lack of authority of the Conduct Board to alter her grade.

parties that Mr. Tatro was disciplined for violating professional norms applicable to her area of study is undermined by their inability to cite any specific professional rules or regulations that she violated.

A. The University's Action was Against Tatro was Disciplinary.

The University cannot be permitted to avoid First Amendment protections for student speech by claiming its discipline was an academic or pedagogical action for failing to meet classroom or curricular standards. Ms. Tatro did not receive an "F" grade from her professor, but from a disciplinary committee. Tatro's instructor had given Tatro a C+ based on her academic performance in the class. (Hearing Transcript at 284; Record Doc. 37, R0115). A disciplinary committee changed the grade to an F based on findings of conduct violations. The discipline included of academic and non-academic sanctions, including the "F" grade, disciplinary probation for the remainder of Tatro's academic career, requirement of a letter of apology, re-taking an ethics course, and a psychiatric evaluation. (Appellant's Addendum 30A-31A). The fact that there were sanctions with academic consequences does not alter the nature of the proceeding and sanctions as disciplinary rather than academic.

The proceedings which led to discipline were based on the University's Student Conduct Code which, by its own description and language, applies to "disciplinary offenses." (Addendum 11A). The disciplinary offenses addressed by the Student Conduct Code are all behavioral in nature, and do not apply to academic performance

other than the narrow issue of academic dishonesty. (Addendum 11A-13A). All of the alleged violations contained in the University's disciplinary complaint against Tatro were based on the Student Conduct Code, as was the disciplinary process utilized. (Addendum 6A-7A).

The suggestion that the discipline of Tatro was an "academic" or "pedagogical" decision is further negated by the composition of the persons involved in the disciplinary process who were entirely from outside of Tatro's academic department. The Campus Committee on Student *Behavior* panel responsible for the discipline decision included, an academic advisor in the College of Liberal Arts, a student in the College of Liberal Arts, the Director of the Office of Diversity in Graduate Education, a graduate student in the College of Education, an extension faculty member with the Center for Youth Development, someone from the "McNamara Academic Center for Student Athletes, and another student member who did not identify her school. (Hearing Tr. 5-6). Jeanne Higbee, a professor in the Department of Post-Secondary Teaching and Learning, was Chair of the Campus Committee on Student Behavior, and presided over the hearing. (Hearing Tr. [throughout]). The disciplinary case was presented by an attorney from the University General Counsel office.

The administrative review process included a hearing before a Provost Appeal Committee panel, which included a faculty members from the Department of Educational Psychology and Department of Civil Engineering, and students from the Law School and

College of Liberal Arts. (Addendum 34A). The final decision was issued by Provost E. Thomas Sullivan. The Court should be able to take judicial notice that Mr. Sullivan's academic background is in law, and - as with all others involved in the decision making process - not mortuary science or even medicine.²

The University and amicus parties attempt to avoid the factual reality of the process employed by attempting to characterize as an academic decision, a process completely conducted and decided by students, staff and faculty with no connection to Ms. Tatro's academic department, whose specific charge under the University's rules was to determine behavioral violations. It is incredible that a major public university that strives for national academic prominence, would employ a process for academic judgments or pedagogical decisions to be made by people with no training, background or expertise in that academic field. It is disingenuous to subject Ms. Tatro to an extensive and humiliating disciplinary process for alleged behavioral violations, and impose disciplinary sanctions as a result of that process, but after substantial constitutional challenges are made, to attempt to re-characterize the nature of the process to avoid constitutional scrutiny.

B. Tatro's Speech was Unrelated to Her Academic Performance.

The University lacks constitutional authority to take academic or academic-

² Professor Sullivan's advertised legal expertise includes antitrust law and complex civil litigation, but not mortuary science - or First Amendment law. See <http://www.law.umn.edu/facultyprofiles/sullivant.html#ElcMP6Fcqk9CBER2ZcUigA>

disciplinary action against Tatro for statements she made to friends outside any classroom setting that were unrelated to any course work. The University's introduction of a Hazelwood "legitimate pedagogical purpose" standard into this case for Facebook posts, is misplaced. Critical to Hazelwood's upholding the action of a high school in removing two pages of a student newspaper was the determination that the school newspaper was not a public forum where it was school sponsored and published as part of a course in which students were graded. Hazelwood School District v. Kuhlmeier, 108 S.Ct. 562, 568-70, 484 U.S. 260, 267-70 (1988). As Hazelwood explains,

The question whether the First Amendment requires a school to tolerate particular student speech the question that we addressed in *Tinker* - is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.

