

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Offensive criticism trumps First Amendment rights

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I was disappointed to learn of the recent decision by the U.S. Court of Appeals for the Second Circuit in *Doninger v. Niehoff*, No. 07-3885-cv, a case I last discussed in March.

At the time, I disagreed with the district court's determination that the penalty imposed by the school district did not implicate the First Amendment rights of the plaintiff, a high school student.

Unfortunately, the Second Circuit upheld the lower court's decision, purporting to limit the holding to the specific facts of the case, but opening the door to the conclusion that any off-campus criticism of school administrators having the potential to cause a disruption on campus may result in school discipline.

In this case, the plaintiff, a 17-year-old high school senior, alleged the officials at her high school violated her First Amendment rights by preventing her from serving on the student council as a result of statements she wrote regarding the school's administration from her home computer, on a blog not affiliated with the school.

Specifically, she expressed her disappointment with the likely cancellation of the annual "Jamfest," a musical event she helped to organize: "jamfest is cancelled due to douchebags in central office. here is an email that we sent to a ton of people and asked them to forward to everyone in their address book to help get support for jamfest. basically, because we sent it out, Paula Schwartz is getting a TON of phone calls and emails and such. we have so much support and we really appreciate it. however, she got pissed off and decided to just cancel the whole thing all together. anddd so basically we aren't going to have it at all, but in the slightest chance we do it is going to be after the talent show on may 18th. andd..here is the letter we sent out to parents..."

"And here is a letter my mom sent to Paula [Schwartz] and cc'd Karissa [Niehoff] to get an idea of what to write if you want to write

something or call her to piss her off more. im down."

The school administrators learned of the comment two weeks later, and subsequently barred her from serving on the student council as a direct result of the blog post.

Despite noting at the outset that the Supreme Court's holding in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) — that offensive forms of expression on school grounds may be prohibited under the First Amendment — was inapplicable since the comments at issue were not made on school grounds, the Second Circuit spent an inordinate amount of time focusing on the specific "vulgar, lewd, and sexually explicit language" used by Doninger in her blog post.

In fact, the specific nature of her comments was discussed on 11 pages of the 21-page decision.

The word "offensive" was used on nine occasions and appeared on five pages in the opinion; the word "vulgar" was used seven times and appeared on five pages; the word "civility" was used 4 times and appeared on four pages; the word "values" was used five times and appeared on four pages; and the specific "offensive" phrases used by Doninger, "douchebag" and "pissed off", were reiterated on nine separate occasions, appearing on six pages of the opinion.

That's an awful lot of time spent discussing that which was deemed legally irrelevant, or at the very least, peripheral to the underlying legal analysis.

I can't help but wonder whether the disrespectful nature of the "vulgar, lewd, and sexually explicit" comments made by this young woman was the driving force behind the court's decision in this matter. While the ever-present optimist in me hopes that I'm wrong, my pessimistic side insists that I'm right.

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