RECENT CASES

CONSTITUTIONAL LAW — FIRST AMENDMENT — THIRD CIRCUIT HOLDS UNIVERSITY SEXUAL HARASSMENT POLICY UNCONSTITUTIONAL. — *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008).

At educational institutions across the nation, administrators seeking to protect students from harassment must strike a delicate balance: policies that are too narrow can fail to reach harmful conduct, and policies that are too broad can deter protected speech and chill academic discourse. Recently, in *DeJohn v. Temple University*,[1] the Third Circuit held that Temple's sexual harassment policy was facially unconstitutional.[2] In doing so, the court looked to the wrong body of precedent and improperly applied the overbreadth doctrine. The court could have adopted a viable limiting construction, and accordingly, it should have allowed the policy to survive the facial challenge.

In 2002, Christian DeJohn, a member of the National Guard, enrolled at Temple University to pursue a master's degree in Military and American History.[3] Following his first semester, DeJohn was deployed to active duty in Bosnia, but he continued to earn credit via a correspondence course and returned to Temple in 2003.[4] DeJohn alleged that during his enrollment at Temple, he repeatedly clashed with faculty, particularly Professor Gregory Urwin, over what DeJohn saw as an anti-military bias in response to the Iraq war.[5] In September 2005, DeJohn submitted his thesis to Professor Urwin, who in written comments described DeJohn's work as a "hissy fit in print."[6] After receiving these comments, DeJohn met with University officials, who, he later claimed, refused to address his concerns about his thesis.[7] On February 22, 2006, DeJohn filed suit against Temple, alleging, inter alia, that the University's sexual harassment policy and its student code of conduct were facially overbroad and inhibited protected speech.[8] The sexual harassment policy read, in relevant part:

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[1] 537 F.3d 301 (3d Cir. 2008).

[2] *See id.* at 320. Temple is part of Pennsylvania's public system of higher education and is thus a state actor for First Amendment purposes. *See* 24 PA CONS. STAT. § 2510 (2006).

[3] *DeJohn*, 537 F.3d at 304.

[4] DeJohn v. Temple Univ., No. 06-778, slip op. at 2–3 (E.D. Pa. Sept. 11, 2006) (order granting in part defendants' motion to dismiss).

[5] Complaint at 6–7, 9, *DeJohn*, No. 06-778 (E.D. Pa. Feb. 22, 2006).

[6] *Id.* at 12.

[7] *Id.* at 14.

[8] *Id.* at 20, 25–27. DeJohn also brought various contract claims and claims under 42 U.S.C. § 1983. Complaint, *supra* note 5, at 20–25.

> [A]ll forms of sexual harassment are prohibited, including the following: an unwelcome sexual advance, request for sexual favors, or other expressive, visual or physical conduct of a sexual or gender-motivated nature when . . . (c) such conduct has the purpose or effect of unreasonably interfering with an individual's work, educational performance, or status; or (d) such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment.[9]

DeJohn claimed that he "f[ound] himself consistently engaged in conversations and class discussions regarding issues implicated by the speech codes and . . . fear[ed] that the discussion of his social, cultural, political and/or religious views regarding these issues m[ight] be sanctionable."[10] His complaint did not specify what those issues might be, but on appeal he "argue[d] that he felt inhibited in expressing his opinions in class concerning women in combat and women in the military."[11]

On January 15, 2007, Temple modified the challenged harassment policy by adding a requirement that sanctionable conduct reach a certain level of severity[12] and argued that the changes to the policy had removed the material issues from the case.[13] The district court disagreed, and on March 21, 2007, granted summary judgment in favor of DeJohn on his First Amendment claims, declaring the original policy to be facially unconstitutional and enjoining the University from reimplementing it.[14] Temple appealed.

The Third Circuit affirmed. Writing for the panel, Judge Smith[15] first turned to Temple's arguments that DeJohn's claim was moot.[16] The court found that it was not, as there was no guarantee that Temple would not simply reimplement the policy if the suit were dismissed, and "voluntary cessation of . . . illegal conduct" can only render a claim moot if "there is no reasonable expectation . . . that the alleged

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[9] *DeJohn*, 537 F.3d. at 316 (omissions in original) (emphasis omitted) (quoting TEMPLE UNIVERSITY POLICY ON SEXUAL HARASSMENT § II.A.1).

