

UE on Appeal

Significant appeals undertaken by United Educators (UE) on behalf of our members

Summer 2022

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Warning: This newsletter contains references to graphic content related to harm of adults and minors.

U.S. Court of Appeals for the Eleventh Circuit

University Facilities and Grounds Use Policy Requiring a Permit for Expressive Activity on Campus Is Constitutional

After the Eleventh Circuit affirmed a district court's ruling denying a plaintiff's motion for a preliminary injunction and held that an intersection on campus was a limited public forum for First Amendment expression, the plaintiff amended his complaint. The district court ruled in favor of the university on summary judgment, and the plaintiff again appealed to the Eleventh Circuit, challenging the constitutionality of the university's facilities use policy.

TRAVELING PREACHER CHALLENGES ENFORCEMENT OF UNIVERSITY'S POLICY

Rodney Keister is a Christian evangelist who said his mission is to share his faith with others in public spaces. In March 2016, Keister and a companion went to the University of Alabama in Tuscaloosa, a state-funded public university, to spread their message to students. Keister started preaching on a sidewalk next to a street located between two university buildings and across from the Quad — in a grassy area in the center of campus. Keister distributed literature and posted a banner while his companion preached using a megaphone.

Soon after, campus police and a university representative approached Keister and told him the university's policy for the use of university space, facilities, and grounds required a permit before people could participate in expressive conduct on university grounds. According to Keister, a campus police officer said Keister could relocate to a different sidewalk at the corner of an intersection, which he did. Keister continued to speak about his faith at that location. As he was leaving, Keister was informed by the same officer who stopped Keister earlier that the officer and other university employees were mistaken when they said Keister could preach at the secondary location without a permit.

Keister subsequently filed a motion for preliminary injunction in federal district court seeking to prevent the university from enforcing its policy. The Eleventh

Circuit affirmed the district court’s denial of Keister’s motion after he filed an interlocutory appeal, holding that the intersection is a limited public forum.

Keister filed an amended complaint asserting First Amendment and Fourteenth Amendment due process claims against university administrators in their official capacities, claiming the intersection didn’t fall within campus bounds. The university prevailed on summary judgment, and Keister again appealed. Because Keister sued all defendants in their official capacities — including the President of the university and Chief of the university’s police department — the Fourth Circuit’s opinion refers to them collectively as the “university.”

COURT ANALYZES POLICY UNDER REQUISITE LEVEL OF SCRUTINY

To determine when private speakers can use government property for public expression, courts apply a forum analysis. The type of forum to which a policy pertains determines the level of scrutiny applied to that policy. Assessing the type of forum a particular piece of government property may be requires a court to consider the traditional uses made of the property, the government’s intent and policy concerning the usage, and the presence of any special characteristics. At issue for the court in Keister’s second appeal was whether the university’s policy withstood the requisite level of scrutiny applicable to a limited public forum. Keister also argued that new facts supported the conclusion that the intersection is a public forum.

With the benefit of a court record, the court reiterated its initial forum analysis and reached the same conclusion: The intersection is a limited public forum. Keister contended the sidewalk at issue is merely a municipal sidewalk the city of Tuscaloosa owns, thereby rendering it a traditional public forum as a matter of law. Unpersuaded, the court concluded the sidewalk at issue is on campus, being located just a block from the Quad and immediately in front of the building housing the History department. The court further noted that the university controls and maintains the sidewalk.

As a limited public forum, the university can restrict access to certain classes or types of speech. To determine whether a restriction is constitutional, courts apply a “reasonableness” level of scrutiny, such that any restrictions on speech must be viewpoint neutral and reasonable in light of the purpose the forum at issue serves. Keister challenged several aspects of the university’s policy, including requiring a speaker to get a permit before leafleting. The permit requires a

university-affiliated sponsor, which Keister claimed effectively imposed a ban on leafleting because he couldn’t find one. The court, citing similar cases, upheld this aspect of the policy as constitutional, noting that it doesn’t let the university deny a permit simply because it disagrees with the content of a speaker’s speech. Keister also asserted that one of the policy’s exceptions, for “casual recreational or social activities,” is unconstitutionally vague. The court disagreed and concluded Keister’s actions did not fall within this exception.

