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FEATURED CASE:

Education: Third Circuit Adopts New Standard, Holding that *Tinker* Does Not Proscribe "Off-Campus" Student Speech

B.L. v. Mahanoy Area School District, No. 19-1842 (3d Cir. June 30, 2020).

In a decision likely to create greater uncertainty about regulation of student posts to non-school social media, the Third Circuit adopts a rule that off-campus communication is not subject to *Tinker's* prohibition against creating disruption within schools and holds that a student's profane snapchat post cannot result in discipline against her.

B.L., a junior varsity cheerleader at Pennsylvania's Mahanoy Area High School (MAHS), was disappointed that she had not been selected to advance to varsity cheerleading. One Saturday she took photo of herself and a friend in a local store, middle fingers raised, and posted it to Snapchat. The caption read: "Fuck school fuck softball fuck cheer fuck everything." and "Love how me and [another student] get told we need a year of jv before we make varsity but that's [sic] doesn't matter to anyone else? "

B.L's coaches decided the snap violated school rules, which B.L. had acknowledged before joining the team: cheerleaders pledged to "have respect for [their] school, coaches, . . . [and] other cheerleaders"; avoid "foul language and inappropriate gestures"; and refrain from sharing "negative information regarding cheerleading, cheerleaders, or coaches . . . on the internet." B.L. was suspended from the JV team, with the option to try out again the following year.

B.L. sued the Mahanoy Area School District (District) advancing three claims under 42 U.S.C. § 1983: that her suspension violated the First Amendment; that the rules she was said to have broken were overbroad and viewpoint discriminatory; and were unconstitutionally vague.

The District Court granted summary judgment in B.L.'s favor, finding that (1) B.L. had not waived her speech rights by agreeing to the team's rules and that her suspension implicated the First Amendment even though extracurricular participation is merely a privilege; (2) B.L.'s snap was off-campus speech not subject to regulation under *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986); and (3) the snap had not caused any actual or foreseeable substantial disruption of the school environment, excluding her from discipline under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). It entered judgment in B.L.'s favor, awarding nominal damages and requiring MAHS to expunge her disciplinary record.

The Third Circuit affirmed. As it phrased it, "[T]his appeal requires that we answer just two questions. The first is whether B.L.'s snap was protected speech. If it was not, our inquiry is at an end. But if it was, we must then decide whether B.L. validly waived that protection.

Protection of Student Speech: *Tinker* made it clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate;" those speech freedoms extend to all aspects of "the process of attending school," whether "in the cafeteria, or on the playing field, or on the campus during authorized hours." The only exception allowed for regulation of speech that "would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'"

Nearly two decades later, *Tinker* was amplified in *Bethel*, which held that to "inculcate the habits and manners of civility," schools may "prohibit the use of vulgar and offensive terms." Later, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), allowed regulation of student speech in the context of "school-sponsored . . . expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." And *Morse v. Frederick*, 551 U.S. 393 (2007), held that schools could "restrict student expression that they reasonably regard as promoting illegal drug use."

Off-campus versus on-campus: Important in Circuit's analysis was whether B.L.'s snap was "off-campus" speech. The "on-campus/off-campus" question is not answered merely by analyzing physical situs, because speech originating far beyond school grounds can carry the imprimatur of "school" communication, as in the case of a school listserv. The rapid proliferation of diverse social media technologies has made this important analysis much more complex: "Updating the line between on- and off-campus speech may be difficult in the social media age, but it is a task we must undertake."

The Third Circuit had two useful precedents to reference in resolving the on- versus off-campus question. Each involved a student's fake MySpace profile ridiculing a school official using crude language. Although those profiles were created away from school, they used photos copied from the schools' websites, were shared with students, caused gossip at school and were viewed on school computers. Both decisions nevertheless held the profiles to be "off-campus" speech, finding insufficient nexus with the school. These cases informed analysis of B.L.'s snap: it did not bear the imprimatur of MAHS, was created away from campus without school resources, and shared on a social media platform unaffiliated with the school.

