UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

LAUREN DONINGER, PPA AVERY DONINGER	:	NO.: 3:07CV01129 (MRK)
v.	:	
KARISSA NIEHOFF AND PAULA SCHWARTZ	:	
	:	JANUARY 29, 2009

MOTION FOR RECONSIDERATION RE RULING ON MOTION FOR SUMMARY JUDGMENT [DOC. 93]

Pursuant to Local Rule 7(c), the defendants, Karissa Niehoff and Paula Schwartz, hereby move for reconsideration of the denial of summary judgment, entered January 15, 2009, as to the Team Avery t-shirt claim pursuant to their defense of qualified immunity. As set forth in the attached supporting memorandum of law, reconsideration is warranted as the right at issue was not clearly established when viewed under the requisite specificity, the prevailing law at the time of the conduct, and the undisputed facts before the Court. Similarly, reconsideration is warranted as the Defendants are entitled to qualified immunity even where the right at issue is clearly established as their actions were objectively reasonable, and any subjective intent by Defendant Karissa Niehoff is irrelevant to the analysis. Finally, reconsideration is warranted as Defendant Paula Schwartz is entitled to qualified immunity where the

ORAL ARGUMENT IS REQUESTED
TESTIMONY IS NOT REQUIRED

undisputed facts before the Court demonstrate the absence of personal involvement on her part as to the t-shirt claim.

WHEREFORE, the defendants, Karissa Niehoff and Paula Schwartz, respectfully request that this court reconsider its ruling and enter summary judgment in their favor based on qualified immunity.

DEFENDANTS,
KARISSA NIEHOFF AND
PAULA SCHWARTZ

By /s/ Beatrice S. Jordan

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CERTIFICATION

This is to certify that on January 29, 2009, a copy of the foregoing Motion for Reconsideration re Ruling on Motion for Summary Judgment (Doc 93) was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION RE RULING ON MOTION FOR SUMMARY JUDGMENT [DOC. 93]

I. BACKGROUND

On January 15, 2009, the Court filed its Memorandum of Decision [Doc. 93] granting in part and denying in part the Defendants' Motion for Summary Judgment [Doc. 73]. In its ruling denying the Defendants' motion as to what has become known as "the t-shirt claim," the Court found: (1) that the conflicting evidence in the record as to whether the plaintiff was chilled in wearing the t-shirt was sufficient to prevent summary judgment; and (2) that this matter was sufficiently similar to Tinker such that the First Amendment right at issue was clearly established and, thus, the Defendants were not entitled to qualified immunity.

Pursuant to Local Rule 7(c), the Defendants now move for reconsideration of the denial of summary judgment as to the t-shirt claim pursuant to their defense of qualified immunity. Reconsideration is warranted as the right at issue was not clearly established when viewed with the requisite specificity, the prevailing law at the time of the conduct,

and the undisputed facts before the Court. Furthermore, reconsideration is warranted as the Defendants are entitled to qualified immunity pursuant to the final factor of the qualified immunity analysis, which is, in the present case, whether the defendant's could reasonably have been mistaken about the status of law found to be clearly established. The defendants submit they are entitled to qualified immunity even assuming the right at issue is clearly established as their actions were objectively reasonable, and any subjective intent by Defendant Karissa Niehoff is irrelevant to the analysis. Finally, reconsideration is warranted as Defendant Paula Schwartz is entitled to qualified immunity where the undisputed facts before the Court demonstrate the absence of personal involvement on her part as to the t-shirt claim.

II. STANDARD OF REVIEW

The standard for granting a motion for reconsideration is strict. See Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995). Such a motion "will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Id. Reconsideration is justified: (1) where there has been an intervening change of controlling law; (2) the availability of new evidence; or (3) the need to correct a clear error or prevent manifest injustice. See Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992). The fact that the court overlooked controlling law or material facts may also entitle a party to succeed on a motion to reconsider. See Eisemann v. Greene, 204 F.3d 393, 395 n. 2 (2d Cir.2000)

(per curiam) ("To be entitled to reargument, a party must demonstrate that the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion.") (citations omitted).