Keister last challenged the policy’s advance notice requirement, which provides that applicants for a grounds use permit should request permission 10 working days prior to the event. The university defended the notice period as necessary to ensure the space is available and the event won’t interfere with university operations. Moreover, the policy didn’t require an application be submitted 10 days in advance; rather, it instructed that one “should” be submitted. Keister never applied for a permit, and there was no evidence that the university had ever rejected an application simply because it wasn’t submitted 10 days before the event.

The policy also permitted “fast-tracking” a permit if an event relates to a current issue or responds to another event. Noting that a university’s policy must be “reasonable, not perfect,” the court also found this advance notice requirement constitutional.

THE BOTTOM LINE

The Supreme Court has recognized that higher education institutions differ from other public forums in important ways, including their mission to educate. Institutions should ensure policies relating to use of campus or university facilities are clear, reasonable, tied to the university’s mission, and viewpoint neutral. When it comes to evaluating requests from any speaker to use the campus — including controversial groups or speakers — institutions must objectively apply their policies.

Keister v. Bell et al., 29 F.4th 1239 (11th Cir. Mar. 25, 2022), *pet’n for reh’g en banc denied*.

RELATED UE RESOURCE

- [Responding to Controversial Events on Campus: A United Educators Symposium](#)

University Not Liable for Shooting at Campus Party Despite Allegations of Insufficient Security

In a tragic case arising from the shooting of a visitor on campus by a non-student, the Fourth Circuit found no legal duty by Wake Forest University, as required to establish negligence, when the shooting at an event venue on campus wasn't foreseeable.

GUEST SHOT AT SORORITY EVENT ON CAMPUS AFTER VERBAL ALTERCATION ESCALATED

On the night of Jan. 19, 2019, a sorority at Wake Forest University, a private institution, hosted a party at a campus event center called the Barn. The party, a large event like many of the student parties held there, was open to students at nearby universities. Najee Ali Baker, a student at nearby Winston-Salem State University, attended, as did Jakier Austin, a former student at that university, who had a valid student identification card.

Baker got into an argument with a friend of Austin's inside the Barn that escalated to pushing and shoving. Austin and his friends left, and Baker followed a few minutes later. Lucas Willie, a student Event Resource Manager stationed near the entrance, heard either Baker, Austin, or one of Austin's friends yell, "Go get your gun." Minutes later, Austin shot and killed Baker on the roadway nearby. In 2020, Austin pled guilty to voluntary manslaughter.

Baker's family sued, alleging the university was negligent in staffing and event management for the party. They argued a history of altercations at parties at that location should have put the university on notice of the need for a more robust security presence, but instead the university allegedly weakened security by implementing a new security plan for events there that:

- Transferred most of the event management duties from the Wake Forest Police Department to student event resource managers
- Reduced police presence
- Transferred security duties to a private security company whose security officers had a "hands-off" approach, meaning that, unlike Wake Forest police, they weren't allowed to physically intervene to stop fights

Student organizations, Wake Forest police, and other campus stakeholders collaborated to implement the new security plan to address tension with students created by the strong police presence at Barn events.

The university moved for summary judgment, arguing the shooting wasn't foreseeable. The district court granted the motion. Baker's family appealed.

NO LEGAL DUTY BECAUSE CAMPUS SHOOTING NOT FORESEEABLE

Under North Carolina law, a defendant's status as a landowner can create a duty to non-trespassers coming onto their property to act as a reasonable person would under the circumstances. One limitation on this duty is that a landowner is generally not responsible for intentional criminal acts committed by third parties on its land. If, however, criminal acts of third parties are "reasonably foreseeable," the landowner must take reasonable steps to protect non-trespassers.