[10] Complaint, *supra* note 5, at 19. In his complaint, DeJohn discussed the chilling effects of sections of the Temple counseling center website as if they were part of the harassment policy, *see id.* at 16, 19, but the district and circuit courts focused exclusively on the sexual harassment policy and the code of conduct found in the University's *Policies and Procedures Manual*.

[11] *DeJohn*, 537 F.3d. at 317 n.18.

[12] *DeJohn*, No. 06-778, slip op. at 1–2 (E.D. Pa. Mar. 21, 2007) (order granting plaintiff's motion for partial summary judgment) ("[T]he harassing behavior must be 'sufficiently severe, pervasive, and objectively offensive as to substantially disrupt [a person's working or learning].'").

[13] *See id.* at 2.

[14] *See id.* at 4, 7. The district court later awarded DeJohn $1.00 in nominal damages. *DeJohn*, 537 F.3d at 306.

[15] Judge Smith was joined by Judges Hardiman and Roth.

[16] *DeJohn*, 537 F.3d at 308.

violation will recur."[17] Turning to the substance of the suit, the court stated that it was appropriate in the school context to employ the overbreadth doctrine, which allows facial challenges to statutes that have the potential to chill speech,[18] provided that "no reasonable limiting construction is available that would render the policy constitutional."[19] The court acknowledged that the Supreme Court had never applied overbreadth in a school speech case but justified its application in *DeJohn* as necessary to prevent a chilling effect on protected expression, which is of particular concern in the university setting.[20]

The court then introduced the case that would guide much of the *DeJohn* opinion, *Saxe v. State College Area School District*.[21] In *Saxe*, the Third Circuit struck down a similar public school harassment policy, relying on *Tinker v. Des Moines Independent Community School District*[22] for the proposition that "a school must show that speech will cause actual, material disruption before prohibiting it."[23] The *DeJohn* court noted that universities have less leeway to restrict speech than do public schools like those in *Saxe* and that Temple's policy thus would *at least* have to satisfy all of the concerns raised in *Saxe* to survive.[24]

As the *Saxe* court had, the *DeJohn* court took issue with the policy's focus on the speaker's mindset. The court explained that whereas *Tinker* required that speech cause a material disruption before a school could prohibit it, the Temple policy also reached speech that only intended to do so, even if it was unsuccessful.[25] The court further suggested that the policy's "unreasonably interferes" prong, even if narrowed, probably fails the *Tinker* test because "it still does not necessarily follow that speech which effects an unreasonable interference" is proscribable.[26] The court likewise objected to the use of the phrase "gender-motivated," on the grounds that it could extend to speech on a range of protected topics, "such as gender politics and sexual morality."[27] Specifically, the court expressed concern over the fluidity of the modern definition of "gender."[28]

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[17] *Id.* at 309 (quoting County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979)) (internal quotation marks omitted). The court also rejected Temple's assertion that DeJohn was no longer a member of the University and thus lacked a valid claim. *Id.* at 311–13.

[18] *Id.* at 313–14.

[19] *Id.* at 315 (quoting Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 259 (3d Cir. 2002)).

[20] *Id.* at 313–14.

[21] 240 F.3d 200 (3d Cir. 2001).

[22] 393 U.S. 503 (1969).

[23] *DeJohn*, 537 F.3d at 317 (citing *Tinker*, 393 U.S. at 509); *see also Saxe*, 240 F.3d at 211.

[24] *DeJohn*, 537 F.3d at 316, 318.

[25] *Id.* at 317 (citing *Saxe*, 240 F.3d at 216–17).

[26] *Id.* at 319.

[27] *Id.* at 317.

[28] *Id.* at 318 & n.20.

Having found the policy to implicate a range of protected speech, the court proceeded to consider a potential narrowing construction. In *Saxe*, a "requirement that the conduct objectively and subjectively creates a hostile environment or substantially interferes with an individual's work" was considered necessary to prevent chilling.[29] As the Temple policy appeared to lack such a requirement, the court found that it reached speech on any number of subjects, regardless of the severity of its impact, and thus could not be sufficiently narrowed.[30]

In holding Temple's policy unconstitutional, the *DeJohn* court focused on the policy's potential to chill speech on subjects that should be freely discussed in a university setting.[31] However, a feasible limiting construction would have allowed the policy to stand without chilling speech. Adopting such a construction is highly preferable to the "last resort" of invalidating for overbreadth.[32] The court was prevented from reaching such a construction by its reliance on *Tinker* and its failure to consider other precedent that evinces an approval of hostile environment harassment law.