Ambiguity about the scope of *Tinker.* While prior cases had allowed schools to control speech that directly affected school operations and decorum, this scenario raised an issue not decided by *Tinker* and its progeny:

> The School District's defense of its decision to punish B.L. focuses not on disruption of the school environment at large, but on disruption in the extracurricular context—specifically, the cheerleading program B.L. decried in her snap. And, as the parties' and amici's dueling citations reveal, the question of how to measure the potentially disruptive effect of student speech on particular extracurricular activities has bedeviled our sister circuits, and it is not one we have addressed to date. . . .
>
> As one of our district judges put it, "a district court in this Circuit takes up a student off-campus `speech case for review with considerable apprehension and anxiety."

The Third Circuit canvassed its sister courts' application of *Tinker*. The Second and Eighth look for the "reasonable foreseeability" that a communication could cause violence or harassment on campus (for example, a posting depicting a bullet with a message to kill a named teacher). Others, like the Fourth and Ninth, seek a sufficient "nexus" to the school's "pedagogical interests," with the observation that student-on-student harassment "can cause victims to become depressed and anxious, to be afraid to go to school, and to have thoughts of suicide."

For the Third Circuit, these approaches did not adequately take into account the proliferation of technologies which elevate every limited social media posting to a "public square" broadcast of ideas, conferring too much authority on the schools: "[W]e conclude that their approaches sweep in too much speech and distort *Tinker's* narrow exception into a vast font of regulatory authority. . . . We hold today that *Tinker* does not apply to off-campus speech—that is, speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur."

While asserting that its holding provided clarity to students and school administrators alike, the Circuit acknowledged that it was not confronting a case where violence had been threatened (similar to the Second Circuit "bullet and death threat" posting

referenced above). “A future case . . . involving speech that is reasonably understood as a threat of violence or harassment targeted at specific students or teachers, would no doubt raise different concerns and require consideration of other lines of First Amendment law.” The court confirmed while such speech would likely justify greater control and remedial action, “We hold only that off-campus speech not implicating that class of interests lies beyond the school’s regulatory authority.” The Circuit recognized that its ruling “leaves some vulgar, crude, or offensive speech beyond the power of schools to regulate.”

B.L. Did Not Waive Her Free Speech Rights. A final question was whether, by agreeing to certain school and team rules, B.L. waived her First Amendment right to post the offending snap. Although B.L. and amici argued that a requirement to waive First Amendment rights as a condition of joining the team violated the unconstitutional conditions doctrine, the Circuit found no need to evaluate that issue, because a more basic answer was found in the MAHS rules themselves. The “Respect Rule” governing cheerleaders stated:

> Please have respect for your school, coaches, teachers, other cheerleaders and teams. Remember, you are representing your school when at games, fundraisers, and other events. Good sportsmanship will be enforced[;] this includes foul language and inappropriate gestures.

Obviously, that rule would not cover a weekend post to Snapchat unconnected with any game or school event and before the cheerleading season had even begun. The “Negative Information Rule” was likewise inapplicable. It stated “[t]here will be no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet.” Although this rule reached off-campus speech, it only covered “information,” a term denoting matters of fact.

The School District’s last recourse was the “Personal Conduct Rule” in MAHS’s student handbook. It provided:

> Participation on an athletic team or cheerleading squad in the Mahanoy Area School District is a privilege and the participants must earn the right to represent Mahanoy Schools by conducting themselves in such a way that the image of the Mahanoy School District would not be tarnished in any manner. Any participant whose conduct is judged to reflect a discredit upon himself/ herself, the team, or the Mahanoy Schools, whether or not such activity takes place during or outside school hours during the sports season, will be subject to disciplinary action as determined by the coach, the athletic director and/or the school principal.

This rule applied only “during the sports season;” B.L. had posted her snap between seasons. Also, disciplining students’ behavior that might “tarnish[]” the school’s “image” in “any manner,” was too obscure and subject to the whims of school officials to give rise to a knowing and voluntary waiver.