The most probative evidence in determining whether a criminal act was foreseeable is evidence of prior criminal activity. North Carolina courts examine three factors in making that determination: The location, type, and quantity of prior criminal acts. The more incidents of prior similar criminal acts in a particular location, the likelier a criminal act is foreseeable and a duty attaches. However, a scattering of mostly unrelated incidents over several years is insufficient to establish a reasonable foreseeability that a certain criminal act will occur.

Looking at the first factor — location — the court found that whether focusing on the Barn and its immediate surroundings, or the university's campus as a whole, no prior similar criminal attacks occurred there. Before Baker was shot, there never had been shootings connected to events there or any other locations on campus.

Given the lack of prior similar criminal attacks, the court stated that in this case, the second and third factors — the nature and quantity of prior criminal activity — overlap. Though the prior crimes need not be exactly alike, there must be similarities. While eight violent incidents occurred in the seven years between the opening of the Barn and the shooting of Baker,

THE BOTTOM LINE

none involved a shooting. Five incidents involved pushing and shoving or a fistfight, one of which caused a bystander to suffer an injury, and of the remaining incidents, only one, where a student was beaten unconscious, required medical attention. That incident, which did not involve a weapon, occurred before the university implemented its security plan.

As a result, the court held that the nature and quantity of prior crimes in the vicinity of the Barn leading up to Baker's death were insufficient to make it foreseeable that a shooting would occur.

Baker's family fared no better in arguing that the particular events of that night gave the university "actual notice of an imminent risk of harm," thereby making the shooting foreseeable. They argued that the "Go get your gun" exclamation gave actual notice that Austin would shoot Baker. The student Event Resource Manager who heard the statement couldn't identify the speaker or the statement's intended recipient. He also didn't believe the statement was a literal threat, perceiving it instead as trash talk. Under those circumstances, the court held there was no actual notice of an imminent shooting.

In an action alleging that a school negligently permitted a campus injury to occur due to insufficient security measures, lighting, supervision, control over building entrances, or other security inadequacies, the injured party must establish, among other things, the school's legal duty to protect the plaintiff from harm. Like North Carolina law, many state laws provide that a defendant generally has no legal duty to protect a person from criminal acts of a third party absent a special relationship between the parties, such as an innkeeper and a guest, a business owner and invitee, or, in some situations, a school and its student.

It is important to understand your state's laws regarding duties to protect others from harm, including laws with respect to foreseeability and actual notice of a risk of imminent harm.

Baker v. Wake Forest Univ., Case No. 21-1920, 2022 U.S. App. LEXIS 13975 (4th Cir. May 23, 2022) (unpublished)

RELATED UE RESOURCES

- [Checklist: Risk Management for Campus Student Events](#)

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Contact info@ue.org to request these resources.

U.S. Court of Appeals for the Tenth Circuit

School District Didn't Violate Students' Substantive Due Process Rights in Tragic School Bus Accident

Accepting the plaintiffs' allegations as true for purposes of ruling on a motion to dismiss, the Tenth Circuit affirmed that a school district couldn't be liable based on a failure to allege that any school employee committed an underlying constitutional violation. A danger-creation claim against a bus driver also failed based on qualified immunity. The court remanded the case to state court to address remaining state law claims.

HEAD-ON COLLISION OCCURS AFTER BUS SWERVES TO AVOID CRASH

After Konawa Junior High School's softball team played an away game, their coach, Joseph Scoggins, drove six student-athletes back to school on a school bus. As the bus

traveled on a two-lane road, Scoggins and the students spotted an SUV on the wrong side of the road traveling toward them.

Other drivers pulled over to avoid a crash with the SUV. Scoggins, however, told the students that he planned to avoid an accident by veering into the left lane just before impact, so that the SUV would strike the back of the bus. As Scoggins steered into the left lane, the SUV driver changed into the same lane and the vehicles collided head-on.

