UE on Appeal

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

Spring 2020

Decisions Featured in This Issue:

United Educators™

U.S. Court of Appeals for the Eighth Circuit

University Did Not Violate Trustee's Rights by Removing Him From Board After Advocating for Son's Title IX Claim

Relying on the statutory text and precedent, the Eighth Circuit declined to expand Title IX's reach such that any advocate would have standing to bring a retaliation claim provided the person complained of sex discrimination. Instead, to establish standing for a Title IX retaliation claim, plaintiffs must allege a university's retaliatory actions excluded them from, denied them the benefits of, or subjected them to discrimination under an education program or activity.

TRUSTEE CHALLENGES UNIVERSITY'S TITLE IX INVESTIGATION AND RESULTING EXPULSION OF HIS SON

Tom Rossley is a Drake University alumnus who served on its board of trustees while his son attended the university. In fall of 2015, the university investigated an allegation of sexual misconduct against his son, ultimately finding his son responsible. After an appeal process, he was expelled. Throughout the Title IX process, Rossley was critical of how the university handled his son's case. He called, emailed, and otherwise discussed the situation with other board members, university alumni, administrators, and donors. Specifically, Rossley complained the university did not accommodate his son's disabilities during its investigation.

While his son's expulsion appeal was pending, Rossley advised the university that his son might initiate legal action against the university. He sent subsequent emails criticizing the investigation and the university's alleged selective enforcement of its sexual assault policy. Rossley eventually agreed to disassociate himself from his son's issues and recognized a conflict of interest in his involvement, but also informed the board that his son had retained an attorney. The board affairs committee (BAC) advised Rossley that his actions created a conflict of interest under the university's bylaws and expressed concern that Rossley could

not discharge his fiduciary duty to the board while also advocating for his son. To resolve this conflict, the BAC asked Rossley to take a leave of absence from the board. Rossley refused. The BAC determined Rossley's conflict of interest was enough to qualify as a "for cause" removal, and the board of trustees voted to remove him due to his "pervasive conflict of interest."

Rossley filed suit, asserting numerous causes of action. After various other dispositive motions, the district court granted the university's motion for summary judgment. Rossley appealed the dismissal of his Title IX retaliation, disability retaliation, and breach of contract claims.

REMOVAL AS BOARD TRUSTEE INSUFFICIENT TO ESTABLISH STANDING

The district court dismissed Rossley's Title IX retaliation claim for lack of standing. Citing the plain text of Title IX, the Eighth Circuit agreed, holding that the statute protects people from actions taken "on the basis of sex" only if it causes the prospective plaintiff to be excluded, denied the benefits of, or subjected to discrimination under an education program or activity.

Rossley argued that the university retaliated by voting to remove him from the board, prohibiting him from serving as his son's Title IX advocate, and directing him not to visit a tavern near campus (where a witness in the investigation worked).

The Eighth Circuit held that none of these acts supported a claim of retaliation against the university under Title IX. The board's vote to remove Rossley as a member was an internal vote regarding the board's own affairs, acting in a manner separate and distinct from the university. The court also found no facts in the complaint showing a nexus between Rossley's alleged inability to serve as his son's advisor and his complaints to the board.

The university's request that Rossley not patronize an off-campus tavern similarly did not deny him access to any education activity or program. The court therefore held that none of the university's alleged retaliatory actions against Rossley was part of an education program or activity and, consequently, he lacked standing to bring suit under Title IX.

The Eighth Circuit similarly affirmed the district court's conclusion that Rossley failed to provide evidence showing his removal from the board was a pretext for disability retaliation. Finding no question of fact for a jury, the court held that Rossley's removal shortly after his threat of litigation did not undercut the board's proffered reason for his removal because the ever-increasing conflict between Rossley's and the university's interests justified his removal at the time.

Rossley fared no better on his breach of contract claim. He claimed that he entered a contract with the university and the board when he agreed to serve as a trustee of the university and accepted the unpaid, volunteer position, but he offered no evidence of a definite contractual offer.