Summation: The court's summation addressed the larger issue at play:

> The heart of the School District's arguments is that it has a duty to "inculcate the habits and manners of civility" in its students. . . . To be sure, B.L.'s snap was crude, rude, and juvenile, just as we might expect of an adolescent. But the primary responsibility for teaching civility rests with parents and other members of the community. As arms of the state, public schools have an interest in teaching civility by example, persuasion, and encouragement, but they may not leverage the coercive power with which they have been entrusted to do so.

CONCURRENCE/DISSENT: Judge Ambro concurred in the result but dissented as a fundamental principle of judicial restraint--that courts should "neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Here, the speech did not even approach *Tinker's* basic standards that schools may regulate student speech only if it "substantially disrupt[s] the work and discipline of the school." The snap did not mention the District, MAHS, or any individuals, did not feature any team uniforms, school logos, or school property and did not cause any "substantial disruptions."

Here, by being "the first Circuit Court to hold that *Tinker* categorically does not apply to off-campus speech," the majority was solving a non-existent problem, with an opinion likely to create more confusion:

> The bottom line is that Circuit Courts facing harder and closer calls have stayed their hand and declined to rule categorically that *Tinker* does not apply to off-campus speech. Yet we do so here in a case bereft of substantial disruptions within the school. I fear that our decision will sow further confusion. For example, how does our holding apply to off-campus racially tinged student speech? Can a school discipline a student who posts off-campus Snaps reenacting and mocking the victims of police violence where those Snaps are not related to school, not taken or posted on campus, do not overtly threaten violence and do not target any specific individual, yet provoke significant disruptions within the school? Hard to tell. We promulgate a new constitutional rule based on facts that do not require us to entertain hard questions such as these.

LINK

COVID-19: Michigan's Stay-at-home Order and Petition Deadline Violate First Amendment Right to Access the Ballot

SawariMedia, LLC v. Whitmer, No. 20-1594 (6th Cir. July 2, 2020).

Denying the motion for a stay pending appeal, the Sixth Circuit finds the Defendants failed to show a likelihood to succeed on the merits of their appeal, because their proposed extension of the petition deadline would still unconstitutionally burden Plaintiff's First Amendment rights to access the ballot.

Plaintiffs are proponents of a criminal-justice reform initiative that they seek to place on the ballot for the 2020 Michigan general election. Governor Gretchen Whitmer, Michigan Secretary of State Jocelyn Benson, and Director of the Michigan Bureau of Elections Jonathan Brater (Defendants) continued to strictly enforce the signature requirement for initiatives even after Governor Whitmer issued an order requiring most Michigan residents to remain in their homes as part of the fight against the COVID-19 pandemic. When officials told Plaintiffs that the signature requirement would still be enforced against them, they filed suit in the Eastern District of Michigan, alleging that the combination of the stay-at-home order and the signature requirement violated the First Amendment by creating a severe restriction on their access to the ballot.

The district court agreed and enjoined strict enforcement of the signature requirement. The court rejected Defendants' proposed remedy to extend the filing deadline by several weeks, resulting in Defendants' appeal and motion for emergency stay.

The Sixth Circuit denied the motion for a stay pending appeal, holding that the Defendants failed to demonstrate a likelihood of success on the merits of their appeal.

In considering the motion for stay, the court considered four factors: (1) likelihood of success on the merits; (2) likelihood that the moving party will be irreparably harmed absent a stay; (3) prospect of harm to others due to the stay; and (4) public interest in granting the stay. As the moving party, the state carried the burden of showing entitlement to a stay; and its own potential harm and the public's interest merged into a single factor.

On appeal, Defendants argued that the district court erred in finding that the burden on Plaintiffs' access to the ballot was severe under the *Anderson-Burdick* framework, which governs First Amendment challenges to ballot-access restrictions. Defendants also argued that even if the signature requirement and filing deadline were unconstitutional as applied to Plaintiffs, their proposed extension of the deadline in the district court was enough to remedy any infirmity. The Court of Appeals disagreed.