Rhindi Isaacs, who was seated in the bus's stairwell with Scoggins' permission, died in the crash. The school's Principal arrived on scene and began searching for the students, locating everyone except Isaacs. When the Principal asked

where she was, Scoggins first said she was on the right side of the bus with two other students, then said she was taken by ambulance to the hospital.

En route to the hospital, the Principal learned that Isaacs had died on the bus.

Isaacs' estate filed suit against Scoggins and the school district, asserting Fourteenth Amendment substantive due process claims under Section 1983 and state law claims. The parents of two other students injured in the crash also filed suit separately from Isaacs' estate.

The district court granted the defendants' motions to dismiss in both cases and remanded the remaining state law claims to state court.

The plaintiffs appealed the district court's dismissal, and the Tenth Circuit consolidated the cases for appeal.

QUALIFIED IMMUNITY APPLIES TO DANGER CREATION CLAIM AGAINST BUS DRIVER

The plaintiffs asserted due process claims against Scoggins individually. The district court dismissed these claims based on Scoggins' qualified immunity defense, and the Tenth Circuit affirmed.

When qualified immunity is raised, the plaintiff bears the burden of overcoming the defense by pleading facts demonstrating that the defendant violated a federal constitutional or statutory right and that the right was clearly established at the time. To prevail, the plaintiff must prove that government action deprived a person of life, liberty, or property in a manner so arbitrary that it "shocks the conscience." This standard requires much more than negligence — a plaintiff must prove that a government actor arbitrarily abused his authority or employed it as an instrument of oppression. In a situation "calling for fast action," only official conduct done with an intent to harm violates the due process clause of the Fourteenth Amendment.

As a general rule, failure to protect a person against private violence, such as the SUV driver's conduct, doesn't constitute a violation of the due process clause. One exception to the rule — the danger-creation exception — applies when a state actor affirmatively acts to create or increase a plaintiff's vulnerability to danger from private violence. Under this exception, a plaintiff also must prove the defendant's action shocked the conscience.

The plaintiffs argued that Scoggins created or increased danger to the students by changing lanes and crashing into the SUV instead of pulling over and, with respect to Isaacs, by allowing her to sit in the bus's stairwell, stepping over her body to exit the bus, and purposely misleading the Principal about her location.

However, the complaint described Scoggins' plan to veer into the left lane as a plan to "avoid" a head-on crash. While the court noted that Scoggins shouldn't have let Isaacs sit on the stairs, he didn't intend for the SUV to collide with the bus, near where she sat.

Finally, although Scoggins took a risk by deciding to change into the left lane to avoid the SUV, the court found it wasn't a risk taken with intent to harm the students. Accordingly, because the allegations failed to demonstrate an intent to harm, Scoggins' conduct did not shock the conscience, and the court affirmed the district court's conclusion that he did not violate the students' due process rights under a danger-creation theory. Because Scoggins did not commit an underlying constitutional violation, the court also affirmed the grant of qualified immunity to Scoggins.

DISTRICT CAN'T BE LIABLE FOR EMPLOYEE'S ACTIONS ABSENT UNDERLYING CONSTITUTIONAL VIOLATION

A district may be liable for constitutional violations under 42 U.S.C. Section 1983 if the governmental body itself subjects a person to or causes such a deprivation of rights.

To establish municipal liability, a plaintiff must establish:

- The existence of a municipal policy or custom
- A direct causal link between the policy or custom and alleged injury
- That the policy was enacted or maintained with deliberate indifference to an almost inevitable constitutional injury

However, a district can't be held liable for its employees' actions if those actions don't constitute a violation of a plaintiff's constitutional rights.

On appeal, the plaintiffs argued the district violated their substantive due process rights through its policies of requiring bus drivers to work in excess of 15 hours a day and failing to provide a chaperone on "activity trips." However, because the plaintiffs failed to allege that Scoggins or any other district employee committed an underlying constitutional violation,

the court held that the district court properly dismissed the plaintiffs' Section 1983 claims against the school district.