A "motion for reconsideration may not be used to plug gaps in an original argument or to argue in the alternative once a decision has been made." Horsehead Resource Dev. Co., Inc. v. B.U.S. Envtl. Serv., Inc., 928 F.Supp. 287, 289 (S.D.N.Y. 1996) (internal citations and quotations omitted). Ultimately, however, the question of whether to grant a motion for reconsideration is a discretionary one, and the court is not limited in its ability to reconsider its own decisions prior to entry of final judgment. See Virgin Atl., 956 F.2d at 1255; see also Transaero, Inc. v. La Fuerza Aerea Boliviana, 99 F.3d 538, 541 (2d Cir.1996) (noting that "a district court is vested with the power to revisit its decisions before the entry of final judgment and is free from the constraints of Rule 60 in so doing.").

III. LAW AND ARGUMENT

The qualified immunity analysis typically involves a three-step process: (1) the Court must first determine whether plaintiff has alleged a violation of a constitutional right; (2) the Court must then consider if the violated right was clearly established at the time of the conduct; (3) finally, even if the Court determines that the plaintiff had a clearly established, constitutionally protected right that was violated by the actions of the defendants, the Court must consider whether the plaintiff has demonstrated that defendants' actions were not objectively reasonable. See Harhay v. Town of Ellington

Bd. of Educ., 323 F.3d 206, 211 (2d Cir. 2003) (internal citations omitted). As set forth below, the defendants contend that reconsideration is warranted as to the second and third steps of the qualified immunity analysis.

A. THE DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY WITH REGARD TO PROHIBITION OF THE T-SHIRTS AS THE SPECIFIC RIGHT AT ISSUE WAS NOT CLEARLY ESTABLISHED WHEN VIEWED UNDER THE APPROPRIATE STANDARD

In determining whether a particular right is clearly established for purposes of assessing the applicability of qualified immunity, the Second Circuit has considered three factors:

> (1) whether the right in question was defined with "reasonable specificity"; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant or official would have understood that his or her acts were unlawful.

Jermosen v. Smith, 945 F.2d 547, 550 (2d Cir. 1991); see also Shecter v. Comptroller of New York, 79 F.3d 265, 271 (2d Cir. 1996). If the right at issue is identified with a high level of generality, qualified immunity would be rendered meaningless as all officials are reasonably aware of such broadly defined rights. See Zahrey v. Coffey, 221 F.3d 342, 348-49 (2d Cir. 2000).

In defining the right at issue in the present matter, the Court stated “this case is sufficiently similar to *Tinker* that the right was clearly established and, thus, Defendants’ are not entitled to qualified immunity.” However, the Court also noted, there is “no doubt that a school could choose to place reasonable viewpoint-neutral restrictions on

electioneering materials in school assemblies" consistent with the holdings in Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617 (2d Cir. 2005), Make the Rd. by Walking, Inc. v. Turner, 378 F.3d 133 (2d Cir. 2004) and Cornelius v. NAACP, 473 U.S. 788 (1985). Additionally, as demonstrated below, Tinker's facts are not sufficiently similar to those at bar such that a reasonable school official in Principal Niehoff's shoes would know that her conduct with respect to the subject t-shirt was unconstitutional.

Unlike Tinker, this matter did not involve the passive wearing of armbands without anticipation of disruption. Rather, the undisputed evidence before the Court demonstrated that during the early morning hours on May 25, 2007, the date of the election assembly, Principal Karissa Niehoff was faced with rumors "that a few kids may be planning to wear a "Vote for Avery" shirt today for the class speeches and elections, or that they might write her name in on the ballot." See Pl.'s Obj. Mot. Summ. J. at Ex. 14. It is undisputed that the plaintiff was disqualified from running for office. Thus, Principal Niehoff was faced with rumors on the morning of the assembly and student election of the intention by some students to disrupt the integrity of the election process by wearing t-shirts advocating the casting of votes for the disqualified plaintiff and of a campaign to write her name in on the ballots. This is a world apart from the passive speech at issue in Tinker in which no disruption was anticipated, and none occurred.

