

BADGER COUNTY DISTRICT COURT
No. 521
October Term, 2008

Kit Politte and Cory Towles,

Plaintiffs,
v.
Horton Hopkins School District and Keena Smalls,

Defendants

Sally Pearson, Judge

OPINION

Kit Politte and Cory Towles challenge the constitutionality of Horton Hopkins School District’s decision to force Politte and Towles to shut down their individual webpages. I find that the school district’s attempt to regulate student speech is constitutional under the First Amendment, as applied to school officials by the Fourteenth Amendment.

Corey Towles further challenges the constitutionality of Horton Hopkins school officials’ search of his person without consent or a warrant. I find that the school officials permissibly searched Towles under the Fourth Amendment, as applied to school officials by the Fourteenth Amendment.

I. Factual Background

The facts of this case are not in dispute. The parties have stipulated to the following:

A. The Defendants: Keena Smalls and Horton Hopkins School District

For the past twenty years, Keena Smalls has been principal of Horton Hopkins High School (“Horton Hopkins”), a public school in Hopkinsville within the State of Grace. The last five years, she has witnessed increased drug use in Hopkinsville and on the high school campus. During the first two months of the fall semester alone, Smalls and other school staff members caught fifteen students smoking marijuana on school grounds. Last year, Smalls suspended twenty-five students for using illegal drugs on school grounds. The Hopkinsville community is still reeling from the December 2007 death of 17-year-old Kelly Smith, the captain of the volleyball team, who overdosed on cocaine at a party.

In January 2007, Principal Smalls requested that the school district enact a strict, zero-tolerance drug policy. The new policy allows school officials to test students for drugs and conduct searches of lockers, desks, and students’ personal property, including book bags and clothing. If a student possesses illegal drugs, the penalty is a suspension

of no less than three days. *See* Appendix A.

B. The Plaintiffs: Kit Politte and Corey Towles

In September 2008, high school senior Kit Politte, age 18, started Drug Use Damages Schools (DUDS), a school-sponsored club she hoped would help curb drug use within the student body. Approximately 130 students have signed up for the club. DUDS members post flyers throughout the school that promote a drug-free lifestyle. Members also organize school assemblies to discuss the perils of drug use. Following a September 10 assembly, speaker Jeffie Zarling told Politte that the only way to stop the drug problem is to point out drug dealers and users to the entire community.

That night, following her conversation with Zarling, Politte created a network webpage on Friendkepedeia.¹ The page is directed toward all residents of Hopkinsville who are members of the social networking website. Politte worked on the webpage at home from her personal computer. Politte's network webpage, Fighting All Dealers (FAD), called for community members to submit information about potential drug dealers. She hoped tips submitted to her webpage would help

¹ Friendkepedeia is a social networking website that allows users to create personal networks of acquaintances. Although open to anyone, the website is geared towards high school and college students. Friendkepedeia allows users to set up networks or groups, which are essentially webpages hosted by Friendkepedeia that other Friendkepedeia users with similar interests may join.

police and lead to the arrest of local dealers.

Politte named herself the administrator of the FAD webpage, and tipsters can e-mail information to Politte through a link on the network webpage. Politte moderates these e-mails and posts what she says are the "strongest" tips. All tips remain anonymous because Politte wants to be sure community members feel comfortable sending in information. Politte promoted her webpage at the September 15 DUDS meeting. The meeting took place after school hours, but in a Horton Hopkins classroom. Of the 235 members of Politte's network, 198 members are Horton Hopkins students, including all 130 DUDS members.

Corey Towles, age 16, is a sophomore at Horton Hopkins. He transferred to Horton Hopkins for the 2008-09 school year from a high school in the State of Disarray. At his former school, Towles, an honor student, played on the junior varsity baseball team and had no disciplinary action taken against him, except for two detentions because of tardiness during his freshman year.