Id., 108 S.Ct. at 570-71, 484 U.S. at 270-71. The Supreme Court coined the "legitimate pedagogical justification" standard for the limited purpose of allowing schools to govern the communicative use of their own property. Id., 108 S.Ct. at 570-71, 484 U.S. at 271-73. That standard applies only to students' use of the nonpublic forum of school "curricular" publications as a vehicle for speech. Another consideration in Hazelwood, "that readers or listeners are not exposed to material that may be inappropriate for their level of maturity," Id., 108 S.Ct. at 570, 484 U.S. at 71, is a concern applicable to

secondary school students but not adult University students.

The underlying purpose of Hazelwood to permit a secondary school to regulate speech on its property for legitimate pedagogical reasons cannot be extended to University student speech on non-government property such as Facebook. To permit a student to be punished through academic channels for anything that she does -- even constitutionally protected activity -- so long as there is a legitimate pedagogical purpose is an exception that swallows not just the Free Speech protections set forth in Tinker and its progeny but all student constitutional rights.

The numerous other cases that the University and amicus parties cite in support of their theory that Tatro's Facebook posts should be regulated for academic reasons are inapplicable for the same reasons that all of them involve speech or other conduct at the occurred at the school or was part of the student's course work. All the opposing parties rely on Brown v. Li, 308 F.3d 939 (9th Cir. 2002), where that court upheld the refusal of a graduate thesis committee's refusal to approve the student's masters thesis for material sciences because it contained a "Disacknowledgements" insulting various people, which did not conform to standards set forth in the university's handbook and guide or other authoritative guides for such papers. There are again critical distinctions between Brown and the instant case, including that the the student had failed to use the proper format for a scientific paper, the thesis was clearly "curricular" rather than "extracurricular" speech, and the thesis was clearly not a public forum where it was to be cosigned by a committee

of professors who could not be required to take ownership of the content and form. Id. at 950-54. Brown specifically explained that “Plaintiff remained free to publish and publicize his ideas in many other ways.” Id. at 954. Ms. Tatro’s Facebook posts, in contrast, had no relationship to any academic assignment and could not be described as “curricular,” and the posts were made in a public forum - the precise sort of forum where Brown would have recognized Tatro’s right to publicize her ideas.

The other cases cited by the University pertaining to a school’s power to set academic standards all involve situations where students refused to perform curricular requirements. See Axxon-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004); Marinella v. Bushby, 163 F.3d 1356, 1998 WL 857879 (5th Cir. Nov. 17, 1998); Ward v. Wilbanks, No. 09-CV-11237, 2010 WL 3026428 (E.D. Mich. July 26, 2010). The amicus brief of the American Council on Education and several other organizations also cites numerous cases to the propositions that instructors have a right to set their grades, and upholding failing or other ramifications for students who fail to complete their assignments or engage in academic fraud. (Brief of ACE et al. at 7-11). Their most extensively cited case, and which is also cited by the University, Board of Curators, University of Missouri v. Howrowitz, 435 U.S. 78 (1978), addresses the power of an educational institution to dismiss a student for poor academic performance and does not even relate to free speech. These issues are not relevant to Tatro. There is no question that Tatro properly completed her required course work. Her instructor evaluated Tatro’s academic performance and

gave her a passing grade. The failing grade and other discipline was imposed not by the course instructor. The discipline was imposed by committee members and administrators who had no involvement in Tatro's academic department, much less her course work. The discipline was imposed not based on the quality of Tatro's course work or any refusal to perform assignments, but solely for ideas that she shared on the internet that had nothing to do with her academic assignments.

Had Tatro engaged in venting and commentary about her class that she posted on Facebook on an exam or in a paper or in the classroom itself, that would present a significantly different factual issues where Hazelwood and related cases involving academic standards could have had more relevance. Her statements which resulted in discipline, however, were made completely outside of the academic process in a public forum. The University's attempt to impose academic discipline for comments made complete outside of school and outside of any academic project is clear violation of Tatro's constitutional rights. A decision to uphold the power of the University to impose discipline for "pedagogical" reasons in such circumstances sets a dangerous precedent where a student can be discipline not only for literary speech, but also for any speech meeting the disapproval of school officials, such as harsh criticisms of a school program or school officials. Facebook is precisely the sort of forum where Ms. Tatro must be free to publicize ideas without interference from government authority, including a large and powerful university.

