

A10-1440  
STATE OF MINNESOTA  
IN COURT OF APPEALS

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Amanda Tatro,

Relator,

vs.

University of Minnesota,

Respondents.

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**RELATOR'S REPLY BRIEF**

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## **Clarification of Standard of Review**

Although Respondent points out case law supporting deference to the administrative disciplinary decisions of the University, it does not dispute that the applicability of the normal administrative review of whether it “made its decision based on unlawful procedure, acted arbitrarily or capriciously, made an error of law, or lacked substantial evidence in view of the entire record submitted.” Montella v. City of Ottertail, 633 N.W.2d 86, 88 (Minn. Ct. App. 2001). Respondent also does not dispute that the judicial deference does not apply to violations of Relator’s constitutional rights.

The unpublished case that Respondent relies upon as its lead authority on the standard for review of University disciplinary decisions also points out that “[t]he basic relationship between a student and an educational institution is contractual in nature” and that “catalogs and pamphlets with institutional regulations that are given to students form part of that contract.” RT v. University of Minnesota, 2002 WL 1275663 at \*1 (Minn. Ct. App. June 11, 2002)(citing Alsides v. Brown Inst., Ltd., 592 N.W.2d 468, 472 (Minn. Ct. App. 1999)(further citations omitted)). 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 the numerous 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.

It is also important to note that all of the U.S. Supreme Court cases that Respondent cites to support its position regarding the University's broad authority "to prescribe and control student conduct,"<sup>1</sup> involve juvenile students in high school or junior high school. See Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 504, 89 S.Ct. 733, 735 (1969); New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733, 734 (1985); Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 994 (1975). It is obvious that a secondary or junior high school's interest and latitude in regulating student behavior is far greater than that of a University administration's authority to control the conduct of its adult students. Yet Respondent's brief repeatedly relies on cases involving junior high or high school students as authority.

**I. THE UNIVERSITY FAILS TO DEMONSTRATE THAT JURISDICTION UNDER ITS OWN RULES TO DISCIPLINE RELATOR FOR OFF-CAMPUS CONDUCT AND UNDER RULES NOT COVERED BY THE STUDENT CONDUCT CODE.**

Respondent begins this argument with the assertion that "The Provost acted within his discretion in concluding that the Code applied."<sup>2</sup> This is a fundamental flawed theme that recurs in Respondent's Brief suggesting that the Provost, presumably by virtue of his

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<sup>1</sup> Respondent's Brief at 14.

<sup>2</sup> Respondent's Brief at 15.

stature, can arbitrarily decide how to apply the rules regardless of whether there is any specific language in the rules supporting his interpretation. The underlying problem with the underlying proceedings, including Respondent's argument before this Court, is the apparent belief that the University can make up its rules as it goes along. Respondent, however, fails to provide any plain language supporting application of its Code to Tatro's conduct. Respondent cites Subdivision 16 of the Student Conduct Code which defines violations to cover "University, collegiate or departmental regulations" without further definition. It provides no specific language or provision indicating that any of these categories cover courts syllabi or other rules. Respondent also fails to provide a reasonable basis for concluding that Tatro's off-campus conduct was "Threatening" under its rules, for reasons addressed in Relator's original brief and in Argument II below.

**II. THE UNIVERSITY FAILS TO DEMONSTRATE A REASONABLE BASIS TO DETERMINE THAT RELATOR'S CONDUCT VIOLATED THE PLAIN LANGUAGE OF THE RULES CITED.**

Respondent relies on the fact that those at the University exposed to Tatro's facebook entries found them offensive, disrespectful or threatening, and again on the Provost's general commentary about the intent of the Rules. There were no rules provided which made it a disciplinary offense to be "unprofessional" and "disrespectful" which seemed to be the extent of the provost's "analysis." Respondent's general conviction about the wrongfulness of the conduct cannot compensate for its inability to find specific rules that it can reasonably find that Ms. Tatro violated.

Respondent fails to provide an satisfactory explanation of how Anatomy Laboratory Rule 6 which addresses the physical handling of the human cadaver can be applied to literary and abstract facebook posts which do not only involve the handling of a human body or even specifically identify any cadaver. Similarly, these posts cannot reasonably be construed to violate Anatomy Laboratory Rule 7 which restricts *conversations* about dissection, and prohibits blogging but does not mention anything about Facebook. Respondent requests that the Court reject authority which requires strict construction of penal provisions based on Bethel School District No. 403 v. Fraser, 478 U.S. 675, 686, 106 S.Ct. 3159 (1986) which held that a *high school's* need to impose discipline meant that its disciplinary rules need not be as detailed as a criminal code. The broader authority that is recognized for a high school to discipline its students has not been applied to a University where students are adults. It is also worth noting that the conducted in Bethel, where a student addressed an assembly of students with "an elaborate, graphic, and explicit sexual metaphor" was more clearly in violation of a rule against "obscene language." Id. at 676. In the instant case, the University's rules were far more ambiguous in their application to Ms. Tatro's personal Facebook posts consisting of literary metaphor.

With respect to the rule against assaultive, harassing or threatening conduct, Respondent principally relies on testimony of University staff that they felt threatened by the Facebook posts, and a hearsay statement that a student claimed to be fearful. The

feelings of these witnesses cannot overcome the obvious facts about the Facebook posts that they did not indicate much less identify any target for the vague expressions, did not contain any context to indicate any intent to carry out any threat, but did contain plenty of context to make clear the statements were not meant to be taken literally. Respondent attempts to dismiss the points that the posts were obviously intended as satire and literary expression on the grounds that “the Facebook posts reveal no evidence of satire or literary worth.”<sup>3</sup> Respondent’s opinion about the quality or value of Ms. Tatro’s literary expressions is completely irrelevant. She was sharing her personal frustrations, and not entering a contest. The point is that the posts were clearly not meant literally, were not specifically directed at any identifiable person, and therefore could not be taken as threats within the meaning of the University’s rule, Subdivision 6, which requires a threat “to endanger the health, safety, or welfare of *another person*” (emphasis added).