On October 3, 2008, Towles attended a house party at the home of Jeff Tweegs, a Horton Hopkins junior. Tweegs is captain of the Horton Hopkins baseball team, and Towles hoped that meeting some of the baseball players would improve his chances of making the team. During the week prior to the Friday night party, rumors circulated at the school that some students would bring marijuana to the party. Tweegs, the party's host, had been suspended for a week in September after Principal Smalls caught him smoking marijuana during lunch.

Towles arrived at the party around 9 p.m. and left by 11 p.m. Although he said he saw a few students drinking beer and smoking cigarettes, he saw no drug use. Towles spent most of his time at the party outside tossing a football with a few other sophomores.

Around 11:30 p.m. on October 3, neighbors called Hopkinsville police complaining of noise at Tweegs' house. When police arrived to break up the party, they cited five high school students for underage drinking. Police also cited sophomore Frank Conrad for marijuana possession, after they found him in the backyard holding a marijuana joint.

The next day, on October 4, Politte, who did not attend the party, received an e-mail with an attachment. The attachment contained a photograph of Towles sitting with two other students, Conrad and another sophomore, John Thomson, outside Tweegs' house during the party. The photo showed Conrad smoking. Politte posted the photograph on her Friendkepedia FAD network and attributed the photograph to "an anonymous Horton Hopkins student." Although Towles' name was never revealed, his face was clearly visible in the photograph. The photograph's caption read: "Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?"

C. Student searches

The next morning, Principal Keena Smalls received calls from several school parents who had viewed the photograph on the FAD webpage and were concerned about the use of drugs. The Hopkinsville police also contacted

Smalls to alert her about the students they cited at Tweegs' party.

After she viewed the FAD webpage and photograph, Principal Smalls called Towles, Conrad, Thomson, and Tweegs individually into her office for questioning. When all four students denied possessing drugs, Smalls conducted a search of each of their lockers and book bags, per the school's drug policy. She found a small baggie of marijuana in Conrad's locker. She then asked each of the boys to submit to a search of their persons individually and in private.

Despite Towles' and the other three students' refusals to be searched, the gym teacher, Mr. Jim Waters, still conducted a search of each boy in a private room. Each boy was told to strip to his undergarments, and Waters then searched all clothing pockets. At no time did Waters touch any of the boys. During the search, Waters found a small amount of marijuana in Thomson's jeans pocket. Waters found no drugs in Towles' possession.

D. Demand to take down webpages

In response to Politte's posting on her Friendkepedia webpage and the school's search, Towles created his own Friendkepedia network page called Students Against Defamatory Statements (SADS). He edited his page only at home from his personal computer. He wrote on his webpage:

"By taking unauthorized photographs of me during a Friday night out with my friends, and then posting inaccurate captions, DUDS, a school organization under the guise of its website FAD, committed a gross

invasion of my privacy and defamed me in front of my friends and peers. What we do on our own time for fun is our business. Horton Hopkins school officials committed a far worse injustice when they subjected my friends and me not only to an unreasonable search of our lockers, but also to strip searches. We need to fight this injustice. I call for all Horton Hopkins students to let our school administrators know that we will not tolerate this kind of treatment. Let's speak out against Smalls and the rest of these Hopkins idiots."

After Horton Hopkins students heard about Towles' webpage, they began accessing both Politte's and Towles' pages not only from their homes, but also from the school computer labs and library during their free time throughout the school day and after school hours. Realizing the situation had gotten out of control, Principal Smalls demanded that both Politte and Towles shut down their Friendkepedia network webpages. When both students refused, Smalls suspended Politte and Towles until they agreed to take down the webpages.

Principal Smalls admitted she was angry about Towles' criticism of the school administration's actions in dealing with the drug problem on school grounds. However, Smalls said her main concern was keeping discipline and order at school, and preventing what she saw as a potential for student protest. She worried that Towles and Politte's websites were causing too much of a disturbance and interrupting other high schools students' education.