THE BOTTOM LINE

Parents whose children are injured may seek to recover damages from a public school district or individual employees when they believe something could have been done to prevent the injury. Because the applicable state tort claim act may in many cases provide immunity to districts and employees for student injuries, plaintiffs often assert additional claims, including alleged statutory violations and/or

Section 1983 due process claims, which also may present serious challenges to recovery. As the Tenth Circuit held here, when an injury is caused by third-party violence, to establish a due process clause violation, a plaintiff generally must show a district actor affirmatively acted to create or increase the student's vulnerability to such danger in a manner shocking the conscience, and, if the situation called for quick action, a plaintiff also must show official conduct with an attempt to harm.

Isaacs v. Konowa Pub. Schs., 2022 U.S. App. LEXIS 9912, 2022 WL 1100402 (10th Cir. Apr. 13, 2022).

U.S. Court of Appeals for the Fifth Circuit

Clinical Professor Whose Contract Wasn't Renewed Failed to Establish Gender Discrimination, Retaliation, or Hostile Work Environment

A recent Fifth Circuit case demonstrates the challenges an employee may face in establishing an inference of discrimination sufficient to withstand an employer's motion for summary judgment, when there is no direct evidence of discriminatory intent.

MEDICAL SCHOOL PROFESSOR COMPLAINS OF ALLEGED TOXIC ENVIRONMENT

In 2014, Dr. Lesley Ann Saketkoo began a clinical appointment as an Associate Professor at Tulane's School of Medicine. Her one-year contract was continually renewed until 2019, two years after she transferred to the school's pulmonary section, reporting to a new supervisor, Dr. Joseph Lasky.

Lasky allegedly engaged in conduct such as ridiculing Saketkoo when she made suggestions or asked questions, commenting that other women were "very difficult to work with" or were the "enemy," and causing another female doctor to cry. That doctor allegedly told Saketkoo that Lasky "does this to strong women." In September 2018, Lasky allegedly berated Saketkoo in an intimidating way when he wrongly accused her of failing to tell him she was teaching an undergraduate class. After this incident, Saketkoo complained to Tulane's Office of Institutional Equity (OIE) and superiors about Lasky and the "toxic" work environment he created.

Five months later, Dean Lee Hamm told Saketkoo that her employment contract wouldn't be renewed because she

wasn't earning enough to cover her salary. Saketkoo then told Hamm that Lasky had discriminated against her and other women because of their gender. Although Hamm told Saketkoo that OIE would investigate her discrimination complaint, he said the investigation's outcome wouldn't change the decision to non-renew her contract, which expired in June 2019. Saketkoo later alleged that three months after her contract expired, Hamm interfered with a potential employment opportunity by telling Dr. Nirav Patel that he shouldn't hire her at the University Medical Center (UMC).

Saketkoo sued Tulane, alleging gender discrimination, retaliation, and a hostile work environment in violation of Title VII. The district court granted summary judgment to Tulane. Saketkoo appealed, but the Fifth Circuit affirmed.

PLAINTIFF FAILS TO IDENTIFY APPROPRIATE COMPARATORS, ESTABLISH A HOSTILE WORK ENVIRONMENT, OR SHOW PRETEXT

Because Saketkoo had no direct evidence of discriminatory intent, she needed to demonstrate, among other things, that other similarly situated employees outside her protected class were treated more favorably. An important factor in the school's renewal decision was whether a faculty member could generate revenue at least equal to their salary. Although Saketkoo was able to point to some male physicians who

were retained even though they hadn't earned enough to cover their salaries some years, she was the only one who ran a deficit every year of her employment. She also failed to provide evidence that the male physicians shared her research responsibilities, section assignments, historical performance, or other attributes so as to make them valid comparators.