The Circuit found that the burden imposed on Plaintiff's access to the ballot contained identical restrictions as those in *Esshaki v. Whitmer*, No.20-1336, 2020 WL 2185553 (6th Cir. May 5, 2020), which it found to be severe. The Circuit also found that

Defendants failed to show a likelihood that the district court abused its discretion by rejecting their proposed remedy. Defendants proposed to extend the petition deadline, by 40 days, from the original May 27 deadline to July 6. The district court counted from its June 11 order issuing the preliminary injunction and considered it to be a 25--day extension. The Court of Appeals reasoned that even if Defendants were right to count from the May 27 deadline, their proposed July 6 deadline would not be a 40-day extension. The governor's stay-at-home order remained in effect from May 27 until June 1. Defendants were still unconstitutionally burdening Plaintiffs' First Amendment rights during that period. Lastly, the Court of Appeals did not take a position on the merits of the petition, which was under consideration by the en banc court.

The Court of Appeals retained jurisdiction over the appeal but directed the district court to address any further remedy proposed by Defendants no later than July 15, 2020. If Defendants fail to propose a remedy that resolves the constitutional infirmity by that date, then Defendants will be precluded from enforcing the petition deadline against Plaintiffs, pending further review of any proposed remedy by that court.

LINK

COVID-19: Michigan's Order to Keep Indoor Fitness Facilities Closed During Pandemic Survives Rational Basis Test

League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, No. 20-1581 (6th Cir. June 24, 2020).

Granting a motion for an emergency stay, the Sixth Circuit defers to Michigan Governor Whitmer's Order to keep indoor fitness facilities closed during the COVID-19 crisis.

Michigan residents have been subject to a wave of executive orders governing their rights and responsibilities since the onset of the COVID-19 crisis. Plaintiffs are mostly owners and operators of Michigan indoor fitness facilities closed in all but the northernmost parts of the state by order of Governor Gretchen Whitmer. Plaintiffs challenged Michigan Executive Order No. 2020-10 on the grounds that it violated, among other constitutional protections, the Fourteenth Amendment's guarantee of equal protection of the laws treating indoor fitness facilities (which remain completely closed) differently from bars, restaurants, and salons (which may open with restrictions).

Since the Order did not involve a fundamental right or suspect classification, the district court applied rational basis review. It concluded that the Order's differential treatment of indoor fitness facilities failed the rational basis test and issued a preliminary injunction.

The Governor unsuccessfully moved the district court for a stay pending appeal. She then moved the Sixth Circuit for an emergency stay, which succeeded: the Court of Appeals held that the Order passed muster under rational basis and granted the Governor's motion for an emergency stay.

When considering whether to grant an injunction or stay pending appeal, the court balances four familiar factors: (1) likelihood of success on the merits; (2) likelihood of irreparable harm absent a stay; (3) whether issuance of the stay will substantially injure the other interested parties; and (4) the public interest in granting the stay. As the moving party, the Governor had the burden of showing the stay was warranted.

Under rational basis review, the Plaintiffs were required to disprove all possible justifications for the Order regardless whether those justifications motivated the Governor's decision making. Under this test, the Governor's action was not subject to courtroom fact-finding and could be based on rational speculation unsupported by evidence or empirical data, especially in the case of a public health crisis like the one created by COVID-19, where Michigan's latitude must be especially broad. The district court had granted the injunction primarily because the Governor did not adequately explain during the hearing the treatment of indoor fitness facilities, relying instead on conclusory statements that gyms are "dangerous." The Court of Appeals disagreed and found that the relevant standard merely required rational speculation that offered conceivable support to the Governor's Order. That heavy breathing and sweating in an enclosed space containing many shared surfaces creates conditions likely to spread the virus was a pragmatic example of rational speculation that fairly supported the Governor's treatment of indoor fitness facilities; that logic also applied to dance halls and rock-climbing facilities which are similarly closed pursuant to the Order.

Among other infirmities in the decision-making process, the Order did not close every venue in which the virus might easily spread; however, the Governor's mandate did not need to be the most effective or least restrictive measure possible to attempt to stop the spread of COVID-19.