The balancing of rights and interests that led to *Tinker*'s result was quite different from that appropriate in *DeJohn*. *Tinker* dealt with a distinct set of circumstances: an as-applied challenge, expressly political speech, viewpoint discrimination, and a national backdrop of student protests.[33] Furthermore, although the *DeJohn* court acknowledged that *Tinker*'s rule extended beyond the threat of disruption — student speech rights must give way should speech "substantially disrupt school operations *or interfere with the rights of others*"[34] — the court nevertheless treated the disruption prong as providing the sole basis on which schools may restrict speech.[35] It did so despite more recent cases in which the Supreme Court clarified that speech can sometimes be regulated "even without the threat of substantial disrup-

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[29] *Id.* at 318 (citing *Saxe*, 240 F.3d at 210–11).

[30] *Id.* at 318–20.

[31] The examples the court gave were "gender politics and sexual morality." *Id.* at 317.

[32] Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973); *see also* L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 39 (1999) ("[T]he overbreadth doctrine is not casually employed.").

[33] In *Tinker*, a public high school adopted a regulation apparently aimed at prohibiting the wearing of black armbands in protest of the Vietnam War. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509–11 (1969).

[34] *DeJohn*, 537 F.3d at 317 n.17 (emphasis added) (citing *Saxe*, 240 F.3d at 214). The "right of other students" at issue in *DeJohn* is the right to be free from sexual harassment. *Cf.* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992) (allowing damages under Title IX for the creation of a hostile environment based on sex). The *DeJohn* court did note this alternate rationale, 537 F.3d at 319, but it did not appear to alter the court's analysis.

[35] *See, e.g.*, *DeJohn*, 537 F.3d at 317 ("[S]peech cannot be prohibited in the absence of a tenable threat of disruption.").

tion."[36] As a result of the *DeJohn* court's misplaced focus, it saw fatal flaws wherever the Temple policy touched nondisruptive speech.

The *DeJohn* court would have found more useful guidance in the Supreme Court's sexual harassment jurisprudence. In *Meritor Savings Bank v. Vinson*,[37] the Court first recognized hostile environment sexual harassment, quoting approvingly from the definition of sexual harassment provided by the Equal Employment Opportunity Commission (EEOC).[38] *Meritor* itself did not address the constitutional questions it raised. In 1992, however, the Court decided *R.A.V. v. City of St. Paul*,[39] striking down as impermissibly content-based a local hate crimes ordinance that banned speech that "arouse[d] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[40] *R.A.V.*'s holding seemed to imply that harassment law was now constitutionally suspect as applied to speech,[41] but the Court suggested otherwise, noting that the state may permissibly restrict some expression if it is not targeted on the basis of its content: "[F]or example, sexually derogatory 'fighting words,' *among other words*, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices."[42] The concurring Justices were likewise concerned about separating sexual harassment law from *R.A.V.*'s

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[36] *Id.* at 317 n.17 (quoting *Saxe*, 240 F.3d at 214) (internal quotation mark omitted). In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Court stated that "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school." *Id.* at 266 (citation omitted) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986)). Likewise, in *Morse v. Frederick*, 127 S. Ct. 2618 (2007), the Court upheld the suspension of a high school student for (apparently nondisruptively) holding a banner appearing to advocate drug use because of the school's interest in preventing illegal drug use, *id.* at 2625, an interest surely no more compelling than the eradication of sex discrimination, *cf.* Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) (finding a compelling state interest in "eradicating discrimination against . . . female citizens").

[37] 477 U.S. 57 (1986).

[38] *See id.* at 65 ("[V]erbal or physical conduct of a sexual nature . . . [with] the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment [constitutes sexual harassment]." (citation omitted) (quoting 29 C.F.R § 1604.11(a) (1985)) (internal quotation marks omitted)). The quoted EEOC regulation closely resembles the Temple policy challenged in *DeJohn*.

[39] 505 U.S. 377 (1992).

[40] *Id.* at 380 (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

[41] Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1, 1–2.