II. Arguments of the Parties

On October 15, 2008, Plaintiffs Towles, along with his parents, and Politte filed this action in Badger County Court pursuant to 42 U.S.C. §1983, alleging that Horton Hopkins High School's requirement that they take down their respective websites violated their rights to free speech under the First and Fourteenth Amendments of the U.S. Constitution. Plaintiff Towles further alleges that Horton Hopkins school officials' search of his person constituted an unreasonable search under the Fourth Amendment, as incorporated by the Fourteenth Amendment to the U.S. Constitution.²

Defendants Horton Hopkins High School and Keena Smalls, in her official capacity as principal of Horton Hopkins High School, moved for summary judgment on both counts. Defendants argue that this court should find, as a matter of law, that Horton Hopkins permissibly regulated the students' websites under the standard developed by the United States Supreme Court in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). Defendants further argue that the search of Towles was reasonable under the circumstances, but even if this court were to find it was unreasonable, defendants must still prevail under the doctrine of qualified

² Defendant Towles only challenges school officials' search of his backpack, wallet, and person; he does not challenge the search of his locker. *See e.g. Zamora v. Pomeroy*, 639 F.2d 662, 670 (10th Cir. 1981) ("Inasmuch as the school had assumed joint control of the locker it cannot be successfully maintained that the school did not have a right to inspect it").

immunity. *See Saucier v. Katz*, 533 U.S. 194 (2001).

I grant Defendants’ motion for summary judgment on both counts and find that Horton Hopkins School District did not violate either Defendant’s constitutional rights.

III. Discussion

A. Freedom of Speech

Plaintiffs Politte and Towles allege Horton Hopkins violated their First Amendment rights to free speech by forcing them to shut down their webpages. A threshold issue in student speech and cyberspeech cases is whether the speech at issue constitutes a true threat, which the First Amendment does not protect. *Watts v. U.S.*, 394 U.S. 705 (1969). “True threats encompass statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 534 U.S. 343, 359 (2003).

Because there is clearly no “expression of an intent to commit” an act of violence here, we do not have a true threat. Therefore, I turn to *Tinker* and its progeny to decide whether Horton Hopkins School District may permissibly regulate Plaintiffs’ webpages.

Under *Tinker*, if school officials reasonably predict that student speech will create a “substantial disruption or material interference” with school activities or invade the rights of others, they may regulate the speech. 393 U.S. at 514. However, school officials may not suppress student speech simply because they do not like it or out of

“undifferentiated fear or apprehension.” *Id.* at 508. Students may express controversial opinions, however, “conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.” *Id.* at 512-13 (citing *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966)).

In *Tinker*, a group of students wore black armbands to school to protest the Vietnam War. *Id.* at 504. School administrators suspended the students until they agreed to return to school without the black armbands. *Id.* The Supreme Court found that the students were merely expressing an opinion and hoping to persuade others to adopt their viewpoints. *Id.* at 514. The Court held that school officials could not constitutionally prohibit the black armbands because the students “neither interrupted school activities nor sought to intrude in the school affairs or the lives of others.” *Id.*

Later Supreme Court cases elaborated on *Tinker*’s application. The Court in *Bethel School District No. 403 v. Fraser* held that public school officials could prohibit student speech that was vulgar, lewd, or plainly offensive. 478 U.S. 675 (1986). In *Hazelwood School District v. Kuhlmeier*, the Court held that schools may exercise editorial control over the style and content of student speech if the speech is school-sponsored. 484 U.S. 260 (1986). Most recently, the Supreme Court added a fourth standard to its school speech jurisprudence in

Morse v. Frederick, a narrow holding that found school officials did not violate the First Amendment in restricting speech that they reasonably believed was promoting drug use. 127 S.Ct. 2618 (2007).