The Circuit found that enjoining the actions of elected state officials, especially in a situation where an infectious disease has spread rapidly, caused irreparable harm. It also found that although Plaintiffs bear the very real risk of losing their businesses, the Governor's interest, and that of the and public, in combatting COVID-19 were at least equally significant.

The Sixth Circuit concluded that crises like COVID-19 call for quick, decisive measures to save lives, which can exact extreme costs that often are not felt equally, but such decisions rest with the government—including Governor Whitmer.

LINK

Ethics: Government Lawyers' Use of Official Emails to Circulate "Forum of Hate" Messages Prejudices Administration of Justice

Attorney Grievance Commission of Maryland v. Markey, AG no. 5 (Md. Ct. App. June 26, 2020).

Adopting in full the conclusions of a hearing judge, the Maryland Court of Appeals indefinitely suspends two federal government lawyers who, over a seven-year period, participated in a Veterans Administration office email ring circulating racist, sexist, and homophobic messages about co-workers.

James Markey (Markey) and Charles Hancock (Hancock) (together, Respondents), worked as a Veterans Administration (VA) Law Judge and an Attorney-Advisor, respectively, at the Board of Veterans' Appeals (Board). For approximately seven years, Markey, Hancock, and three other employees of the Board used their official VA Department (Department) e-mail addresses to participate in "the Forum of Hate," a collective that routinely sent racist, sexist, misogynistic, homophobic, xenophobic sand otherwise offensive emails to one another, often attacking colleagues. Readers can refence the actual quotes reproduced over many pages in the opinion, for which a link is attached below, but suffice it to say the language was exceptionally graphic and demeaning.

The Veterans Affairs Office of Inspector General discovered the e-mails, the VA terminated Markey, and Hancock voluntarily retired. On May 30, 2019, on behalf of the Attorney Grievance Commission, Petitioner, Bar Counsel filed a "Petition for Disciplinary or Remedial Action" against Markey and Hancock, charging them with violating various provisions of the Maryland Lawyers Rules of Professional Conduct (MLRPC). A judge of the Circuit Court for Montgomery County heard the proceeding, and in January 2020, filed an opinion including findings of fact and conclusions of law, concluding that Markey and Hancock had violated the MLRPC.

The Respondents did not contest the hearing judge's findings of fact based on the continuous and withering trail of incriminating emails. The mission of the Court of Appeals was therefore to determine whether these findings constituted clear and convincing evidence of MLRPC violation.

MLRPC 8.4(d) (Conduct That Is Prejudicial to the Administration of Justice):

> "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice[.]" MLRPC 8.4(d).

While Markey and Hancock contended that the comments in their e-mails did not violate MLRPC 8.4(d) because the comments were intended to be humorous, and were spread in a small private circle of people without the expectation or intent that they would ever

be public, the hearing judge determined that the e-mails were related to the practice of law and violated MLRPC 8.4(d). The Court of Appeals agreed that this finding was supported by clear and convincing evidence, citing various Maryland precedents: "[W]here . . . a lawyer engages in conduct that is related to the practice of law[,]" the lawyer violates MLRPC 8.4(d) if the lawyer's conduct "would negatively impact [the] perception of the legal profession" of "a reasonable member of the public[.]" Moreover, "Where a lawyer engages in "purely private conduct—i.e., conduct that is entirely unrelated to the practice of law—" the lawyer violates MLRPC 8.4(d) "if the lawyer's conduct is criminal or so egregious as to make the harm, or potential harm, flowing from it patent."