The only evidence of consideration for the alleged contract Rossley could point to was that in return for service as a trustee, he was provided with liability insurance and free meals on certain occasions. The Eighth Circuit concluded the mere provision of insurance for trustees without any evidence that it was part of a bargained-for exchange is insufficient to constitute contractual consideration under Iowa law.

The Bottom Line

While this case ultimately resolved in the university's favor, institutions should bear in mind that there are potential scenarios in which a non-student may have standing to assert a Title IX claim against a college or university.

As cited by the Eighth Circuit, various courts have entertained causes of actions by parents asserting claims on behalf of a minor or a deceased student. With respect to Title IX retaliation, there may be more opportunities for non-students to assert a viable claim if the plaintiff can link the institution's action to exclusion from or denial of an educational program or activity.

Of course, there is also potential for the non-student and the student to assert concurrent claims — Tom Rossley Jr.'s appeal of the order dismissing his own Title IX lawsuit based on the university's motion for summary judgment remains pending before a different panel of the Eighth Circuit.

Rossley v. Drake University, et al., 958 F.3d 679 (8th Cir. May 4, 2020).

Court Reaffirms Waiver of Eleventh Amendment Immunity in Sex Discrimination Cases for Recipients of Federal Funding

Analyzing a Supreme Court case and its own precedent, the U.S. Court of Appeals for the Fifth Circuit reaffirmed its prior decision that a public university waives immunity to Title IX lawsuits when accepting federal funds. Congressional conditions attached to such funds may support a waiver if they are coercive, but no regional circuit considering this issue has found such a waiver in relation to Title IX.

PUBLIC INSTITUTIONS SUBJECT TO SUIT FOR SEX DISCRIMINATION

Nearly two decades ago, the Fifth Circuit Court of Appeals held in *Pederson v. La. State. Univ.* that state recipients of Title IX funding waive their 11th Amendment immunity against suits alleging sex discrimination. The *Pederson* decision was premised on the five-part test governing claims of waiver based on acceptance of federal funds laid out by the Supreme Court in *South Dakota v. Dole*:

1. A federal expenditure must benefit the general welfare.
2. Any condition on the receipt of federal funds must be unambiguous.
3. Any condition must be reasonably related to the purpose of the federal grant.
4. The grant and any conditions attached to it cannot violate an independent constitutional provision.
5. The grant and its conditions cannot amount to coercion as opposed to encouragement.

Applying these factors in *Pederson*, the Fifth Circuit held this type of Spending Clause waiver exists for Title IX, concluding that a statute enacted in 1986 — the Civil Rights Remedies Equalization Act (CREA) — validly conditioned Title IX funding on a recipient's waiver of 11th Amendment immunity.

The question of Title IX immunity was recently raised again when, following the death of a student during a fraternity hazing event, his parents sued Louisiana State University for violations of Title IX and state law, alleging that the university discriminated against male students by policing hazing in fraternities more leniently than sororities.

The university moved to dismiss for lack of jurisdiction on the basis of 11th Amendment immunity. The district court granted its motion with respect to the state law claims but held that the university had waived immunity to Title IX suits under Fifth Circuit precedent. The university sought hearing *en banc*, which is necessary for a previous decision of the court to be overturned. The Fifth Circuit declined this request but granted the university's petition for interlocutory appeal on the denial of 11th Amendment immunity.

COURT ADHERES TO PRECEDENT, FINDING NO INTERVENING RULINGS

Facing the Fifth Circuit's 20-year old decision in *Pederson*, the university argued that an intervening ruling had been issued by the Supreme Court in 2012's *Nat'l Federation of Indep. Bus. v. Sebelius* that, according to the university, marked an "unequivocal" change in how the Supreme Court might rule in the future. The focal point of the university's appeal centered on *Dole's* "no coercion" requirement, arguing that the *Sebelius* case identified two situations, present here, when conditional spending rises to the level of coercion.