C. The University Fails to Cite Specific Professional Standards that Tatro Violated.

The University and all three of its supporting amicus brief heavily emphasize the need of the mortuary science program to enforce appropriate professional standards in order to properly train students for the profession and maintain academic accreditation. The glaring shortcoming of all parties is their failure to cite any specific legal or recognized professional standards that Ms. Tatro violated by her Facebook posts. The University's Brief cites *no* specific standards or authorities governing professional behavior other than the vague course rules which can only reasonably be construed to prohibit inappropriate behavior in the clinical setting itself or disclosure of actual private or sensitive information about cadavers outside of class. There is no support from outside professional authorities for the University's extremely broad interpretation of these rules to apply to Ms. Tatro's Facebook posts which do not reveal any confidential information and contain only vague references to lab procedures.

Amici ACE et al. and American Board of Funeral Service Education (ABFSE) do extensively discuss professional and educational accreditation standards. However, they fail to cite any standards that cover Mr. Tatro's speech that is at issue. ABFSE extensively discusses its accreditation standards and attaches its 43 page Accreditation Manual, but fails to indicate any provision that specifically applies Tatro's conduct or suggest that an educational program must police its students' behavior 24-7. It notes that "Funeral service programs involve off-site instruction including embalming cases, restorative arts cases,

and internships.” (ABFSE Brief at 7). ABFSE makes Appellant’s point by distinction -- all of the examples that it offers are examples in which the student is performing class duties or participating in class functions. While it is unremarkable that a school’s authority would extend off campus to instructional activity that takes place off campus, that is much different from extending the authority into recreational off-hours.

The only authority that ABFSE and ACE et al. cite that has any standards relevant to discussion of the issues in the instant case is Minn. Stat. § 149A.70, subd. 7, which sets forth lists specific sorts of actions which are deemed “unprofessional conduct” that can jeopardize a funeral home license. The provisions which have some relationship to this case are instructive in showing how Ms. Tatro’s statements on Facebook are clearly outside the realm of conduct that would violate statutory standards. For example, § 149A.70, subd. 7(5) prohibits “revealing personally identifiable facts, data, or information about a decedent, customer, member of the decedent’s family, or employee acquired in the practice or business without the prior consent of the individual, except as authorized by law.” Whereas the opposing parties complain about Ms. Tatro posting *anything* on the internet relating to her studies, the only written standard only prohibits revealing personally identifiable facts, data, or information. Ms. Tatro’s posts clearly did not reveal any specific information about any existing person. None of the other provisions of this pertinent statutory provision can be interpreted to remotely cover Ms. Tatro’s postings on Facebook that are outside her professional education activities and do not reveal any

specific information about those activities.

As the University suggests, Appellant would not dispute the need to allow some regulation of off-campus conduct that violate specific professional obligations. The University's own examples are instructive, which include the obligations of law clinic students, medical and other health care students to respect client or patient confidentiality or be respectful in their interactions with clients or patients. (Respondent's Brief at 21). These examples relate to actual well-defined professional obligations. By contrast, Tatro did not breach any confidentiality and was not unprofessional towards any patient or customer. She merely engaged in satirical literary expression on Facebook which did not violate any specific professional standard that any party can find.

The opposing parties' complaint about Ms. Tatro's conduct boils down to an insistence that she violated the accepted *unwritten* social norms within the profession, but they fail to show violations of any specific rules. The distinction is critical. Ms. Tatro is a student who must fulfill academic requirements which might include conforming her conduct to certain standards while engaged in course work. Ms. Tatro was a student and not an employee of the University, and no party suggests otherwise. The University's authority over her is limited to her actions as a student. She cannot be required to always behave in a certain manner that is pleasing to school officials and suppress her right to personal expression at all times, regardless of whether she performing her duties as a student or on her own time. The purported need to enforce professional standards is not

applicable where no specific standards are set forth, much less standards that pass constitutional muster.

II. THE UNIVERSITY FAILS TO DEMONSTRATE TATRO'S OFF-CAMPUS SPEECH EXCEEDED THE BOUNDS OF THE FIRST AMENDMENT.

The authorities presented by the University and its supporting amicus parties support their position that Tatro could be disciplined for her Facebook posts. Regardless of the standards employed, Tatro's internet comments were insufficiently threatening or disruptive to defeat First Amendment protections. Although there is not clear authority on whether a Tinker-like substantial disruption standard should apply to a college setting, the University does not dispute that however the standard is defined, public higher education students enjoy substantially more Free Speech protection than grade school or secondary students.