The court further amplified the meaning of "private" for these purposes—it refers to conduct unrelated to the practice of law, rather than something that is unknown by the public. In one precedent where the conduct was "private" and not actionable, the lawyer engaged in a verbal altercation with two employees of the Motor Vehicle Administration. The lawyer's conduct was "rude, boorish, insensitive, oppressive[,] and certainly Insulting," but was unrelated to the practice of law because it did not occur "during the course of litigation or court proceedings[,]"and because, "[a]lthough [the lawyer] was representing a client at the time of the incident, that fact was not readily apparent or sought to be emphasized . . . "

Here, applying the "reasonable member of the public" test, the hearing judge had concluded that "the insulting[,] demeaning language" used by Markey and Hancock would "undoubtedly bring[] the legal profession into disrepute in the eyes of a reasonable member of the public." The Court of Appeals agreed, citing a public comment about the emails: "If I were a veteran and learned that my [Board] denial may have been decided by an individual who holds racist or sexist bias, I'd sure be speaking with a veterans law attorney."

The Court of Appeals also concurred that the attorneys' conduct was related to the practice of law. When they made the statements, Markey and Hancock were a VA Law Judge and an Attorney-Advisor of the Board, respectively--positions that were law-related and could be performed only by lawyers. They made their statements using their VA e-mail addresses, mostly during work hours and significantly about other members of the VA legal department, who are responsible for reviewing veterans' claims for compensation. "Under these circumstances, it would be difficult, if not impossible, to conclude that the conduct at issue was not related to the practice of law."

The Respondents' use of their VA e-mail addresses was significant. By definition, the addresses were provided by the VA for use in providing legal work. This made defendants' arguments about privacy –however incorrectly they were construing Maryland caselaw -- even more specious: e-mails from federal government e-mail addresses can never be presumed to remain private, whether from federal senders to federal recipients or to members of the general public.

MLRPC 8.4(e) (Bias or Prejudice):

> It is professional misconduct for a lawyer to . . . knowingly manifest[,] by words or conduct[,] when acting in a professional capacity[,] bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation[,] or socioeconomic status when such action is prejudicial to the administration of justice, provided, however, that legitimate advocacy is not a violation of [MLRPC 8.4(e).]

Comment 4 to MLRPC 8.4 states in pertinent part that "a commitment to equal justice under the law lies at the very heart of the legal system. . . ." A lawyer who, while acting in a professional capacity, engages in the conduct described in section (e) "prejudices the administration of justice commits a particularly egregious type of discrimination. Such conduct manifests a lack of character required of members of the legal profession."

The hearing judge had determined that Markey and Hancock clearly manifested bias and prejudice based upon race, sex, sexual orientation, national origin, and socioeconomic status, that their views were prejudicial to the administration of justice and served no legitimate advocacy. The Court of Appeals agreed in full. It had only one prior case, recently decided, to construe MLRPC 8.4(e). In *Attorney Grievance Comm'n v. Sanderson*, 465 Md. 1, 65, 25-26, 213 A.3d 122, 159, 136 (2019), the court held that a lawyer violated the provision by approaching a social worker who had just testified at a hearing in a Child in Need of Assistance case and calling her a "baby-snatching b[****]." The court found that the lawyer was acting within his professional capacity at the time because of the temporal proximity between the hearing and the remark, and that his language knowingly manifested bias or prejudice based upon sex. That holding only buttressed the hearing judge's finding of actionable bias by Markey and Hancock.

MLRPC 8.4(a) (Violating the MLRPC):

> "It is professional misconduct for a lawyer to[] violate . . . " the MLRPC.

Given the hearing judge's conclusion that Markey and Hancock violated various provisions of the MLRPC, the court turned to sanctions, which are applied not so much to punish a particular lawyer, but instead to protect the public and the public's confidence in the legal profession.

In determining an appropriate sanction, the court considers: (1) the provision of the MLRPC that the lawyer violated; (2) the lawyer's mental state; (3) the injury that the lawyer's misconduct caused or could have caused; and (4) aggravating factors and/or mitigating factors.

Aggravating factors include: (1) prior discipline; (2) dishonest/selfish motive; (3) pattern of misconduct; (4) multiple MLRPC violations; (5) obstruction of the disciplinary proceeding; (6) false evidence or other deception during the proceeding; (7) refusal to

acknowledge misconduct; (8) victim's vulnerability; (9) substantial experience in law practice; (10) indifference to restitution or rectifying consequences; (11) illegal conduct, including use of controlled substances; and (12) likelihood of repetition.