First, the university contended that it is coercive for Congress to attach conditions that do not govern the use of the funds. The Fifth Circuit disagreed, holding that the university misread *Sebelius*, which held that Congress's threat to withhold all Medicaid funding from states that did not agree to dramatically expand Medicaid under the Affordable Care Act was unconstitutionally coercive. The Fifth Circuit concluded that although congressional conditions on federal funding that do not directly "govern the use of funds" are subject to further inquiry to assess their constitutionality, such conditions do not necessarily constitute coercion.

The university's other argument supporting an unequivocal change in the coercion inquiry was the *Sebelius* court's holding that Congress cannot surprise states with post-acceptance conditions, which the university claimed was satisfied by CREA's addition of new conditions to Title IX funding. The Fifth Circuit, however, contrasted the facts in

Sebelius, where the funding was conditioned on accepting significant obligations that created a new program entirely different from the original one the state had opted into. According to the Fifth Circuit, while CREA added a new condition to the receipt of federal funds after Title IX was enacted, it did not resemble the creation of a brand-new legislative program akin to the *Sebelius* case. Further, the university continued to accept federal funding long after CREA went on the books in 1986.

Thus the court concluded *Sebelius* did not unequivocally alter the circuit's previous decision's conditional spending-analysis, nor could it find any case holding that the case marks such a transformation of Spending Clause principles. The court remained bound by its precedent in *Pederson* that the university had waived 11th Amendment immunity by accepting federal funds, and that Congress did not coerce it to do so. Accordingly, it affirmed the district court's denial of the university's motion to dismiss.

THE BOTTOM LINE

To avoid Title IX obligations, a public institution must decline federal funds. As discussed by the Fifth Circuit, every regional circuit to consider the question — and all but one has — agrees that CREA validly conditions federal funds on a recipient's waiver of its 11th Amendment immunity. Absent an explicit, "unequivocal" intervening ruling from the Supreme Court, circuit precedent will continue to control this issue.

Gruver, et al. v. La. Bd. of Supervisors for the La. State Univ. Agric. and Mech. Coll., 959 F.3d 178 (5th Cir. May 12, 2020).

U.S. Court of Appeals for the Fifth Circuit

Free Speech: Public School Administrators' Retaliatory Discharge Claims Fail Because Plaintiffs Did Not Speak as "Citizens"

The U.S. Court of Appeals for the Fifth Circuit recently reviewed two decisions involving UE members in which officials at public educational institutions alleged their First Amendment rights of free speech had been violated. This first case involves a claim of retaliatory discharge for speech, while the second case (which follows) involves a claim of injury caused by a public censure. Both cases demonstrate the nuanced evaluation of First Amendment claims made by public officials.

SCHOOL OFFICIALS COMPLAIN TO STATE AGENCY ABOUT SCHOOL DISTRICT'S ALLEGED FAILINGS IN PROVIDING ACCOMMODATIONS

During the 2012-13 academic year, the duties of Adams Hill Elementary School Principal Don Powers and Assistant Principal Karen Wernli — the plaintiffs — included serving on a five-person school committee to implement regulations for students with disabilities seeking accommodations at the school under Section 504 of the Rehabilitation Act of 1973.

In May 2013, "the 504 committee" met to conduct an evaluation of a student, J.B., who was diagnosed with attention deficit hyperactivity disorder. The committee determined that J.B. was entitled to an oral administration accommodation for an upcoming Texas standardized test. However, the school district's Section 504 program coordinator disagreed and notified the plaintiffs that J.B. did not meet the criteria and would not be given the accommodation. Thereafter, the district — Northside Independent School District — reviewed all of Adams Hill's Section 504 files and standardized test procedures and met with Wernli and Powers to inform them of potential standardized testing errors and Section 504 violations at the school.

Dissatisfied with the district's investigation conclusion, Powers and Wernli each placed calls to the Texas Education Agency (TEA), the state agency that oversees primary and secondary public education, to make their case that they and the school had the right approach and to report the district's allegedly unlawful conduct in taking testing accommodations from J.B.