Moreover, as this Court recognized, Principal Niehoff was entitled to place reasonable restrictions on materials in the assembly. Caselaw was clear as of May 25, 2007 that restrictions on student speech in a nonpublic forum, such as the election

assembly, were allowed, so long as they were reasonable in light of the purpose of the assembly, and the surrounding circumstances. See Cornelius, 473 U.S. at 809; Make the Rd., 378 F.3d at 147. Such restrictions will be deemed reasonable where they are consistent with the administration's purpose in preserving the assembly for the use for which it was intended. See Make the Rd., 378 F.3d at 147. "The [administration] can reasonably exclude expression that undermines the purpose served by a nonpublic forum. The most common reason for such an exclusion is that the excluded expression is distracting or disruptive." Id. at 148. The administration "need not wait until havoc is wreaked to restrict access to a nonpublic forum." Cornelius, 473 U.S. at 810.

The undisputed facts in this matter demonstrated that the plaintiff was disqualified from running for office. Despite this fact, Principal Niehoff heard rumors that students planned on wearing "Vote for Avery" t-shirts into the student speeches, and were planning to write the plaintiff's name in on the ballot. As the throngs of students were filing into the auditorium, Principal Niehoff observed several students with "Team Avery" t-shirts. Pursuant to the precedents set forth in Peck, Make the Rd., and Cornelius, Principal Niehoff was entitled to reasonably restrict such speech in order to preserve the integrity of the purpose of the assembly and election and was not required to wait until the process was in fact undermined in order to do so.

Accordingly, it was not clearly established under the principles of Tinker, Peck, Make the Rd., and Cornelius, that a school principal in Principal Niehoff's position could not make an on the spot determination to restrict students from wearing the t-shirts into

the assembly, either as a reasonable time, place and manner restriction, or as a means of preventing disruption of the election process.

In addition, as recently acknowledged by the Second Circuit, actual disruption is not required under Tinker and it's progeny. Rather, the proper inquiry is "whether school officials *might reasonably portend disruption* from the student expression at issue." Doninger v. Niehoff, 527 F.3d 41, 51 (2d Cir. 2008) (emphasis added). Based upon the rumors overheard by Principal Niehoff, as documented in her e-mail during the early morning hours on May 25, 2007, she reasonably portended that students would advocate for votes to be cast for the plaintiff at the assembly notwithstanding that she had been disqualified, and that students would embark on a campaign to write her name in on the ballot, as rumors were circulating that this conduct would take place. In fact, disruption of the integrity of the election process is exactly what occurred. The undisputed evidence before the Court was that a few students yell out "Vote for Avery" during the assembly, requiring Principal Niehoff to admonish the students to be more respectful. See Defs.' Rule 56(a)1 Stmt. at ¶¶ 82-83; Pl.'s Rule 56(a)2 Stmt. at ¶¶ 82-83. Moreover, students did in fact write the plaintiff's name in on the ballot, and the plaintiff steadfastly made claim as the proper winner of the election and ultimately sought injunctive relief to have herself declared the winner of the election. See Pl.'s Rule 56(a)2 Stmt. at ¶ 69; Pl.'s Second Amended Complaint at ¶ 35.

As demonstrated above, the facts of this matter are not similar to Tinker. This was not a situation involving the passive wearing of armbands without the anticipation of

disruption. Rather, this matter involved a rumored plan by students to undermine the integrity of the school's assembly and election process in combination with the "ambush" nature of the decision faced by Principal Niehoff as hundreds of students filed down the hall to the assembly. It is at this moment that Principal Niehoff observed the "Team Avery" t-shirts and had to make an on the spot decision as to their being allowed into the election assembly Principal Niehoff's ultimate decision to restrict all electioneering materials from the assembly comports with Peck, Make the Rd., and Cornelius. The plaintiff does not contend that Principal Niehoff restricted only her t-shirt while allowing other electioneering t-shirts into the assembly. In fact, the undisputed evidence before the Court was that absolutely no electioneering materials were permitted or present in the auditorium. See Defs.' Rule 56(a)1 Stmt. at ¶ 80; Pl.'s Rule 56(a)2 Stmt. at ¶ 80. The fact that the plaintiff was disqualified from running for office does not alter the analysis that the rumored t-shirts and write-in ballots were electioneering materials as the students were advocating for the election of the disqualified plaintiff. Furthermore, even absent the thought about any other electioneering materials, the law was not clearly established that the "Team Avery" t-shirts" could not be excluded from the election assembly because the Principal reasonably portended disruption.