Mitigating factors include: (1) absence of prior discipline; (2) absence of dishonest/selfish motive; (3) personal or emotional problems; (4) timely good faith efforts at restitution or to rectify; (5) full disclosure/cooperation with disciplinary proceeding; (6) inexperience in legal practice; (7) character or reputation; (8) physical disability; (9) mental disability or chemical dependency; (10) delay in disciplinary proceeding; (11) other penalties or sanctions; (12) remorse; (13) remoteness of prior MLRPC violations; and (14) unlikelihood of repetition.

The hearing judge found that the aggravating factors of substantial experience in the practice of law and a pattern of misconduct applied to both Markey and Hancock, and the additional factor of a refusal to acknowledge the wrongful nature of the misconduct applied to Markey. The Court of Appeals agreed with each of these, and found one more aggravating factor that applied to both Markey and Hancock: multiple violations of the MLRPC.

In terms of mitigating factors, the hearing judge found a lack of prior attorney discipline, cooperation with the disciplinary investigations, and the imposition of other sanctions (loss of employment) applied to both Markey and Hancock, with additional mitigating factors—remorse and good character/reputation applied to Hancock. The Court of Appeals accepted these, although it expressed doubt as to Hancock's remorse, character and reputation based on the length and tone of the email exchanges.

Sanction: The Court of Appeals suspended Markey and Hancock indefinitely from the practice of law in Maryland, pointing to their positions as public employees: "Markey's and Hancock's many inappropriate and offensive statements were demeaning of many groups of people in our society, an affront to the dignity of the legal profession, and cannot be tolerated from any members of the Bar of Maryland—especially ones who occupy positions of public trust."

Returning to a theme discussed earlier in its opinion, the court again addressed defendants' contention that their behavior was private. Considering "whether other people knew of the lawyer's conduct . . . would lead to the absurd result that whether a lawyer violated [the MLRPC] would depend on . . . how much the lawyer's conduct was publicized."

> Ultimately, it does not matter whether the lawyer's conduct was publicized before this Court considers the attorney discipline proceeding. By issuing an opinion that will become available to anyone with an internet connection, this Court will effectively inform the public of the lawyer's conduct. It would be ironic if we issued a publicly available opinion in which we recited the lawyer's conduct, then concluded that the lawyer's conduct could not have negatively impacted the

public's perception of the legal profession because the public did not actually know of the lawyer's conduct.

Any lesser sanction would send the wrong message: a reprimand or short suspension "would beg the question of what, if any sanction, would be appropriate for a lawyer who violates MLRPC 8.4(e) by making a stray offensive comment, as opposed to many statements that are deliberate, egregious, and occur over a period of time."

(Of note, Markey was already decertified and temporarily suspended from the practice of law in Maryland as a result of his failures to pay an annual assessment to the Client Protection Fund, provide information regarding his federal Tax Identification Number, and file a Pro Bono Legal Service Report and an Interest on Lawyers Trust Accounts Report. Hancock was is in inactive/retired status; his indefinite suspension will take effect on the date, if any, as of which he returns to active status as a Maryland lawyer).

LINK

Qualified Immunity: Prisoner's "Mattress Restriction" for 200 Days Violates Clearly Established Right

McClure v. Haste, no. 19-2200 (3d Cir. July 8, 2020).

Reversing the district court, the Third Circuit finds that a 200-day period of forcing a prisoner to sleep on an empty mattress and denying any mattress during the day cannot form the basis for qualified immunity.

Tabu McClure (McCLure), an inmate in Dauphin County Prison (DCP), was transferred to administrative segregation after refusing to turn on his light. The segregation cell was very cold; when McClure's request for sheets, a blanket and pillow were unanswered, he ripped the stuffing out of his mattress and crawled inside to stay warm. He was then subjected to a "mattress restriction" from February through September 2013, meaning that his mattress was taken away during the daytime and returned to him each night. The mattress he was given was the one from which he had removed the stuffing; he would lie on the mattress shell on the cell's concrete slab as a bed, sliding papers beneath it to add insulation.