The dispute came to a head that summer, when the district suspended the plaintiffs pending the outcome of an investigation into Section 504 and standardized test procedures at the school. The district later filed its investigation report with

the TEA, finding that the plaintiffs intentionally authorized inappropriate student testing accommodations based on a misapplication of Section 504 eligibility requirements.

The plaintiffs filed grievances alleging they were retaliated against as whistleblowers, but their grievances were denied. Instead, at the board's next regular meeting, Superintendent Brian Woods recommended, and the board preliminarily approved, termination of the plaintiffs' employment.

Pursuant to school district procedure, the plaintiffs received an evidentiary hearing before an independent hearing examiner the TEA appointed. The examiner found that the district had "good cause" to propose termination of the plaintiffs' employment contracts. The board adopted the examiner's recommendation and unanimously voted to terminate the plaintiffs' employment.

PLAINTIFFS SUE AS WHISTLEBLOWERS AND ALLEGE FREE SPEECH RETALIATION

Shortly after the termination vote, the plaintiffs filed suit against the school district and its superintendent. Their suit, as amended, alleged that the district violated the Texas Whistleblower Act and their First Amendment free speech rights under 42 U.S.C. § 1983. They also alleged that Woods retaliated against them in violation of their First Amendment rights.

The district court dismissed the plaintiffs' First Amendment retaliation claim against Woods on the basis of qualified immunity and also granted the school district's motion for summary judgment on their free speech claims.

The plaintiffs' remaining claims under the Texas Whistleblower Act went to a jury trial. After the close of evidence, the jury returned a unanimous verdict in favor of the school district, finding that the plaintiffs' conversations with the TEA about the district's denial of a student's test-taking accommodations were not reports of a violation of law made in good faith.

SUPERINTENDENT ENTITLED TO QUALIFIED IMMUNITY, AND PLAINTIFFS SPOKE AS PUBLIC OFFICIALS, NOT CITIZENS

The plaintiffs appealed on a number of grounds, including that the district court should not have dismissed the claims of First Amendment retaliation against Woods or the school district.

The Fifth Circuit rejected both arguments. First, the court held that Woods was entitled to qualified immunity from suit under Section 1983 unless the plaintiffs could demonstrate that his actions violated clearly established constitutional law.

However, at the time of the discharge, applicable Fifth Circuit case law was ambiguous as to whether an individual recommending an adverse employment decision but who is not a final decision-maker can be liable for First Amendment retaliation under Section 1983.

In 2018, the Fifth Circuit settled the issue in *Sims v. City of Madisonville*, which held that there is no absolute bar on liability for individuals who are not final decision-makers in a First Amendment retaliation claim if a plaintiff can show "an affirmative causal link" between the principal's recommendation and the school district's decision. This certainty in the law came too late to save the plaintiffs' claims against Woods.

As to the school district itself, the Fifth Circuit held that the district court properly found that the plaintiffs' complaints to the TEA about the school district's application of disability accommodation law were activities performed pursuant to their official duties. This doomed the free speech claims. For the speech of a public employee to receive First Amendment protection, the speech must both be made as a citizen and on a matter of public concern. However, when public employees speak pursuant to their official duties, they are not speaking as citizens for First Amendment purposes and, consequently, their speech is not protected.

Here, the plaintiffs did not dispute that their job duties included implementing disability accommodations under Section 504 for students at Adams Hill. Instead, they argued that their job duties *did not include* reporting the school district's alleged misconduct to higher level authorities, such as the TEA.

The court disagreed. Because the plaintiffs were members of the committee tasked with implementing and ensuring compliance with Section 504 and participated in the meeting to determine J.B.'s eligibility for accommodations, the court said it follows that their subsequent calls to the TEA about Section 504 construction and application at the school were "clearly activities undertaken in the course of performing their jobs such that they were pursuant to Plaintiffs' official duties."