[42] *R.A.V.*, 505 U.S. at 389 (emphasis added). While *R.A.V.* focused specifically on "sexually derogatory 'fighting words,'" the Court has held that this principle applies to speech beyond the disfavored categories of obscenity or fighting words. In *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), the Court upheld a zoning regulation that targeted theaters showing nonobscene adult films, because the regulation was aimed at the films' secondary effects, not their content. *Id.* at 47–49. *R.A.V.* cited *Renton* as an example of the type of exception it was discussing. *R.A.V.*, 505 U.S. at 389 (citing *Renton*, 475 U.S. at 48).

"broad principle."[43] Thus, as Professor Richard Fallon observes, "it appears that all nine Justices participating in *R.A.V.* assumed that the core Title VII prohibition against speech that creates a discriminatorily hostile work environment would pass constitutional muster."[44]

That impression was bolstered by *Harris v. Forklift Systems, Inc.*,[45] decided the next year. In *Harris*, the Court clarified that hostile environment claims under Title VII had both objective and subjective aspects, noting along the way that "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' . . . Title VII is violated."[46] The *Harris* Court made no mention of the First Amendment concerns raised by *R.A.V.*, but it did not do so unthinkingly: multiple parties and amici briefed those issues, and "at least one specifically urged the Court to narrow the scope of the 'hostile environment' cause of action to accommodate . . . speech rights."[47] Professor Fallon has read the Court's demonstrable efforts to avoid any narrowing of hostile environment law in *Harris* as an "implicit[] acknowledg[ment] that distinctive principles should apply to sexually harassing speech."[48] Collectively, *Meritor*'s use of the EEOC language, *R.A.V.*'s "sexually derogatory fighting words, among other words," and *Harris*'s "ridicule, and insult" strongly suggest that the Supreme Court considers hostile environment law as applied to speech to be constitutional.

Although *R.A.V.* is notoriously opaque,[49] and *Harris* is as notable for what it does not say as for what it does, these cases nevertheless illuminate the proper analysis of sexual harassment law far more effectively than *Tinker* can; *Meritor* should have been the yardstick against which the *DeJohn* court measured the language of Temple's policy.[50] The policy's most glaring departures from *Meritor*'s language were its uses of "gender-motivated" alongside "sexual" and "unreasonable interference" in addition to "hostile environment."

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[43] *R.A.V.*, 505 U.S. at 409–10 (White, J., concurring). Justice White was joined by Justices Blackmun, Stevens, and O'Connor.

[44] Fallon, *supra* note 41, at 12.

[45] 510 U.S. 17 (1993).

[46] *Id.* at 21 (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986)).

[47] Fallon, *supra* note 41, at 10.

[48] *Id.* at 2.

[49] *See, e.g.*, Ronald Turner, *Hate Speech and the First Amendment: The Supreme Court's* R.A.V. *Decision*, 61 TENN. L. REV. 197, 200 (1993) (calling the Court's approach "unclear").

[50] It is true that these cases dealt with workplace, not school, harassment, and also that schools are "marketplaces of ideas" in a way that workplaces are not. Even so, sexually harassing speech that would be strong enough to violate Title VII in the workplace would surely be "inconsistent with [a school's] 'basic educational mission,'" Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986)), and would just as surely "impinge upon the rights of other students," Tinker v. Des Moines Ind. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969), because hostile environment harassment is also a violation of Title IX, Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992).

Indeed, the *DeJohn* court was concerned that "gender-motivated conduct" could include speech on topics related to sex or gender generally. First, the court did not believe it was clear *whose* gender was to be the "motivation."[51] However, construing the policy with reference to its purpose, it is only logical to read "gender-motivated" to mean "directed at the gender of the recipient."[52] The court also, however, expressed unease with the term "gender" itself, which it described as having a fluid meaning, insofar as it can refer to either biological sex or personal identity.[53] This distinction is likewise easily dispensed with — the court's discretion in narrowing would allow it to adopt the latter meaning if the former appeared problematic.[54] In fact, the court considered a meaning that would have resolved both of its concerns — "because of one's sex" — but dismissed it out of hand, suggesting that it was unclear that it did not still reach "expression on a broad range of social issues."[55] Here, the court bizarrely insisted upon reading this provision as entirely discrete, contrary to the Supreme Court's admonition that the "[i]nterpretation of a word or phrase depends upon reading *the whole statutory text*."[56] Certainly, "expression because of sex" as a discrete proposition could cover a vast swath of speech, but the policy only reaches such expression when it also unreasonably interferes with an individual's work or creates a hostile environment.