Respondent also relies on Ms. Tatro’s explanation at the hearing that the Facebook entry in question was directed at her ex-boyfriend. Although relied upon by the Provost in his final decision, this fact is completely immaterial. The content of the Facebook post provided no information to enable anyone to identify the target of Ms. Tatro’s frustration. Only Ms. Tatro knew to who she was referring.

This situation stands in sharp contrast to the case cited by Respondent for the proposition that a party need not specifically say “I’m going to injure you,” United States

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<sup>3</sup> Respondent’s Brief at 25.

v. Dinwiddie, 76 F.3d 913, 925 (8<sup>th</sup> Cir. 1996). The defendant in Dinwiddie would stand outside an abortion clinic with a bullhorn, and over a six- to eight-month period, made approximately 50 comments to a doctor, warning about another physician who was killed by an opponent of abortions, made comments about violence to other staff, and physically assaulted a staff person. Id. at 917-18. Ms. Tatro did not make any comments directed at specific persons or in proximity to other persons, and did not engage in any violent conduct towards anyone. Ms. Tatro's Facebook posts clearly fail the test for a threat set forth in Dinwiddie for reasons discussed in her original Brief.

### **III. THE UNIVERSITY FAILS TO PROVIDE JUSTIFICATION FOR ITS DISCIPLINE UNDER THE FIRST AMENDMENT.**

Ms. Tatro primarily relies on her extensive analysis in her original Brief as to why her Facebook entries were protected Free Speech and where she addressed the same authority on "true threats," but points out that all of the cases that Respondent cites in support of its authority to discipline Ms. Tatro involved junior high or high school juvenile students rather than adult University students. Supreme Court cases that Respondent cites explain that "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. 393, 404-05, 127 S.Ct. 2618 (2007)(citing and quoting Bethel School District No. 403 v. Fraser, 478 U.S. at 682). The protection of speech that may be deemed offensive for various reasons is far more protected in a University setting.

See e.g. Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 828, 115 S.Ct. 2510, 2516 (1995); DeJohn v. Temple University, 537 F.3d 301, 314 (3<sup>rd</sup> Cir. 2008); Papish v. Board of Curators of University of Missouri, 410 U.S. 667, 670, 93 S.Ct. 1197 (1973); IOTA XI Chapter of Sigma Chi Fraternity v. George Mason University, 773 F.Supp. 792 (E.D. Va. 1991). It is critical to recognize that unlike in high school, the University cannot discipline Ms. Tatro merely because it finds her statements to be subjectively offensive or inappropriate.

The cases cited by Respondent where students were discipline for statements outside of school or on the internet are also easily distinguishable because there was no identifiable person who was the object of Ms. Tatro's alleged vague and metaphorical threats. Other federal decisions have held, even with respect to high school students, and a student's internet posts about school subject matters, even if deemed offensive, are protected free speech. See J.C. and R.C. v. Beverly Hills Unified School District, 711 F.Supp.2d 1094 (C.D. Cal. 2010); Buessink v. Woodland R-IV School District, 30 F.Supp.2d 1175 (E.D. Mo. 1998). Ms. Tatro's Facebook entries were expressions of her own personal feelings about school and life, which did not in anyway interfere with or violate her obligations to the University. She therefore had a constitutional right to her self-expressions on Facebook.

#### **IV. THE UNIVERSITY FAILS TO SHOW THE CHANGING OF RELATOR'S PASSING GRADE TO A FAILING GRADE WAS AN AUTHORIZED SANCTION UNDER ITS RULES.**

Respondent fails to cite any language in its Student Conduct Code which provides for a sanction of changing a student grade, and does not even deal with the plain language of the conduct code in its brief. It instead relies on another case involving a high school student, Zellman ex rel. M.Z. v. Independent School District No. 2758, 594 N.W.2d 216, 219 (Minn. Ct. App. 1999), which upheld a failing grade for plagiarism. Zellman challenged the direct decision of the teacher to give a failing grade which was upheld by the principal. The decision addressed whether the student was entitled to more due process, despite having admitted to plagiarism. There was no question in Zellman about the teacher's authority to issue a failing grade. The instant case differs in critical respects. Ms. Tatro is a University student rather than a high school student, and is relying provisions of a student conduct code that undisputably governs her discipline. She is challenging the authority of a disciplinary panel to change her grade where the University cannot point to any such authority in its Conduct Code. Respondent therefore fails to provide any applicable legal authority or authority under its rules for changing Tatro's grade.

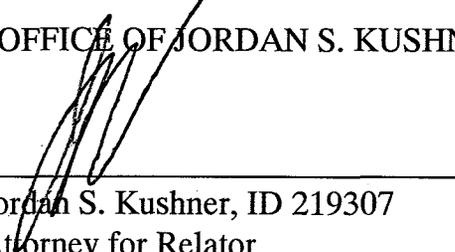
#### **CONCLUSION**

For the foregoing reasons and for reasons set forth in her original Brief, Relator respectfully requests that the decision of the University be reversed with instructions to

provide all necessary and appropriate remedies to negate her improper discipline.

Dated: February 7, 2011

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