THE BOTTOM LINE

This case provides a useful framework for reviewing a retaliatory free speech claim brought by a public employee. The court must determine whether the employee spoke as a citizen and on a matter of public concern.

If the answer to one or both is no, employees cannot challenge their employer's reaction on First Amendment grounds.

If the answer to both questions is yes, the next question becomes whether the employer had an adequate justification for treating the employee differently from other members of the general public.

Having found that Powers and Wernli spoke as public officials, not citizens, the court did not consider the remaining questions.

Powers v. Northside Indep. Sch. Dist., 951 F.3d 298 (5th Cir. Feb. 26, 2020).

U.S. Court of Appeals for the Sixth Circuit

Title IX: No Deliberate Indifference Where Student Fails to Plead Actionable Sexual Harassment Took Place After University Learned of Alleged Rape

In the Winter 2020 edition of UE on Appeal*, we reported on the U.S. Court of Appeals for the Sixth Circuit's decision in* Kollaritsch v. Michigan State University*, in which the court analyzed and clarified the Supreme Court's pleading standard for a Title IX deliberate indifference claim in a case of student-on-student sexual assault. In this recent decision involving a similar claim filed against the University of Kentucky (UK), the Sixth Circuit applies the reformulated standard and upholds the district court's dismissal of the deliberate indifference claims on several grounds.*

STUDENT VICTIM COMPLAINS ABOUT TWO SEXUAL ASSAULTS AND SUBSEQUENT CONTACTS WITH STUDENT PERPETRATORS

Jane Doe, a freshman, reported two separate rapes to UK involving different students on different nights.

Jane alleged the first rape occurred in August 2016, after she met John Doe at a frat party. They left the party together, returned to his apartment, and drank together. Jane asked if John had a condom, and they began to have sex. Jane recalled asking him to stop mid-intercourse, but John denied she did. John walked Jane home, asked for her number, and kissed her goodnight. Jane later told several friends that John raped her, and they reported the incident to UK. UK's Title IX office immediately met with Jane, issued a no-contact order, and began an investigation.

After interviewing multiple witnesses and reviewing documentary evidence, UK initially concluded that the evidence was insufficient to proceed to a hearing. When Jane pleaded for UK to reconsider, UK acquiesced.

During the March 2017 hearing, John was represented by two attorneys, in accordance with UK's procedures, which allowed the accuser and accused to have "support persons." The "support persons," however, were not permitted to "represent, speak on behalf of, delay, disrupt or otherwise interfere" with the proceedings, but the attorneys made arguments on John's behalf. Jane alleged that the interim dean of students, who acted as the complainant and presented evidence to the panel on Jane's behalf, did a bad job representing her interests.

The panel found John not responsible for sexual misconduct by a preponderance of the evidence. Jane appealed, but the appeals board upheld the panel's decision.

Jane alleged the second rape occurred in October 2016, after she met James Doe at a football tailgate party his fraternity hosted. Jane, who had been drinking heavily, agreed to go to James' apartment with him. She alleged that upon arrival, she had difficulty staying awake and that James raped her while she was incapacitated.

Jane reported the assault to the UK Police Department, and her friends reported it to UK's Title IX office, which again immediately met with Jane and issued a no-contact order. UK completed the investigation and held a hearing in April 2018. But James failed to appear. The panel found

that James violated UK's sexual misconduct policy, and James was subsequently dismissed from UK.

During and after the investigations, Jane reported continued contacts with John and James, despite the no-contact orders, which caused her distress. She reported that John stood too close and stared at her at a tailgate party and followed her home from class one day. The Title IX office questioned John and determined that he did not violate the no-contact order.

Jane also later reported that John made eye contact with her when walking to class and habitually sat near her at the library. She asked UK to ban him from a certain floor in the library, but UK declined to "restrict the movement of either [student] within an academic building." Jane also complained that James stared at her in shared classes, and asked for him to be removed. The Title IX office notified James by phone and email that he needed to move sections. He ignored the directives.