A. True Threat Analysis.

The University also does not dispute Tatro position's that her Facebook posts did not arise to the level of a "true threat" under applicable law, but instead contends that the "true threat" inquiry is not the appropriate standard for determining whether school can regulate speech that is allegedly threatening. The two Eighth Circuit cases that employed a "true threat" analysis in response to violent writings by students employed a "true threat" analysis to determine whether the First Amendment permitted discipline of high school students for those writings. Doe v. Pulaski County Special School District, 306 F.3d 616, 619, 625-26 (8th Cir. 2002); Riehm v. Engelking, 538 F.3d 952, 958-59, 963-64

(8th Cir. 2002). Contrary to the University’s suggestion, neither case held that students can be disciplined for allegedly threatening speech that was not a “true threat.”³ Both cases held that the students could be disciplined because their speech was a true threat. The cases from other federal circuits cited by the University in support of their contention that speech which is not a true threat can still be a substantial disruption are all cases involving high school rather than University students, and some are misconstrued by the University. For reasons explained in Appellant’s principle brief and acknowledged by the University, a higher education institution has less power to punish adult student speech than a secondary school or grade school. Since adult University students are entitled to full free speech protection allowed to any citizen, it is unacceptable to be able to punish their speech for being threatening if it does not constitute a true threat.

The authority cited by the University also does not so clearly support its positions. Porter v. Ascension Parish School Board, 393 F.3d 608 (5th Cir. 2004), did not hold as the University suggests, that a drawing which was not a true threat could be regulated as disruptive under Tinker. It merely recognized that the Tinker standard applied to on campus speech. Id. at 615 & n. 17. Porter did specifically hold that a student’s drawing depicting violence at the school which he made and stored at home, was not a “true threat” and therefore protected by the First Amendment. Id. at 618. With respect to the

³ The dissent in Doe which contended that the student’s writing was not a true threat, but could receive a lighter punishment based on the substantial disruption standard was a dissent and therefore not the holding of the case.

University's other two citations on this issue, Wisnieski v. Board of Education, 494 F.3d 34 (2nd Cir. 2007) and Kowalski v. Berkeley County Schools, 652 F.3d 565 (4th Cir. 2011), it is important to note that these decisions involved high school students and relied on more restrictive standards than should be applied to University students, and also both involved students whose writings involved expressions of violence or harassment directed specifically at other individuals at the respective schools. The considerations in these cases were therefore significantly different from the instant case where Ms. Tatro is an adult student and direct her Facebook posts at any individuals at the University.

B. Arguments that Tatro's Speech Caused a Substantial Disruption Must Fail.

The University and Amicus parties' arguments that Tatro's off campus Facebook posts caused a substantial disruption to the University are not grounded in objective reality. The mere fact that students or faculty were upset by Tatro's posts or feared that the posts could be directed by them does not come close to constituting substantial disruption of the University's functioning. The opposing parties utterly fail to deal with the actual definitions for "substantial disruption" set forth in Tinker and its progeny, which require "disorder or disturbance [or] interference, actual or nascent, with the school's work or of collision with the rights of other students to be secure and left alone." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 504, 89 S.Ct. 733 (1969). "Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508. "The Supreme Court has held

time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it.”Saxe v. State College Area School Dist., 240 F.3d 200, 215 (3d Cir.2001).

In the absence of an actual disruption, administrators must be able to point to “a particular and concrete basis . . . to give rise to well-founded fear of genuine disruption in the form of substantially interfering with school operations or with the rights of others.”

Sypniewski v. Warren Hills Regional Board of Education, 307 F.3d 243, 257

(3d Cir. 2002). These authorities previously included in Appellant’s principle Brief are again summarized because the University and its supporting amicus parties fail to set forth how the off-campus Facebook posts specifically interfered with the University’s functioning or anyone’s actual security, or provided any concrete basis for fear of substantial disruption. No classes were cancelled or even interrupted. No student or faculty member or staff stayed home from school or even missed any class. The University relies solely on testimony that people were concerned, had meetings to discuss their concerns, and had the police investigate. None of these activities in response to the Facebook posts approach a substantial disruption, and the meetings and investigations indeed failed to reveal any concrete basis for fear.