McClure had a preexisting back problem, which was exacerbated by the mattress restriction—both the nighttime defective mattress the absence of any mattress to sit or lie on during the day. He began to experience substantial pain in his lower back, along with sciatica and numbness in his legs, and requested that he be given a functional mattress. While the DCP wardens gave McClure a limited amount of Motrin, they

deprived him of a new or daytime mattress until he was eventually transferred out of DPC—a period of 200 days.

McClure sued the DPC wardens; the district court granted summary judgment based on qualified immunity.

On appeal, the Third Circuit vacated and remanded. Circuit precedent instructs that the Eighth Amendment prohibits deprivations suffered during incarceration "that constitute an 'unnecessary and wanton infliction of pain,' including 'those that are totally without penological justification.'" A prisoner's Eighth Amendment conditions of confinement claim must establish two components. First, the deprivation alleged must be, objectively, sufficiently serious to constitute "the denial of the minimal civilized measure of life's necessities." This is a totality-of-the-circumstances analysis, and individual deprivations that might not be cognizable may, when combined with others, become actionable. Deprivation of sleep can qualify: the Circuit noted its own precedent holding that "[s]leep is critical to human existence, and conditions that prevent sleep have been held to violate the Eighth Amendment.'"

Second, a successful conditions-of-confinement claim requires a showing that a prison official has a "sufficiently culpable state of mind," to constitute deliberate indifference to the inmate's health or safety. While the lower court had concluded that McClure did not demonstrate "that Defendants knew or were aware of a risk to his health or safety by imposing the daytime mattress restriction," the Circuit found otherwise, noting McClure's various conversations with the DPC wardens about the harms caused by the mattress restriction.

The district court had cited precedent which appeared to countenance mattress deprivation: "The Third Circuit has concluded that an inmate is not subject to cruel and unusual punishment when he is deprived of a mattress during the day and has the mattress returned to him at night." But that statement, elevating the proposition to a matter of law, ignored important factors, such as the length of the deprivation and the totality of the circumstances. In fact, the cases cited dealt with mattress restrictions lasting only one week. There was no indication in any of them that the mattress was defective or the inmates in question had pre-existing back problems. The 200-day timeframe compelled the Circuit to conclude that the mattress restriction was "objectively, sufficiently serious, resulting in the denial of the minimal civilized measure of life's necessities."

The defendants resurrected another argument on appeal—that whatever adversity was occasioned by the mattress restriction, McClure had "clearly brought it upon himself" by eviscerating the mattress—compounded by a litany of other misconduct. In the Defendants' view, there could be no constitutional foul because McClure, much like an individual found to be in civil contempt, held the keys to release from punishment in his own hands. All McClure had to do was to shape up, the defendants asserted, and he would have been given a functional mattress to use day and night. But the cases cited for this proposition were inapposite—they involved instances where the inmates' rule

violations made provision of the deprived needs difficult or dangerous, such as threatening jail staff when they attempted to provide meals or assaulting other inmates when in the exercise area.

Those cases were clearly distinguishable, because McClure posed no threat which would obstruct providing him a new, fully functional mattress. "[W]e reject the Defendants' argument that McClure's actions justified the restriction."

The defendants argued that even if there was an Eighth Amendment violation, the right at play was not clearly established, justifying the application of qualified immunity. But as the Circuit pointed out, more nuanced interpretations of the *Saucier v. Katz* principles have evolved, and "clearly established" does not mean that "the very action in question has previously been held unlawful." Rather, "the salient question . . . is whether the state of the law' at the time of an incident provided 'fair warning' to the defendants 'that their alleged [conduct] was unconstitutional.'" Here, the defendants had such warning: "We conclude that, at the time the mattress restriction was in effect, it was clearly established that an inmate could not be effectively deprived a functional mattress for over 200 days, for no legitimate penological reason, particularly where the deprivation caused the exacerbation of his pre-existing back problems."
Reversed and remanded.

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