Jane ultimately sued UK and several UK officials, alleging that:

1. UK's response to student-on-student harassment was clearly unreasonable because it caused a hostile educational environment and her vulnerability to further harassment.
2. UK demonstrated deliberate indifference by failing to follow its own policies throughout the investigation and hearing processes.

UK filed a motion to dismiss and attached matters outside the pleadings from the investigations and disciplinary hearing. The district court granted the motion, which it treated it as a motion for summary judgment.

SIXTH CIRCUIT APPLIES *KOLLARITSCH* TO JANE DOE'S CLAIMS

The court first noted the rearticulated pleading standard as set forth by the Sixth Circuit in the recent *Kollaritsch* decision.

First, a plaintiff must plead "actionable sexual harassment," which is sexual harassment that is severe (more than just juvenile behavior), pervasive (multiple acts of harassment), and objectively offensive (offensive to a reasonable person under the circumstances).

Second, a plaintiff must allege that the school committed a deliberate-indifference intentional tort, which requires a showing of "an incident of actionable sexual harassment, the school's actual knowledge of it, some further incident of actionable sexual harassment, that the further actionable harassment would not have happened but for the objective unreasonableness (deliberate indifference) of the school's response, and that the Title IX injury is attributable to the post-actual knowledge further harassment."

On appeal, Jane argued that she adequately alleged actionable sexual harassment because rape "constitutes a severe form of sexual harassment that can create a hostile educational environment" and that she notified UK of continued interactions with John and James post-rape, but that UK failed to adequately alleviate her distress.

But the court found that the relevant inquiry is whether UK's response to Jane's accusations of rape subjected her to *further* actionable sexual harassment. The court held that nothing about her allegations that John stared at her, stood by her at a party, followed her home, and sat near her in the library — or that James stared at her during a shared class — suggested sexual harassment, much less sexual harassment that qualified as severe, pervasive, and objectively offensive.

Jane also failed to show that UK's response was clearly unreasonable or that it caused further harassment. After Jane complained of rape, UK took proactive steps to reduce opportunities for further harassment by issuing no-contact orders, investigating when Jane alleged those orders were violated, and promptly and thoroughly investigating the alleged rapes, even acquiescing to Jane's request for a hearing in John's case. Simply put, the record failed to establish that UK took insufficient action, which made Jane "vulnerable to (meaning unprotected from), further harassment."

Likewise, the court rejected the argument that UK's noncompliance with its own Title IX hearing policies amounted to deliberate indifference. Jane did not allege that UK's noncompliance caused her further harassment. The Fifth Circuit emphasized that school administrators are also not required to engage in particular disciplinary actions, and courts should not second guess their disciplinary decisions.

Finally, citing a 2018 Sixth Circuit decision, *Doe v. Baum* (which requires a public university to give an accused student or his agent an opportunity for cross-examination if the university needs to choose between competing narratives to resolve a case), the court held that it was reasonable

for UK's panel officer to conclude that due process required the limited participation of John's attorney support persons, despite UK's policies to the contrary.

THE BOTTOM LINE

Because of a 60-day extension issued by the Supreme Court for all litigants due to COVID-19, the time has not yet elapsed for the *Kollaritsch* plaintiffs to petition for *certiorari* and ask the Supreme Court to resolve a split in the circuits regarding the vulnerability to further harassment argument. Time will also tell whether Jane Doe files a petition for re-hearing, for rehearing *en banc*, and/or for *certiorari*.

Jane Doe v. University of Kentucky, et al., 959 F.3d 246 (6th Cir. May 18, 2020).

RELATED UE RESOURCE

- Prevention and Protection Podcast: Recent Developments in Title IX Caselaw

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U.S. Court of Appeals for the Fifth Circuit

Free Speech: Board Member of Public Educational Institution States a First Amendment Claim After Being Publicly Censured for Reporting Corruption

Expanding the Supreme Court's holding that a free speech violation giving rise to a reputational injury constitutes an injury in fact, the Fifth Circuit holds that injury stemming from the public censure of a college board member, like a reputational injury, is enough to confer standing in a First Amendment claim.

