

CLIENT NEWS BRIEF

Federal Appeals Court Affirms Constitutionality of Student Conduct Code, but Allows Free Speech Retaliation Claim against University to Proceed

The Ninth Circuit Court of Appeals denied a university's request to dismiss a student's lawsuit alleging retaliation for protected speech under the First Amendment.

In *O'Brien v. Welty* (9th Cir. 2016) 818 F.3d 920, a student intruded into the university offices of two faculty members, questioned the faculty members about a poem published in the student newspaper and proceeded to video record the interactions. The university disciplined the student under its student conduct code on the ground the student's conduct constituted prohibited intimidation and harassment.

The student sued, alleging the discipline was unlawful retaliation for his protected speech in violation of the free speech clause of the First Amendment. The university moved to dismiss the complaint, arguing that the student's allegations, even if true, did not state a claim under the First Amendment. The trial court rejected the student's claim that the terms "intimidation" and "harassment," as used in the code of conduct, were unconstitutionally overbroad. The trial court then dismissed the complaint, agreeing with the university that the student failed to allege enough facts to establish a free speech retaliation claim.

The Court of Appeals agreed that the code of conduct was not unconstitutionally overbroad, but disagreed that the student failed to allege sufficient facts to state a claim. The court observed that a plaintiff must establish three elements to state a First Amendment retaliation claim: (1) the plaintiff was engaged in a constitutionally protected activity; (2) the defendant's actions would "chill a person of ordinary firmness from continuing to engage in the protected activity"; and (3) the protected activity was a "substantial or motivating factor in the defendant's conduct."

The court explained that action taken under the code of conduct could support a claim under this standard if "motivated by retaliation for having engaged in activity protected under the First Amendment." In this case, the court found that the student did allege sufficient facts that, if true, could reasonably support a conclusion that university officials not only disagreed with the student's expressed political views but also sought to "punish and muzzle him in retaliation for his expression of those views."

The court noted the following allegations in support of its conclusion:

- An administrator "requested that students and other faculty members gather information and complaints to use against" the student.
- A student provided complaints and other documents to the administrator pursuant to the request.
- Employees sent emails to university administrators demanding they do something about the student and his website, which criticized the

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student body president and the university.

- Faculty members said that the student was “stalking” the hallway, and that they should post “wanted” signs with the student’s face to mock him and serve as a warning to other students and faculty.
- The university and several other defendants “did not facilitate – and indeed impeded – [the student] in his attempt to document and explain his side of the story” during the student’s disciplinary hearing.
- As part of the discipline imposed for the student’s conduct, an administrator imposed an additional punishment of probation that was not part of the university panel’s recommendation, which had the effect of limiting the student’s political activity, which included serving as president of the political advocacy club he founded and as a member of the university’s student government.
- After the discipline was imposed, university officials deleted posts made by the student on “university-managed Facebook pages, permanently blocking him from posting about certain issues, while at the same time allowing posts expressing left-leaning viewpoints to remain.”

The case will now return to the trial court for further proceedings.

Notably, the Court of Appeals also emphasized that institutions can avoid liability if they can show that they would have taken the same disciplinary actions in the absence of the student’s protected activity. Further, the court cautioned “against overreading our opinion,” explaining that the “First Amendment does not give a free pass to students who violate university rules simply because they can plausibly show that faculty or administrators disapprove of their political views,” even where a student’s “misconduct is preceded by or accompanied by the expression of opinions with which faculty members or administrators strongly disagree.”

The impact codes of conduct have on student expression on campus is a challenge facing higher education institutions across the country. While *O’Brien* reaffirms students’ right to appropriate expression free from retaliation, it also reaffirms an institution’s right to regulate unprotected, harmful speech and activity. Institutional officials must, however, be careful to not act based on a particular viewpoint and to sufficiently document the viewpoint-neutral rationale for an action.

If your institution has any questions regarding the impact of the *O’Brien* opinion or the First Amendment in general, please contact the authors of this Client News Brief or an attorney at one of our [10 offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#) or download our [Client News Brief App](#).