Although the Supreme Court has not addressed Internet speech in schools, many courts apply the *Tinker* “substantial disruption” test to questions involving online speech. *See e.g.*, *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34 (2d Cir. 2007); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998); *J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412 (Pa. Commw. Ct. 2000); *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008). Here, Defendant Towles’ web posting clearly called for a protest of Principal Smalls policy to search students for drugs. Smalls stated she was concerned of a protest breaking out and disrupting classes, and her concern was reasonable. Politte’s webpage induced Towles to create his own webpage, and therefore contributed to any potential disruption. Principal Smalls does not need to show a disruption did occur; she need only demonstrate that she and the school district could reasonably “forecast” a disruption. *Tinker*, 393 U.S. at 514. Towles’ call to action on his webpage, “[l]et’s speak out against Smalls and the rest of these Hopkins idiots,” could reasonably be seen as future disruption at school.

Defendants prevail under the *Tinker* standard, and I grant defendants’ motion for summary judgment on the First Amendment claim.

B. Defendants’ search of Plaintiff Towles was reasonable under the Fourth Amendment

School officials’ search of Towles constituted a permissible search within the meaning of the Fourth Amendment. The Fourth Amendment guarantees the privacy of individuals against certain arbitrary and invasive acts by government officers. *See Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 616 (1989). The Fourteenth Amendment applies the Fourth Amendment right to be free from unreasonable searches to state officials. *Elkins v. United States*, 364 U.S. 206, 213 (1960). Under a Fourth Amendment analysis, state officers include public school officials. *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

Under most circumstances, a search is not reasonable unless it is conducted pursuant to a judicial warrant issued after the government demonstrates probable cause. *See e. g.*, *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973). However, the Supreme Court carved out an exception when “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.” *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). This exception allows for searches based on a “reasonable suspicion,” even if the suspicion does not rise to the level of probable cause. *See e.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968). The Supreme Court applied this “special needs” exception to school situations because of the non-criminal investigatory nature of the searches. *See, e.g.*, *T.L.O.*, 469 U.S. at 341-42. A reasonable search “does not require employing the least intrusive means, because the ‘the logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all

search-and-seizure powers.” *Bd. of Educ. v. Earls* , 536 U.S. 822 (2001), (quoting *United States v. Martinez-Fuerte* , 428 U.S. 543, 556-57 (1976)).

New Jersey v. T.L.O., the leading school search case, established the framework for a reasonable search, as analyzed under the totality of the circumstances. *T.L.O.*, 469 U.S. at 341. School searches comport with the Fourth Amendment if the search is: (1) “justified at its inception,” and (2) “reasonably related in scope to the circumstances which justified the interference in the first place.” *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). Horton Hopkins officials’ search of Towles satisfied both of these requirements.

1. *The search was clearly justified at its inception because the school had independent evidence that Towles may have possessed drugs.*

A search is justified at its inception “when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.” *T.L.O.*, 469 U.S. at 342 (1985). In this case, school officials based their suspicion not only on a tip, but also on the photographic tip that Politte posted online. The photograph, which plainly showed Towles at a party where drugs and alcohol were present, is far more reliable than a tipster’s claim alone.

However, even if the Internet posting alone was insufficient to support the search, other independent facts corroborated the tip and justified the school officials’ search. First, Towles’

friends had been involved with drug use in the past—Frank Conrad had been cited at the party for marijuana possession, and Jeff Tweegs had been suspended from school for marijuana use. Further, Towles himself had attended a party that was rumored to be a drug party. Lastly, before conducting a personal search of the students, Principal Smalls found a baggie of marijuana in Conrad’s locker. That fact that one of these students had marijuana on school grounds should alone create a suspicion that more drugs could be present.

2. *The scope of the search was permissible because a strong government interest was at stake and the methods employed were not excessively intrusive.*

Under the *T.L.O.* framework, the search of a student by a public school official must also be permissible in its scope. 469 U.S. at 341-42. A search is permissible in its scope if “the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” *Id.* at 342.

