July 21, 2020

Exploring the Reaches of the First Amendment

The First Amendment has been turned into a sword as well as a shield in modern times. Three recent Opinions, albeit very different in certain respects, demonstrate the vitality that still defines the scope of First Amendment protections. The First Amendment, as most people fully appreciate, generally addresses religion and speech.

Our Lady of Guadalupe School vs. Morrissey-Berru, 2020 U.S. LEXIS 3547 (July 8, 2020) written by Justice Alito required the court to determine whether the First Amendment permits courts to intervene in employment disputes involving teachers at religious schools who are entrusted with the responsibility of instructing their students in the faith of the school where they work.

The religious education and formation of students is the reason for the existence of most private religious schools. Some private religious schools are just a former prep school. However, most religious schools select and supervise teachers who are consistent with the religious mission of the institution. Judicial review of the way in which religious schools discharge those responsibilities, wrote the Court, "would undermine the independence of religious institutions in a way that the First Amendment does not tolerate."

The question can be asked whether the discharge of a teacher for discriminatory reasons, not related to the teaching, would automatically cross the bounds of the newly enhanced First Amendment protection against government intrusion upon religious matters.

The same day as *Our Lady of Guadalupe School*, Justice Thomas wrote the Opinion in *Little Sisters of the Poor vs. Pennsylvania*, 591 U.S. ___ (July 8, 2020). The question in *Little Sisters* was whether the Government created lawful exceptions from a regulatory requirement implementing the Patient Protection and Affordable Care Act of 2020 (ACA), 124 Stat. 119. Certain employers are required to provide contraceptive coverage for their employees through group health plans. Although contraceptive coverage is not required or addressed in the Affordable Care Act provision reviewed by the United States Supreme Court, the Government mandated such coverage by promulgating interim final rules shortly after the ACA's passage. This is known as the contraceptive mandate.

The United States Court of Appeals for the Third Circuit concluded that the Department lacked statutory authority to promulgate these exceptions and affirmed the trial court's nationwide preliminary injunction. The United States Supreme Court held this was erroneous. The Departments had the authority to provide exceptions from the regulatory contraceptive requirements from employers with religious and conscientious objections. The Third Circuit was therefore reversed.

Once again, a newly robust First Amendment protects employers from requirements that may offend their religious sensitivities.

Another important First Amendment religious freedom case is *Espinoza vs. Montana Department of Revenue*, 2020 U.S. LEXIS 3518 (June 30, 2020), written by Chief Justice Roberts. The Montana Legislature established a program to provide tuition assistance to parents who send their children to private schools. The program grants a tax credit to anyone who donate to certain organizations that in turn award scholarships to selected students attending such schools. When petitioners sought to use the scholarships at a religious school, the Montana Supreme Court struck down the program. The Court relied on the "no-aid" provision of the State Constitution, which prohibits any aid to a school controlled by a "church, sect, or denomination." The question presented was whether the Free Exercise Clause of the United States Constitution barred that application of the no-aid provision.

Did the Free Exercise Clause of the First Amendment preclude the Montana Supreme Court from applying Montana's no-aid provision to bar religious schools from the scholarship program. The prohibition, said the U.S. Supreme, was said to burden not only religious schools but also families whose children attend or hope to attend them. The Court noted that it had previously recognized the rights of parents to direct "the religious upbringing" of their children.

The decision in *B.L. vs. Mahanoy Area School District*, 2020 U.S. App. LEXIS 20365 (June 30, 2020), is a bit more difficult to appreciate. The decision by the United States Court of Appeals for the Third Circuit concerned a woman who did not make her high school varsity cheerleading team. In a weekend away from school, the student posted a picture of herself with the caption "Fuck Cheer" to Snapchat. She was suspended from the junior varsity team for a year and sued her school in federal court. The District Court granted summary judgment in B.L.'s favor, ruling that the school had violated her First Amendment rights. The United States Court of Appeals for the Third Circuit agrees and affirmed that the suspension represented a violation of the student's First Amendment rights.

To define B.L.'s speech rights with precision, therefore, the Court of Appeals asked whether her snap was "on-" or "off-campus" speech. The Court reminded the reader that it uses the terms with caution for the schoolyard's physician boundaries are not necessarily coextensive with the "school context."

The Third Circuit easily found that the snap fell outside the school context. This is not a case in which the relevant speech took place in a "school sponsored" forum, *Fraser*, 478 U.S. at 677. Nor is this a case in which the school owns or operates an online platform. Instead, B.L. created the snap away from campus, over the weekend, and without school resources, and she shared it on a social media platform unaffiliated with the school. While the snap mentioned the school and reached 16 MAHS students and officials, *J.S*. and *Layshock* claim that those few points of contact are not enough. B.L.'s snap, therefore, took place "off campus."

No one challenges what happened to B.L. B.L. did not abdicate her First Amendment right to speak as a cheerleader. The Court refused to return to what it referred to as the "bygone days" in which a police officer was thought to have a "right to talk politics…. [but not] to be a policeman." See *O'Hare Tuck Serv., Inc. vs. City of Northlake*, 518 U.S. 712, 716-17 (1996) (quoting *McAuliffe vs. Mayor*, 29 N.#E. 517, 517 (Mass. 1892)). Instead, the Court concluded that *Fraser* did not authorize the School District's punishment of B.L. for her off-campus speech.

Most citizens would find it difficult to understand how a student could post vulgarities on social media and not pay any consequence for it. Should the First Amendment really permit Nazis to come to Williamsport, Pennsylvania and yell through a bullhorn "Fuck your nigger mayor"? When I heard the words replayed on a Facebook post, I was more livid than if I read it in a magazine or newspaper. I had difficulty sleeping that night to appreciate that psychopaths abusing the First Amendment can be tolerated. Is such conduct speech at all? The devout purpose of the Nazis who came to Williamsport on July 18th was to evoke violence, while carrying their AK-47s, so as to create another Charlottesville murder. We know that is true because it is contained in their e-mails to City Hall revealed as a result of a Right-to-Know response.

Is there any limit to the First Amendment? The Nazis who came to Williamsport were denied a permit and theoretically could have been arrested on the spot. The Mayor correctly thought that protection from Covid-19 was more important at this juncture than the right of crazy people to scream unacceptable vulgar epithets at other people.

The Nazis not only created a clear and present danger but violated Pennsylvania's laws on gathering as a militia, something outlawed when the National Guard was created.

All of the legal developments that we are now witnessing presage the question as to how far the First Amendment can go to protect religious and speech rights and whether there are any discernable limits.

Clifford A. Rieders, Esquire
Rieders, Travis, Humphrey,
Waters & Dohrmann
161 West Third Street
Williamsport, PA 17701
(570) 323-8711 (telephone)
(570) 323-4192 (facsimile)

Cliff Rieders is a Board-Certified Trial Advocate in Williamsport, is Past President of the Pennsylvania Trial Lawyers Association and a past member of the Pennsylvania Patient Safety Authority. None of the opinions expressed necessarily represent the views of these organizations.