



# THE FIRST AMENDMENT MEETS THE CONFEDERATE FLAG AT PUBLIC SCHOOL



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©2010 Brian S. Batterton, Attorney, Legal & Liability Risk Management Institute (llrmi.com), School officials are frequently required to make quick decisions regarding violations of school dress codes. Fortunately, the courts have provided a fair amount of case law to assist school officials in the decision making process. For example, *A.M. and A.T. v. Burleson Independent School District et al.*, decided by the Fifth Circuit Court of Appeals, is a case that offers such guidance. The facts of the case are as follows:

A.M. and A.T., both minors, attended Burleson High School which, at the time of the incident, had approximately 2,300 students. The school district had a policy that stated, in pertinent part, “there will be no tolerance for clothing or accessories that have inappropriate symbolism, especially that which discriminates against other students based on race religion or sex.” Additionally, the high school had a policy that prohibited the visible display of the Confederate flag.

In January 2006, A.M. and A.T. both arrived at school with purses that displayed large images of the Confederate flag. School administrators treated this as dress code violation and gave the girls the option of leaving their purses in the office for the day or having someone from outside the school come and retrieve the purses. The girls chose to go home for the day. They were not suspended and no additional disciplinary action was taken.

A.M. and A.T. subsequently appealed the policy to principal, who is the first level of appeal at the school district. The principal cited past incidents of racial tension at the school and concluded that the prohibition of the Confederate flag help minimize such incidents. The girls then went to the next appeal level, the school district superintendent. He also denied the girls appeal citing that, if the ban did not exist, racial tension and incidents would

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increase and amount to a “material interference and substantial disruption of the educational environment.”

A.M. and A.T. then filed suit in the U.S. District Court for the Northern District of Texas alleging violations of their First and Fourteenth Amendment rights, as well as a state claim under the Texas Constitution. The District Court granted summary judgment to the defendant school officials and school district. A.M. and A.T. appealed to the Fifth Circuit Court of Appeals.<sup>ii</sup>

The first issue before the court that we will discuss is *whether the school district and school officials violated the First Amendment right to free speech and expression with the ban on the display of the Confederate flag.*

The Fifth Circuit began by examining United States Supreme Court precedent relevant to the issue. The lead case is *Tinker v. Des Moines Independent Community School District*<sup>iii</sup>, which was decided in 1969. In *Tinker*, a group of students were planning to wear armbands to protest the Vietnam War. Learning of this plan, the school district enacted a policy that banned arm bands. The students were suspended when they wore their armbands to school and refused to remove them when asked. The Supreme Court enacted the following rule:

**[S]chool officials may prohibit student speech and expression upon showing facts which might reasonably have led school authorities to forecast [that the proscribed speech would cause] substantial disruption of or material interference with school activities. School officials must be able to show that [their] action[s] [were] caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint**<sup>iv</sup> [internal quotations omitted]

The Supreme Court then held that the school district failed to meet the above burden because there was no evidence that wearing the armbands would lead to substantial interference with the school or impinge on the rights of other students.

In 1971, in *Butts v. Dallas Indep. Sch. Dist.*<sup>v</sup>, the Fifth Circuit further explained the holding in *Tinker*. In *Butts*, the Fifth Circuit held...

**Although school officials may prohibit speech based on a forecast that the prohibited speech will lead to a material disruption, the proscription cannot be based on the officials' mere expectation that the speech will cause such a disruption. Officials must base their decisions on fact, not intuition, that the expected disruption would probably result from the exercise of the constitutional right and that foregoing such exercise would tend to make the expected disruption substantially less probable or less severe.**<sup>vi</sup> [internal quotations omitted]

In *A.M.*, the Fifth Circuit then applied the above rules to the facts of the case at hand. The court noted, importantly, that there had been numerous racially related incidents at Burleson High School. For example, during the 2002-2003 school year, there were 35 reported incidents of race related problems. During the 2004-2005 school year, there were 10 race related incidents, and during the

2005-2006 school year there were 7 race related incidents. The court noted that the incidents involved activity such as racially hostile graffiti and vandalism, racial epithets, and a physical confrontation between students that included the use of the Confederate flag. The court then held that...

T]hese past incidents were sufficient “to serve as a factual basis for administrators’ forecast that disruptions might occur if students were allowed to display racially charged symbols such as the Confederate flag.”<sup>vii</sup>

The Fifth Circuit also cited other federal circuits that have upheld bans on Confederate flags where there was evidence of past racial hostility and tension. For example, the Third, Fourth, Sixth, Eighth, Tenth and Eleventh Circuits have all upheld similar restrictions on the display of the Confederate flag at school.<sup>viii</sup>

The Fifth Circuit also noted that schools do not have to wait for a disruption to occur in order to enforce a dress code ban or ban on the Confederate flag.<sup>ix</sup> The court then concluded the issue by stating...

**[A]dministrators will usually meet their burden under *Tinker* by showing that the proscribed speech has in fact been disruptive in the past. But *Tinker* does not require a showing of past disruption; administrators can also meet their burden by establishing that they had a reasonable expectation, grounded in fact, that the proscribed speech would probably result in disruption. While it is possible for administrators to fail to meet this burden in the absence of past disruptions, the racial tension and hostility at the school justified defendants' ban on visible displays of the Confederate flag in this case.<sup>x</sup>**

Thus, the court upheld summary judgment for the school district and the school officials.

