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Recent Developments: Bethel School District No. 403 v. Fraser: First Amendment Does Not Prevent School District from Disciplining Student for Giving Offensively Lewd and Indecent Speech

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ficient to protect the bank because the policy did not address sexual harassment. The policy therefore failed to notify employees of the employer's interest in avoiding that form of discrimination. Second, the mere existence of a grievance procedure within the bank was insufficient to protect the bank against liability because the procedure required an employee to complain to her supervisor first. In this case, the employee would have had to complain to the alleged perpetrator, which she understandably failed to do. The Court left the door open regarding the rulings on employer's liability in the future. It even suggested that if the employer's "procedures were better calculated to encourage victims of harassment to come forward" the employer may be able to avoid liability. *Id.* at 2409.

Justice Marshall delivered the concurring opinion, joined by Justices Brennan, Blackmun, and Stevens. They agreed that workplace sexual harassment is illegal and violates Title VII. As regards employer liability, however, the justices concluded that "sexual harassment by a supervisor of an employee under his supervision, leading to a discriminatory work environment, should be imputed to the employer for Title VII purposes, regardless of whether the employee gave 'notice' of the offense." *Id.* at 2411.

Based on the Court's holding there may be problems in the future concerning proof of whether conduct was "unwelcome" or "voluntary." Also, the issue of employer liability in sexual harassment cases has been left open, although the Court has indicated that future cases should apply agency principles.

—Libby C. Reamer

Bethel School District No. 403 v. Fraser: FIRST AMENDMENT DOES NOT PREVENT SCHOOL DISTRICT FROM DISCIPLINING STUDENT FOR GIVING OFFENSIVELY LEWD AND INDECENT SPEECH

In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Supreme Court of the United States acknowledged that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. Recently, however, the Court held that a school district acted entirely within its permissible authority in imposing sanctions upon a high school student in response to the student's offensively lewd and indecent speech given at a school assembly. The Court held that such speech was not protected by the first amendment. *Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159 (1986).

Matthew Fraser was a high school student in Bethel, Washington. At a school assembly attended by about 600 students, many of whom were 14 years of age, Fraser delivered a speech in support of a candidate for student government office. The speech referred to the candidate in terms of explicit sexual metaphors, employing such phrases as "he's firm in his pants . . . his character is firm," "a man who takes his point and pounds it in," and "a man who will go to the very end—even the climax, for each and every one of you." *Id.* at 3167. Students at the assembly hooted and yelled during the speech, mimicking the sexual activities alluded to in the speech, while others appeared to be shocked and embarrassed. Prior to Fraser's delivery of the speech, two of his teachers with whom he had discussed the contents of his speech

in advance, advised him that it was inappropriate and should not be given.

The day after he delivered the speech, Fraser was asked to report to the assistant principal's office. At the meeting, Fraser was given notice that he was being charged with violating the school's disruptive conduct rule, which prohibited conduct that substantially interfered with the educational process, including the use of obscene, profane language or gestures. After being given an opportunity to explain his conduct, in which he admitted that he deliberately used sexual innuendos in the speech, Fraser was suspended for three days. In addition, he was informed that his name would be removed from a list of candidates on a ballot for graduation speakers.

Fraser initiated a grievance of the disciplinary action through the school district's grievance procedures. The hearing officer affirmed the decision but Fraser was allowed to return to school after serving only two days of his suspension. Fraser, joined by his father as guardian *ad litem*, then filed a civil rights action in federal district court, seeking injunctive relief and monetary damages under 42 U.S.C. § 1983. The district court, holding that the sanctions violated the student's rights under the first and fourteenth amendments, awarded Fraser monetary damages and enjoined the school district from preventing him from speaking at graduation. Fraser was elected graduation speaker and spoke at the commencement ceremonies.

The United States Court of Appeals for the Ninth Circuit affirmed the district court judgment, rejecting the argument that the nomination speech had a disruptive effect on the educational process. The court also rejected the argument that the school district had an interest in protecting



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students, most of whom were minors, from lewd and indecent language in a school-sponsored setting.

The Supreme Court of the United States reversed. Chief Justice Burger, speaking for the majority, distinguished *Tinker* as markedly different from the facts in this case. Specifically, that the penalties imposed on Fraser were unrelated to any political viewpoint. Moreover, the Chief Justice emphasized that “[i]n upholding the student’s right to engage in a nondisruptive, passive expression of a political viewpoint in *Tinker*, this Court was careful to note that the case ‘did not concern speech or action that intrudes upon the work of the schools or the rights of other students.’” 106 S.Ct. at 3163. It was against this background that the Court considered the level of First Amendment protection accorded to Fraser’s nomination speech.