The University and supporting Amicus parties assert that must be able to respond to threatening behavior in order to protect security, with ACE et al. even demagogically raising the specter of the massacre at Virginia Tech. The factual evidence establishes that

the University was able to use all the tools it needed to determine whether Tatro's off-campus speech caused any threat to security. The faculty met including with Tatro and investigated the situation, and contacted the police who conducted their own investigation. The faculty further banned her from coming to the Mortuary Science Program offices, classroom or teaching spaces while the matter was being investigated by police. Once the police determined there was no crime committed and there was no reason to fear Tatro, she was allowed to return. The University was fully within its rights to investigate the situation as much as it felt the need to do so. Tatro is also not challenging on this appeal the University's action of temporarily barring her from classes. The end result was that the University was fully able to take actions needed to ensure security without disrupting any of its functioning other than Ms. Tatro's own ability to go to school. If the police or the University staff had found a concrete basis to believe Tatro posed a threat, the University could have taken further action. The fact that there was no concrete basis for determining that Tatro posed a threat or intended to pose a threat meant there was no grounds for discipline.

The cases cited by the University in support of its discretion to discipline allegedly threatening or disruptive speech all again involve high school students and much more clear cases of threats or disruption. See e.g. D.J.M. v. Hannibal Public School District No. 60, 647 F.3d 754 (8th Cir. 2011)(student sent instant message to classmate talking about getting a gun and shooting other students); Donigner v. Niehoff, 527 F.3d 41 (2nd

Cir. 2008)(student posted message on her blog falsely stating that a school event was cancelled); Weisniewski (student sent instant messages to other students with drawing of pistol firing bullet at English teacher's head). The key distinction is the Tatro was determined not to be directing her messages at anyone at the University, and her posts were not intended as threats and could not be construed as threats.

The University and supporting amicus parties emphasize the alleged danger to the Anatomy bequest program. The opposing parties fail to cite any precedent that speech can constitute a substantial disruption merely because it upsets potential donors or threatens harm to an educational institution's public image. For reasons stated in Appellant's principle brief and supporting amicus briefs, it would indeed be a dangerous precedent to permit a University to impose discipline on such grounds.⁴ It is also significant that the University has failed to provide any evidence of one donor who withdrew from the Anatomy Bequest Program or decided not to donate due to Tatro's Facebook posts. Again, the fact that people were upset by the Facebook posts cannot constitute a substantial disruption without any concrete evidence that the operation of any University Program was actually harmed. It is inevitable that a large public University will have students who engage in some sort of conduct that causes disapproval in the

⁴ Under such reasoning, a student at Penn State could have been disciplined for exposing child sex abuse in the football program since it would likely have alienated donors and hurt public trust in the program that raised great amounts of money for that University.

University community, including faculty, students and donors. The fact that a student's conduct or mere speech is deemed offensive and even alienating does not come close to justifying discipline, either on constitutional or other rational grounds.

The University makes considerable effort in arguing that the off-campus nature of Tatro's speech cannot absolve her from discipline. The bottom line, based on the University's own citations, is that such speech is beyond the reach of the University unless it at least disrupts its functions. For reasons previously stated, Tatro's Facebook posts did not disrupt the University. The fact that the posts were on the internet rather than, for example, being circulated in the classroom did indeed greatly weaken any contention that they disrupted the University.

The University cites Morse v. Frederick, 551 U.S. 393, 405-06, 127 S.Ct. 2618 (2007) for authority that a school can discipline a student for disruptive actions. However, the legal reasoning in Morse cannot be squared with the instant case. In Morse, a high school student held a banner encouraging illegal drug use in a setting that is much more closely tied to school, namely a school-endorsed outing across the street from school under the supervision of school personnel. Id. at 397. The principle suspended the student only after he refused to take down the banner. Id. at 398. It is important to note that Morse specifically rejected the proposition that that decision and Bethel v. Fraser could be used to ban speech deemed offensive:

that case [Fraser] should not be read to encompass any speech that could fit under some definition of "offensive." After all, much political and religious

speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use.

Id. at 409. The permitted speech restrictions in Morse are based on the narrow grounds involving speech that promotes illegal activity.⁵

In contrast to Morse, Tatro's speech is made by an adult college student. The setting is not physically proximate to school, or supervised by school personnel. And yet the school wants authority to punish the speech because it "offended" some of the cadaver donors. As Morse explains, "The constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," and that "the same speech in a public forum outside the school context . . . would have been protected." Morse v. Frederick, 551 U.S. at 404-05 (citing and quoting Bethel School District No. 403 v. Fraser, 478 U.S. 675, 686, 106 S.Ct. 3159 (1986)). The University has no authority under the First Amendment to punish Tatro for statements she makes about school that are completely outside of the school context.