The second issue before the court was *whether the ban on “inappropriate symbolism” was too vague to put students on notice of what constitutes a violation of the policy such that the policy violates the Due Process Clause of the Fourteenth Amendment.*

In the school environment, the United States Supreme Court in *Bethel Sch. Dist. No. 403 v. Fraser*<sup>xi</sup>, dealt with the issue of vagueness of a school rule. In this case, Fraser was a high school student who was scheduled to deliver a speech to the student body. He had the speech reviewed by faculty advisors who advised him that the speech was a violation of the school rule prohibiting “conduct which materially and substantially interferes with the educational process.” The rule specifically prohibited “obscene” speech. Against the advisors advice, he gave the speech, which was sexually explicit. He received a two day suspension. In *Fraser*, the United States Supreme Courts stated:

**We have recognized that 'maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship.' Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process,**

**the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.<sup>xii</sup>**

The Supreme Court then held that Fraser's vagueness argument was "wholly without merit" because the policy, along with the warnings from the faculty advisors were sufficient to put him on notice that he may be punished for the speech.

Applying the rationale and rule of *Fraser* to the facts of *A.M.*, the Fifth Circuit opined that that A.M. and A.T. were never suspended but rather chose to go home instead of relinquishing their purses for the day. This mitigated against the "vagueness" claim. Additionally, the Fifth Circuit found that the Confederate flag ban in *A.M.* was no more vague than the prohibition in *Fraser*. Further, schools have latitude in enacting policies that have the "flexibility to deal with a wide range of unanticipated conduct."<sup>xiii</sup>

Therefore, the Fifth Circuit upheld the grant of summary judgment for the school district and school officials.

The third and final issue we will discuss was *whether the school district and school officials violated the plaintiff's right to equal protection because they were disciplined under the dress code for the Confederate flag purses while other students who wore clothing with "inappropriate symbolism" were not disciplined.*<sup>xiv</sup>

Under the Equal Protection Clause of the Constitution, the "strict scrutiny" analysis applies when a legislative classification or rule impermissibly interferes with the exercise of a fundamental right or operates to specific disadvantage of a protected class, such as alienage, race, or ancestry.<sup>xv</sup> In *A.M.*, the Fifth Circuit noted that the plaintiff's, based on the holding in the previous two issues, failed to show that a policy of the school district infringed on their rights. Further, the plaintiff's failed to provide evidence that they were treated differently because of their race or other protected classification. Therefore, the "strict scrutiny" test does not apply to this case.

This meant the court must utilize the much less stringent "rational basis" test. Under this test, the plaintiff's right to equal protection is only violated if "the policy is not rationally related to a legitimate government purpose."<sup>xvi</sup> The Fifth Circuit, in its analysis in *A.M.*, then stated that schools have a "legitimate governmental interest in maintaining discipline and order in the public schools."<sup>xvii</sup> They then held...

Because school officials reasonably anticipated that displays of the Confederate flag would cause substantial disruption of or material interference with school activities, we conclude the policy was rationally related to the legitimate interest in maintaining school discipline and order.<sup>xviii</sup>

Therefore, the Fifth Circuit upheld the grant of summary judgment to the defendant school district and school officials on this final issue.

As such, the district court's order granting summary judgment to all defendants on all issues was affirmed.

**Note: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.**

## **CITATIONS**

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<sup>i</sup> 585 F.3d 214 (5<sup>th</sup> Cir. 2009)

<sup>ii</sup> *Id.*

<sup>iii</sup> 393 U.S. 503 (1969)

<sup>iv</sup> *A.M.*, 585 F.3d at 221 (quoting *Tinker*, 393 U.S. at 514)

<sup>v</sup> 436 F.2d 728 (5<sup>th</sup> Cir. 1971)

<sup>vi</sup> *A.M.*, 585 F.3d at 221-222 (quoting *Butts*, 436 F.2d at 731)

<sup>vii</sup> *Id.* at 222

<sup>viii</sup> [Sypniewski v. Warren Hills Regional Board of Education, 307 F.3d 243 \(3d Cir. 2002\)](#); *United States v. Blanding*, 250 F.3d 858, 861 (4th Cir. 2001); *Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2008); *B.W.A. v. Farmington R.-7 Sch. Dist.*, 554 F.3d 734, 739 (8th Cir. 2009); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366 (10th Cir. 2000); *Scott v. Sch. Bd. of Alachua County*, 324 F.3d 1246, 1249 (11th Cir. 2003)

<sup>ix</sup> *A.M.*, 585 F.3d at 224

<sup>x</sup> *Id.*

<sup>xi</sup> 478 U.S. 675 (1986)

<sup>xii</sup> *A.M.*, 585 F.3d at 225 (quoting *Fraser*, 478 U.S. at 686)

<sup>xiii</sup> *Id.*

<sup>xiv</sup> *Id.* at 225-226

<sup>xv</sup> *Id.* at 226 (citing *Mass. Bd. Of Retirement v. Murgia*, 427 U.S. 307 (1976))

<sup>xvi</sup> *Id.* (quoting *City of Dallas v. Stanglin*, 490 U.S. 19 (1989))

<sup>xvii</sup> *Id.*

<sup>xviii</sup> *Id.*