First, there is a strong government interest in preventing student drug use, especially given the rise in drug use at Horton Hopkins. *Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1322-23 (7th Cir. 1993) (upholding strip search aimed at finding drugs); *see also Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 605 (6th Cir. 2005) (invalidating strip search aimed at finding stolen money and noting that “a search undertaken to find money serves a less weighty governmental interest than a

search undertaken for items that pose a threat to the health or safety of students, such as drugs or weapons.”) To rule otherwise could substantially jeopardize educators’ ability to protect students and provide for a safe campus.

Further, the methods employed in the search were not intrusive. In this case, only a male faculty member searched the four male students. The record indicates that the male teacher never touched the students, but merely searched the pockets of their clothing. Further, a search more thorough than a cursory search of a locker was reasonable given that school officials were looking for small bags of marijuana, similar to the baggie they already found in Conrad’s locker. *See e.g., Williams by Williams v. Ellington*, 936 F.2d 881, 887 (1991) (holding that because school administrators were searching for “a small vial containing suspected narcotics,” their “personally intrusive” search of the suspected student’s person was not unreasonable).

Because the search itself was constitutional and school officials did not violate Towles’ Fourth Amendment rights, I grant Defendants’ motion for summary judgment. There is no need to go further and address the Defendants’ qualified immunity defense.

IV. Conclusion

For the reasons stated above, this court finds that the demand that both Ms.

Politte and Mr. Towles shut down their websites does not impermissibly infringe the students’ First Amendment rights to expression. Additionally, the Horton Hopkins officials’ search of Mr. Towles did not constitute an unreasonable search under the Fourth Amendment because the search was justified at its inception and the scope of the search was permissible.

Defendant’s motion for summary judgment is GRANTED.

STATE OF GRACE COURT OF APPEALS
No. 254
January Term, 2009

Kit Politte and Cory Towles,
Appellants,
v.
Horton Hopkins School District and Keena Smalls,
Appellees

BEFORE: HARDING, P.J., TAYLOR and EVANS, J.
HARDING, P.J., delivered the Opinion of the Court in which TAYLOR, J. joined.
EVANS, J. filed a dissenting opinion.

OPINION

This is an appeal of a decision by the Badger County District Court of the State of Grace. We affirm.

I. Factual Background

The facts presented in the District Court’s opinion are adopted and incorporated by reference herein.

II. Standard of Review

We review a grant of summary judgment under Fed. R. Civ. P. 56(c) *de novo*. See e.g., *Pluet v. Frazier*, 355 F.3d 381, 383 (5th Cir. 2004).

III. Discussion

A. The District Court properly held that Respondent permissibly regulated student speech in order to prevent disruption during school hours.

Although the Supreme Court has

yet to carve out a rule specific to online student speech, the Court has found that Internet speech in general is subject to the same First Amendment protections as print media. *Reno v. ACLU*, 521 U.S. 844, 897 (1997). We agree with the district court that *Tinker v. Des Moines Independent Community School District* is the appropriate case to apply in this context.

In May 2008, the Second Circuit in *Doninger v. Niehoff* held that school officials could punish a student for blogging critically about school administrators. 527 F.3d 41 (2d Cir. 2008). The court wrote, “[w]e have determined, however, that a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct ‘would foreseeably create a risk of substantial disruption within the school environment,’ or at least when it was similarly foreseeable that the off-campus expression might also reach campus.” *Id.* at 48 (quoting *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007)).

In this case, both Towles' and Politte's web postings, even though created entirely off-campus, clearly reached campus. The District Court's record indicates that students accessed and read both webpages during school hours, on school ground. This is a clear example of off-campus expression reaching campus.

We agree with the District Court's findings that both Towles' and Politte's network webpages created a risk of substantial disruption under *Tinker*. We therefore affirm the court's finding that Horton Hopkins School District did not violate Appellants' First Amendment rights.

B. Although the search of Petitioner Towles was unreasonable under the *T.L.O.* standard, Respondents are entitled to qualified immunity with respect to Towles' Fourth Amendment claim.