In light of the undisputed facts in the record, and the prevailing authority relied upon by the Court, it cannot be said that it was clearly established on May 25, 2007 that a school principal could not make an on the spot decision to restrict student speech in

the form of the Team Avery t-shirt from the election assembly. Accordingly, the defendants are entitled to Qualified Immunity.

B. THE DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY WITH REGARD TO PROHIBITION OF THE T-SHIRTS AS THEIR ACTIONS WERE OBJECTIVELY REASONABLE UNDER THE CIRCUMSTANCES PRESENTED

"Even where the plaintiff's federal rights and the scope of the official's permissible conduct are clearly established, the qualified immunity defense protects a government actor if it was 'objectively reasonable' for him to believe that his actions were lawful at the time of the challenged act." Lennon v. Miller, 66 F.3d 416, 420 (2d Cir. 1995), citing, Anderson v. Creighton, 483 U.S. at 641. A governmental actor's conduct is objectively unreasonable where "no [official] of reasonable competence could have made the same choice in similar circumstances." Id. at 420-21. Summary judgment is appropriate, however, if officials of reasonable competence could disagree as to the legality of the defendants' conduct under the circumstances presented. See Malley, 475 U.S. 335, 341 (1986). A defendant's subjective beliefs are irrelevant to the qualified immunity analysis as the standard is one of objective reasonableness. See Anderson, 483 U.S. at 641; Harlow v. Fitzgerald, 457 U.S. 800, 818-820 (1982). The protections of qualified immunity will apply "regardless of whether the governmental official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." Pearson v. Callahan, ___ U.S. ___, 2009 WL 128768, *6 (2009).

In the instant matter, even if we were to assume the law was clearly established

that Principal Niehoff could not constitutionally restrict the "Team Avery" t-shirt from the election assembly, it was reasonable for Ms. Niehoff to have been mistaken about that, given the decisions in Peck, Make the Rd., Cornelius, and even Tinker. Given these decisions, and the undisputed facts that (1) students were rumored to be organizing a write-in campaign; and (2) the students were wearing the "Team Avery" t-shirts as the crowd filed into the auditorium for the election assembly, school principals of reasonable competence certainly could disagree as to whether Principal Niehoff's conduct was permissible under the circumstances presented. See Malley, 475 U.S. at 341. Given the above decisions, it cannot be said that no reasonable school principal could have concluded that he or she could make an on the spot decision to restrict the "Team Avery" t-shirt from the election assembly. See Lennon, 66 F.3d at 420-21. Accordingly, Qualified Immunity protects the defendants from liability.

Principal Niehoff's subjective intent has no place in the calculus. She is entitled to Qualified Immunity if a Principal of reasonable competence could have made the same decision under the same circumstances.. See Anderson, 483 U.S. at 641; Harlow, 457 U.S. at 818-820.

It bears repeating the Supreme court's recent acknowledgement that Qualified Immunity will apply "regardless of whether the governmental official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." Pearson v. Callahan, ___ U.S. ___, 2009 WL 128768, *6 (2009). Under the circumstances presented, it was reasonable for Principal Niehoff to be mistaken about