⁵ See also Alito/Kennedy Concurrence at 422:

I join the opinion of the Court on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue . . .

The concurrence concludes, "I join the opinion of the Court with the understanding that the opinion does not endorse any further extension."Id. at 424

III. APPELLANT CANNOT SIGN AWAY HER CONSTITUTIONAL RIGHTS AND AMBIGUOUS RULES MUST BE CONSTRUED IN HER FAVOR.

MNSCU asserts in its amicus brief that the Court need not address the violations of Tatro's constitutional rights because she signed the Anatomy Bequest Form agreeing to abide by the course rules. Since Respondent did not raise this argument at any stage of the proceedings, it is not properly before the Court. However, MNSCU provides no authority for the proposition that a public school student waives her constitutional rights by abiding by a requirement to sign a form as a condition of attending a class the contains conditions that are later interpreted in a manner that violates her rights. Enforcement of such a "contractual provision" would violate the strong policy in favor of protecting a student's First Amendment Rights against intrusion by a government entity.

The Anatomy Bequest Form further only covers the policies of the Anatomy Bequest Program and laboratory policies. (R0066). The only such Rule Tatro was found to have violated after the Court of Appeals' decision was Anatomy Laboratory Rule 7. MNSCU's argument does not address the other rule violations that were found. Rule 7 provides, "Blogging about the anatomy lab or the cadaver dissection is not allowable." Tatro has explained in her principle Brief that she did not violated this Rule, and it is at the very least ambiguous whether this rule covers Tatro's conduct. "Blogging" is not defined, and it is therefore unclear whether Facebook posts are blogging. Tatro's posts further did not explain any details about the lab or cadavar dissection, but merely made vague reference to a fictitious cadaver and tools that are used.

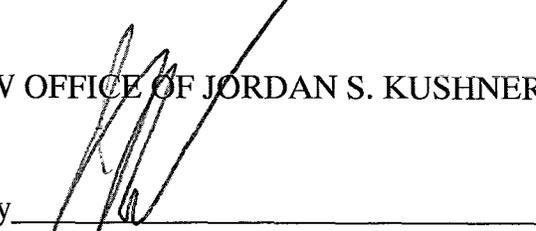
Where the terms of a contract are ambiguous, “it is a well-established principle of contract law that any ambiguity in the contract is construed against the drafter.” Premier Bank v. Becker Dev., LLC, 767 N.W.2d 691, 698 (Minn. Ct. App. 2009); see also Daltex Inc. v. Western Oil & Fuel Company, 148 N.W.2d 377, 383 (Minn. 1967); Orren v. Phoenix Insurance Company, 179 N.W.2d 166, 169, 288 Minn. 225 (Minn., 1970). When reviewing Anatomy Laboratory Rule 7 as well as the numerous other ambiguous rules that Respondent relied on to discipline Ms. Tatro, it is critical to recognize that the University drafted all of the rules in question and it is therefore necessary to construe the ambiguities in favor of Tatro.

CONCLUSION

For the foregoing reasons and reasons stated in Appellant’s original Brief, Appellant respectfully requests that the decision of the University be reversed with instructions to remove and expunge any record of discipline, change Tatro’s grade in MORT 3171 back to a C+ or any higher grade that she earned in the make-up course, and award Tatro costs and attorney fees pursuant to 42 U.S.C. § 1988.

Dated: December 26, 2011

LAW OFFICE OF JORDAN S. KUSHNER

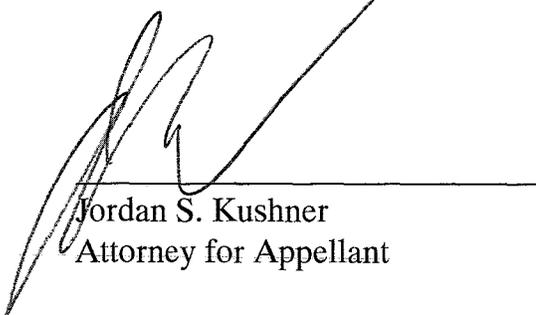
By  _____

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CERTIFICATE OF COMPLIANCE

Undersigned counsel for Appellant Amanda Tatro certifies that this brief complies with Minn.R.App.P. 132.01, subd. 3 in that it is printed in 13 point proportional font, using Wordperfect X5, and contains 5719 words including headings, footnotes and quotations.

Date: December 26, 2011



Jordan S. Kushner
Attorney for Appellant