The court also held that she didn't meet her burden to demonstrate that Tulane's explanation for the adverse action was pretextual. Tulane presented evidence of a policy of retaining physicians operating at a deficit if they were heavily involved in medical education and/or "mission-critical" practices. While several of Saketkoo's male comparators fell within these categories, Saketkoo's sub-specialty of rheumatology wasn't deemed by Tulane to be mission-critical, and she failed to rebut the school's contention that the male physicians who operated at deficits added value in ways she did not. Accordingly, the Fifth Circuit affirmed summary judgment on Saketkoo's gender discrimination claim.

The appellate court also found that Saketkoo's allegations of Lasky's sporadic, demeaning, and abrasive conduct were insufficiently severe or pervasive to sustain her hostile environment claim. In addition, evidence that other women may have experienced severe or pervasive treatment was also insufficient to save a claim that Saketkoo was harassed. The court further found no evidence that the mistreatment was based on her gender, where the evidence showed that Lasky treated male physicians similarly and they also complained about his conduct.

EVIDENCE DOESN'T SUPPORT RETALIATORY TERMINATION OR INTERFERENCE WITH A JOB PROSPECT

The appellate court affirmed summary judgment on both of Saketkoo's retaliation claims. Saketkoo alleged that the medical school's decision not to renew her contract was in retaliation for her complaint about Lasky's discriminatory behavior. But there was no evidence indicating she reported his behavior as discriminatory before the decision was made not to renew her contract.

While she contacted the OIE in September 2018, after Lasky's alleged outburst, she complained only that he was abusive or harsh, not that was discriminating against her because of gender. She didn't accuse him of gender discrimination until February 2019, after Hamm told her that her contract wouldn't be renewed.

Saketkoo's allegation that Hamm directed Patel not to hire her at UMC fared no better. Saketkoo submitted a transcript of a call she taped without Patel's knowledge, in which he implied that Hamm directed him not to hire her. However, Patel also submitted an affidavit stating that Hamm never told him not to hire Saketkoo, and that his statements suggesting otherwise to Saketkoo were made of his own volition because he believed it would be inappropriate for UMC to act contrary to Tulane's decisions by hiring a physician whose contract was not renewed.

Saketkoo didn't allege that Patel lied about what Hamm told him. Moreover, evidence that Patel may have mischaracterized the conversation to Saketkoo "cannot confer a discriminatory motive on Dean Hamm, let alone support the proposition that Dean Hamm would not have made retaliatory comments but for Dr. Saketkoo's actions."

THE BOTTOM LINE



Circumstantial evidence of discrimination must connect the adverse action or harassment to the employee's membership in a protected class. Thus, complaints by a female employee that a supervisor is abrasive, without more, don't put an employer on notice of alleged gender discrimination. Likewise, an employee will be hard-pressed to establish gender-based harassment if a supervisor is also abrasive to male employees. That said, it can be challenging to win over a jury with a defense that a supervisor may have acted badly but not for a discriminatory reason. Ongoing supervisor training regarding rights and obligations under anti-discrimination laws is key, as well as consistent reinforcement of the need to treat all employees fairly and equitably.

Saketkoo v. Adm'rs of the Tulane Educ. Fund, 31 F.4th 990 (5th Cir. Apr. 21, 2022).

RELATED UE RESOURCE

- [Workplace Harassment Prevention Course Collection for Higher Ed](#)



STAY TUNED

Plaintiff's burden in proving Title IX deliberate indifference: Nebraska State College System recently appealed to the Eighth Circuit the district court's denial of its renewed motion for judgment as a matter of law and its judgment in favor of the plaintiff. The issues raised on appeal relate to the Eighth Circuit's previous decision in *Shank v. Carleton College*, which held that post-reporting harassment is re-

quired to establish deliberate indifference, discussed in the [Summer 2021 issue](#) of *UE on Appeal*. The appeal also argues that the district court erred in permitting the plaintiff's expert witness to testify about whether the college violated Title IX and in instructing the jurors. *Doe v. Bd. of Tr. of the Nebraska State Coll., No. 22-1814, opening brief filed June 9, 2022 (8th Cir.)*.

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