whether she could restrict the t-shirt in light of the existing law and facts presented at the time she made her decision. Tinker, admittedly, had been decided years before Ms. Niehoff's action, however, a Principal of reasonable competence could conclude that Tinker's passive wearing of an arm band to class was materially different from the wearing of t-shirts into an election assembly in support of an effort to write in a disqualified candidate. Given the email that plaintiff's counsel highlights in his brief, it was at minimum reasonable for a high school principal to have concluded, or been mistaken, that the t-shirts were being worn for the purpose of a campaign to write in a disqualified candidate. See, Pearson v. Callahan, ___ U.S. ___, 2009 WL 128768, *6 (2009) (Qualified Immunity will apply "regardless of whether the governmental official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.") Indeed, the write in campaign occurred, and a disqualified candidate received the most votes, clearly undermining the integrity of the election as well as the right of the other students to be represented in student government by qualified leaders. "Disruption" under Tinker, includes interference with the rights of other students, and that is precisely what occurred at the election assembly. See Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 680 (1986); Tinker, 393 U.S. at 508; Hazelwood v. Kuhlmeier, 484 U.S. 260, 266 (1988) (student speech can result in discipline if it substantially interferes with the work of the school or impinges upon the rights of other students). Finally, Ms. Niehoff's objectively reasonable judgment is fortified by established law governing reasonable time, place and manner restrictions within certain

proximity to the polls. See e.g. Burson v. Freeman, 504 U.S. 191, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992); Conn. Gen. Stat. § 9-236.

Principal Niehoff is entitled to qualified immunity as her actions were objectively reasonable under the prevailing law and facts presented.

C. FORMER SUPERINTENDENT PAULA SCHWARTZ IS ENTITLED TO QUALIFIED IMMUNITY AS THERE EXISTS NO ISSUE OF FACT THAT SHE WAS NOT PERSONALLY INVOLVED WITH REGARD TO THE T-SHIRT CLAIM

"Because qualified immunity is an immunity from suit rather than a mere defense to liability … it is effectively lost if a case is erroneously permitted to go to trial." Pearson, 2009 WL 128768 at *6, quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (internal quotation marks omitted). Section 1983 imposes liability upon a defendant only where he/she personally "subjects or causes to be subjected the complainant to a deprivation of a right secured by the Constitution and laws." Williams v. Smith, 781 F.2d 319, 323 (2d Cir. 1986); Snider v. Dylag, 188 F.3d 51, 54 (2d Cir. 1999). "Personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under §1983." Wright v. Smith, 21 F. 3d 496, 501 (2d. Cir. 1994), quoting Moffitt v. Town of Brookfield, 950 F.2d 880, 885 (2d Cir. 1991); Williams v. Smith, 781 F.2d at 323; Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995). Where a plaintiff is unable to adduce any evidence demonstrating the personal involvement of a defendant in the alleged deprivation of rights under §1983, the action must be dismissed as to that defendant. See Kia v. McIntyre, 2 F. Supp. 2d at 294.

In the instant matter, it is undisputed that Superintendent Paula Schwartz had no personal involvement in the decision to restrict the t-shirts from the assembly, and that the decision was made solely by Principal Niehoff, on the spot. The plaintiff herself alleges that the decision was made by Principal Niehoff as students were entering the auditorium. See Second Amended Complaint, ¶¶ 30, 31, 33. Moreover, the undisputed facts before the Court demonstrate that solely Principal Niehoff was involved in the restriction of the t-shirts. See Defs.' Rule 56(a)1 Stmt. at ¶¶ 72, 77-79; Pl.'s Rule 56(a)2 Stmt. at ¶¶ 72, 77-79. This Court's ruling itself implicitly recognized that Superintendent Schwartz was not personally involved in the determination to restrict the t-shirts, noting that Ms. Niehoff confiscated the electioneering materials and made the on the spot decision to restriction of the t-shirts. See Mem. of Decision at 21, 23

Accordingly, no genuine issue of fact exists that Superintendent Schwartz was not personally involved in the restriction of the t-shirts. Taking the Qualified Immunity analysis through its paces, it was not clearly established that supervisory involvement of the nature employed by Mrs. Schwartz could support exposure for an on the spot chilling of Avery Doninger's desire to wear her "Team Avery" t-shirt into the election assembly; and even if it were so established, it was objectively reasonable for Mrs. Schwartz to have been mistaken about that.

IV. CONCLUSION

Based on the above, the defendants, Paula Schwartz and Karissa Niehoff ask this

court to reconsider its ruling and enter summary judgment in their favor based on qualified immunity.

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