Similarly, the court could have dispensed with its concerns over the policy's "unreasonable interference" standard.[57] The court wrote only that "it . . . does not necessarily follow that speech which effects an unreasonable interference" is proscribable.[58] It may be true that in the normal course of statutory interpretation a meaning must "necessarily follow" from the text in order to be valid, but the same is not true in constitutional narrowing, where courts may apply any feasible meaning that would not be "plainly contrary" to the will of the enacting body.[59] "Unreasonable interference" is flexible enough to be inter-

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[51] *DeJohn*, 537 F.3d at 318.

[52] Even scholars who criticize hostile environment harassment law have suggested that hostile speech *directed at* a particular individual or small group may constitutionally be restricted. *See, e.g.*, Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1871 (1992).

[53] *DeJohn*, 537 F.3d at 318 n.20. It is unclear why this distinction would be constitutionally significant — there is no basis for concluding that the boundary of free speech lies between harassing speech aimed at "gender as identity" and harassing speech aimed at "gender as anatomy."

[54] *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (using "gender" repeatedly to refer to a biological male/female duality).

[55] *DeJohn*, 537 F.3d at 319.

[56] Dolan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006) (emphasis added).

[57] For the court's discussion of the standard's scope, see *DeJohn*, 537 F.3d at 319–20.

[58] *Id.* at 319.

[59] Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); *see also* Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1111 (9th Cir. 2001) ("[S]tatutory

preted — in light of the policy's purpose — to refer to the level of interference that meets the court's "*substantially* interferes" standard.[60]

The court should also have been reluctant to uphold the facial challenge in light of the Supreme Court's unwillingness to allow overbreadth challenges when the bulk of the behavior sanctioned by a statute or regulation is legitimately proscribable, even when some chilling effect is possible: "Although such laws . . . may deter protected speech to some unknown extent, there comes a point where that effect — at best a prediction — cannot . . . justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe."[61] Although the policy reaches pure speech, it also targets a range of physical and verbal conduct — such as "quid pro quo" harassment — that is within Temple's power to proscribe.

Temple's policy may properly raise constitutional questions. However, in order to justify a facial challenge, a statute's "deterrent effect on legitimate expression [must be] both real and substantial."[62] When Temple's policy is narrowed by a reasonable limiting construction, its chilling effect does not reach that level, and "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied."[63] The court's willingness to read the policy's terms broadly and measure them against the wrong precedential yardstick threatens increased litigation and deprives institutions of meaningful guidance as to how to combat harassment while respecting freedom of speech. Temple's policy is not an outlier — institutions from the University of California to the EEOC share some or most of the language that the *DeJohn* court found unacceptable.[64] Schools and students alike would be better served by a caselaw developed over time through as-applied challenges, which would also enable the courts to properly balance the weighty concerns that compete in such cases.

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construction and constitutional narrowing . . . are . . . very different animals . . . . [N]arrowing seeks to add a constraint to the statute that its drafters plainly had not meant to put there . . . ." (first alteration in original) (quoting United States v. X-Citement Video, Inc., 982 F.2d 1285, 1295 n.6 (9th Cir. 1992) (Kozinski, J., dissenting in part), *rev'd*, 513 U.S. 64 (1994))).

60 *DeJohn*, 537 F.3d at 318 (emphasis added).

61 Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

62 Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975) (citing *Broadrick*, 413 U.S. at 612–15).

63 *Broadrick*, 413 U.S. at 615–16.

64 See, for example, OFFICE OF THE PRESIDENT, UNIV. OF CAL., UNIVERSITY OF CALIFORNIA POLICY ON SEXUAL HARASSMENT 1 (2006), *available at* http://www.ucop.edu/ucophome/coordrev/policy/PP021006Policy.pdf, which uses the "unreasonable interference" standard, and 29 C.F.R. § 1604.11(a) (2008), which shares Temple's "purpose or effect," "unreasonably interfering," and "hostile, or offensive environment" prongs, but not its "gender-motivated" term.