BOARD MEMBER ENGAGES IN PUBLIC CAMPAIGN CRITICIZING COLLEGE

Houston Community College System is a public community college district run by a board of trustees. Each trustee is elected by the public from single-member districts to serve a six-year term without pay.

David Wilson was elected to the board in November 2013. Beginning in 2017, Wilson voiced concern that trustees were violating the board's bylaws and not acting in the college district's best interests.

Wilson made his complaints public by arranging robocalls regarding the board's actions and interviewing with a local radio station. He filed lawsuits against the college district and individual board members seeking declaratory and injunctive relief. He also hired a private investigator to confirm one of the trustees lived in the district where she was elected. He maintained a website where he published his concerns, referring to his fellow trustees and the college district by name.

In January 2018, the board voted to adopt a resolution publicly censuring Wilson for his actions and chastised him for acting in a manner inconsistent with the college district's best interests. Wilson amended his first lawsuit to include claims against the college under 42 U.S.C. § 1983, contending that the censure violated his First Amendment right to free speech and 14th Amendment right to equal protection. The district court granted the college district's motion to dismiss for lack of jurisdiction, finding that Wilson could not demonstrate an injury in fact and, therefore, lacked standing.

APPELLATE COURT REVERSES, FINDING BOARD MEMBER CAN PURSUE FIRST AMENDMENT CLAIM

To pursue a lawsuit in federal court, a plaintiff must have standing — that is, a showing of an injury in fact that is traceable to the defendant's conduct and that can be redressed by the court. An injury in fact must be concrete, particularized, and actual or imminent. In the context of free speech, the governmental action need not have a direct effect on the

exercise of First Amendment rights but must have caused, or must threaten to cause, a direct injury to the plaintiff.

In this case, Wilson alleged that the censure was issued to punish him for exercising his free speech rights and caused him mental anguish. Based on court precedent holding that a retaliatory action resulting in a chilling of free speech constitutes an injury in fact, the Fifth Circuit reversed the district court's dismissal of the case and held that Wilson's allegations established standing and stated a claim for relief for a violation of the First Amendment.

As noted by the court, the Fifth Circuit has previously addressed whether a censure of a public official can give rise to a First Amendment violation. In this case, the board's censure of Wilson specifically noted it was punishing him for criticizing other board members for taking positions that differ from his own. The censure also punished Wilson for filing suit alleging the board violated its bylaws.

Because reporting municipal corruption undoubtedly constitutes speech on a matter of public concern, the Fifth Circuit held that Wilson stated a claim under Section 1983 in alleging that its board violated his First Amendment right to free speech when it publicly censured him, causing him injury. The court dismissed Wilson's claims for declaratory and injunctive relief as moot because he was no longer a trustee, but otherwise reversed the district court and remanded the case for further proceedings.

THE BOTTOM LINE

As governmental institutions, public universities and colleges have additional potential exposure for constitutional violations. While each institution's form of governance varies, universities and colleges may have elected officials serving as board members or trustees. In addition to potential free speech issues involving employees, institutions should be cognizant of attempting to restrain or punish speech by a board member or trustee who is critical of the institution.

Wilson v. Houston Community College System, 955 F.3d 490 (5th Cir. Apr. 7, 2020), petition for reh'g en banc pending.

IN THE NEXT UE ON APPEAL

Sovereign Immunity: In a case involving the fatal shooting of a student during a traffic stop off-campus, the Texas Supreme Court just issued a decision, affirming the Texas Fourth Court of Appeals, holding that private universities do not operate as an arm of the state government through their police departments. Chief Justice Hecht filed a strong dissenting opinion. This case will be analyzed in our next issue of *UE on Appeal.*

University of the Incarnate Word v. Redus, Case No. 18-0351 (Tex. May 22, 2020).