The District Court properly articulated the *T.L.O.* standard for searches performed by school officials. However, it erred in applying the legal standard. The search at issue here was neither justified at its inception, nor reasonable in its scope. *T.L.O.*, 469 U.S. at 341. A search is not something to be taken lightly, and the Supreme Court has held that "even a limited search of the person is a substantial invasion of privacy." *Terry v. Ohio*, 392 U.S. 1, 24-25 (1967). The same holds true for students and "there is no reason to conclude that [students] have necessarily waived all rights to privacy in such items merely by bringing them onto school

grounds." *T.L.O.*, 469 U.S. at 339.

Even though the actual search was unconstitutional, we find that case law at the time of the search does not offer school officials enough guidance to determine whether a strip search will be constitutional. Because the law is not "clearly established," we hold that Appellees are entitled to qualified immunity. *See e.g. Saucier v. Katz*, 533 U.S. 194 (2001).

1. *The search was not justified at its inception because school officials did not have evidence to corroborate the Internet tip.*

In order to establish a reasonable suspicion, officials conducting the search must look at the totality of the circumstances. *United States v. Cortez*, 449 U.S. 411, 417 (1981). Although an anonymous tip alone cannot create a reasonable suspicion, the tip may be taken into consideration when assessing the circumstance. *Alabama v. White*, 110 S. Ct. 2412, 2416 (1990). Student tips alone are insufficient to support a constitutionally permissible strip search. *See Phaneuf v. Fraikin*, 448 F.3d 591, 598-99 (2006) ("While the uncorroborated tip no doubt justified additional inquiry and investigation by school officials, we are not convinced that it justified a step as intrusive as a strip search"); *Williams by Williams v. Ellington*, 936 F.2d 881, 888 (6th Cir. 1991).

Further, even though school officials may have found marijuana on Towles' friends, this does not provide evidence that Towles will have marijuana on his person. The District Court erred in assuming that Towles' friendship or association with Frank

Conrad and John Thomson makes Towles himself more likely to possess a prohibited substance. *See Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1084 (9th Cir. 2008) (“This is nothing more than “guilt-by-association,” certainly too thin of a reed for such a substantial intrusion into . . . expectations of privacy.”). Further, the District Court certainly should not have considered the marijuana found in Frank Conrad’s locker. A reasonableness inquiry must only consider facts the school officials knew prior to the start of the search. *Phaneuf*, 448 F.3d at 597.

Additionally, Towles has never been tied to illegal drug activity, nor has he been disciplined at school prior to the incident at issue here. Absolutely nothing in the record demonstrates a likelihood that Towles himself possessed drugs on school grounds. School officials had an obligation to at least conduct a further investigation, and look for other avenues of information, such as teachers or parents. *See e.g. Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1321 (7th Cir. 1993) (“As the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness.”).

For these reasons, we hold that the search was not justified at its inception.

2. *The search was unreasonable in scope because it was highly intrusive.*

Because we found that the school officials’ search of Towles was unjustified at its inception, and therefore did not meet the first prong of the *T.L.O.* test, there is no need to address whether

the search was unreasonable in its scope. *See T.L.O.*, 469 U.S. at 341-42.

3. *Defendants are entitled to qualified immunity because the constitutionality of strip searched was not clearly established at the time school officials searched Towles*

Even though the school’s search was unreasonable under the Fourth Amendment, and Appellees Horton Hopkins School District and Keena Smalls violated Appellant Towles Fourth Amendment rights, we still address the question of whether defendants prevail on their assertion of qualified immunity.³ The doctrine of qualified immunity rests on “two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.” *Scheuer v. Rhodes*, 416 U.S. 232, 240 (U.S. 1974). Courts must examine whether a constitutional right is “clearly

³ Under *Saucier v. Katz*, the Supreme Court required a two-step process when considering a question of a government official’s qualified immunity: (1) looking at the facts in a light most favorable to the injured party, the court must decide whether the injured party suffered a constitutional violation; and (2) if the injured party’s constitutional rights were violated, the court must next ask whether the right was “clearly established.” 533 U.S. 194, 201 (2001). The Supreme Court recently overruled *Saucier*, and held that although the *Saucier* protocol may be used if appropriate, it must no longer be mandatory. *Pearson v. Callahan*, 2009 U.S. LEXIS 591 (Jan. 21, 2009).

established” at the time the alleged violation occurred. *Saucier v. Katz*, 533 U.S. 194, 202. To be “clearly established,” a reasonable government official must know “that his conduct was unlawful in the situation he confronted.” *Id.* (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999) (holding the constitutional right must be “defined at the appropriate level of specificity before a court can determine if it was clearly established.”))