The Court first discussed the role and purpose of the American public school system. The Court stated that the objectives of public education were to inculcate “fundamental values necessary to the maintenance of a democratic political system.” *Id.* at 3164, (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)). Conceding that these “fundamental values” included tolerance of unpopular views, both political and religious, the Court determined that “[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.” *Id.* at 3164. Moreover, the Court declared that while the first amendment guarantees adults wide protection in matters of public verbal expression, it does not follow that because adults are not prohibited from using offensive forms of expression when making a political point, that children in a public school must be given the same latitude.

Secondly, the Court expressed unequivocally that one of the functions of public school education is “to prohibit the use of vulgar and offensive terms in public discourse.” *Id.* at 3165. The Court reasoned that the “fundamental values necessary to the maintenance of a democratic political system” discourage the use of highly offensive terms. Furthermore, the Court indicated that the Constitution is void of any language which prohibits the states from deciding that certain expressions are inappropriate and subject to sanctions. Realizing that the inculcation of these fundamental values are truly the responsibility of the schools, the Court left the determination of what speech was appropriate in the classroom or assembly to the school board.

The Court then turned its attention to first amendment jurisprudence concerning limitations on free speech where the speech is sexually explicit and reaches an unlimited audience, especially an audience including children. The Court acknowledged that these cases recognize a concerned interest on the part of parents and school authorities “to protect children—especially those in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.” *Id.*; See *Ginsberg v. New York*, 390 U.S. 629 (1968); *Board of Education v. Pico*, 457 U.S. 853 (1982). In addition, the Court cited cases which recognize an interest “in protecting minors from exposure to vulgar and offensive spoken language.” 106 S.Ct. at 3165; See *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

Thus, the Court concluded that the first amendment did not prevent the school district from suspending Fraser in response to his offensively lewd and indecent speech, and further concluded that to permit such a speech would “undermine the school’s basic educational mission.” 106 S.Ct. at 3166. Remarking that “[a] high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students,” the Chief Justice concluded that “it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the ‘fundamental values’ of public school education.” *Id.*

The Court’s holding in *Fraser* dangerously limits a high school student’s first amendment right to free speech. Giving school officials the unbridled discretion to apply the nebulous standard of “indecency” in controlling the speech of high school students, certainly increases the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in the public schools. Language considered “indecent” in one segment of society may be common, household usage in another. Freedom to be different in one’s individual manner of expression is a core constitutional value. The first amendment reflects the considered judgment of the Founding Fathers that government shall not be permitted to use their power to control individual self-expression.

Finally, the Court characterizes Matthew Fraser as a “confused boy” whose “lewd, indecent, and offensive” speech could be “seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality.” 106 S.Ct. at 3165. The Supreme Court obviously fails to consider

the everyday environment that these students live in. Fraser was speaking not to children, but to young adults. Most high school students are beyond the point of being sheltered from the many sights and sounds they encounter everyday. Although school officials and parents may be offended by certain utterances and actions, high school students, as young adults, should be able to determine for themselves whether such conduct is inappropriate and whether it should be disciplined.

—Steven M. Schrier

***Falwell v. Flynt*: NEW YORK TIMES “ACTUAL MALICE” STANDARD DISTINGUISHED IN ACTION FOR EMOTIONAL DISTRESS**

In *Falwell v. Flynt*, *Hustler Magazine, Inc., and Flynt Distributing Co., Inc.*, _____ F.2d _____ (4th Cir. 1986), the United States Court of Appeals for the Fourth Circuit held that the level of protection available to a publisher in a suit by a public figure for emotional distress arising from a false publication is met by the recklessness standard of the tort itself. The court further held that a *New York Times v. Sullivan*, 376 U.S. 254 (1964), analysis is not required. In so holding, the court affirmed the decision by the United States District Court for the Western District of Virginia.

In *Falwell*, the lawsuit arose out of an “ad parody” that appeared in *Hustler* magazine, which attempted to satirize an advertising campaign for Campari Liqueur. In the actual Campari advertisements, celebrities talk about their “first time,” meaning their first encounter with Campari Liqueur, but there is a double entendre with a sexual connotation. In the *Falwell* parody, he is the celebrity in the advertisement which contains his photograph and an interview which is attributed to him. In this interview, Falwell allegedly details an incestuous rendezvous with his mother in an out-house in Lynchburg, Virginia. Falwell’s mother is portrayed as a drunken and immoral woman and he is portrayed as a hypocrite and a habitual drunkard. Falwell filed suit in the United States District Court for the Western District of Virginia alleging three theories of liability: libel, invasion of privacy under Va. Code § 8.01-40 (1984), and intentional infliction of emotional distress. The district court dismissed Falwell’s invasion of privacy claim and the jury returned a verdict for the defendants on the libel claim, finding that no reasonable man would believe that the parody was describing actual facts about Falwell. On the emotional distress claim, the jury