To determine whether a right is “clearly established,” this court first looks to U.S. Supreme Court precedent, and then to circuit court decisions. *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 607 (6th Cir. 2005) (citing *McBride v. Village of Michiana*, 100 F.3d 457, 460 (6th Cir. 1996)). Both the Eleventh Circuit and the Sixth Circuit have found, and we agree, that *T.L.O.* does not offer “detailed guidance” for applying the “reasonable suspicion” test, and therefore a school official has no way of predicting whether a strip search will be constitutional. *Jenkins by Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 825 (11th Cir. 1997); *Beard*, 402 F.3d at 607 (finding that “the Court [in *T.L.O.*] did little to explain *how* the factors should be applied in the wide variety of factual circumstances facing school officials today”).

Moving to circuit court findings, this court agrees with the dissent in *Redding* that the law on strip searches is not clearly established. 531 F.3d at 1108. Several circuits have upheld strip searches in schools in certain cases. *Cornfield*, 991 F.2d 1316; *Williams* 936 F.2d 881; *Hedges v. Musco*, 204 F.3d 109 (3d Cir. 2000); *Bridgman v. New Trier High Sch. Dist. No. 203*, 128 F.3d

1146 (7th Cir. 1997); see also *C.B. v. Driscoll*, 82 F.3d 383 (11th Cir. 1996) (holding a search of student’s pockets was reasonable). However, other circuits have found such searches unconstitutional. See *Phaneuf*, 448 F.3d 591 (2d Cir. 2006); *S.C. v. Connecticut*, 382 F.3d 225, 234 (2d Cir. 2004); *Beard*, 402 F.3d 598.

This discrepancy in circuit court case law alone demonstrates the law is not “clearly established,” and Horton Hopkins officials had no way of knowing for sure that their conduct was “unlawful in the situation.” Therefore, we find Appellees are entitled to qualified immunity.

III. Conclusion

For the above reasons, the District Court’s order granting summary judgment to defendants is AFFIRMED.

EVANS, J., dissenting in part.

The majority agrees with the District Court on the issue of Politte’s and Towles’ First Amendment right to expression. I respectfully dissent because the two webpages at issue here were created and accessed off school property. At no time did either student design or even look at the websites on school property or during school hours. Because the Internet speech was conducted entirely off-campus, this is a situation appropriate for disciplinary action by the parents, should they choose to become involved. Even though it is possible students may have accessed the website from school computers, both Politte and Towles created their websites on their own home computers.

This is not a matter that falls under school officials’ authority. See

e.g., *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (finding that speech off school grounds was “was entirely outside of the school's supervision or control”); *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1044-45 (2d Cir. 1979), (writing that “our willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate.”)

**IN THE
SUPREME COURT OF THE STATE OF GRACE**

Kit Politte and Cory Towles,

Petitioners,

v.

**Horton Hopkins School District and
Keena Smalls,**

Respondents

Docket No. 05-1338

January 26, 2009

WRIT OF CERTIORARI

Petition for writ of certiorari to the Court of Appeals of the State of Grace is **GRANTED**.

The issues before this Court are:

1. Whether Respondents' attempt to regulate students' Internet speech created off-campus was a violation of Plaintiffs' First Amendment rights.
2. Whether Respondents' warrantless search of Petitioner Towles on school premises violated Towles' Fourth Amendment rights, as applied to school officials by the Fourteenth Amendment.