UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AVERY DONINGER,	:	
	:	
Plaintiff,	:	
	:	
v.	:	NO. 3:07CV1129 (MRK)
	:	
KARISSA NIEHOFF and	:	
PAULA SCHWARTZ,	:	
	:	
Defendants.	:	

RULING AND ORDER

On January 15, 2009, the Court granted summary judgment to Defendants on Ms. Doninger's blog entry First Amendment claim. Memorandum of Decision [doc. # 93]. At the same time, the Court denied summary judgment to Defendants on Ms. Doninger's First Amendment "Team Avery" t-shirt claim because of the existence of disputed issues of material fact.[1] The Court assumes familiarity with its decision and the facts of this case. Thereafter, the Court issued a trial schedule for the trial of the t-shirt claim. However, Defendants filed an appeal from the Court's denial of summary judgment on the t-shirt claim. In their appeal, Defendants assert that they are entitled to qualified immunity on the t-shirt claim as well as the blog entry claim. Not to be outdone, Plaintiff filed a cross appeal, in which she sought to appeal the Court's grant of summary judgment to Defendants on the blog entry claim.

Since Plaintiff's appeal is an improper interlocutory appeal, the parties have now jointly asked

[1] The Court also: (1) granted summary judgment to Defendants on Ms. Doninger's Equal Protection claim, and her claim for intentional infliction of emotional distress; (2) declined to exercise supplemental jurisdiction over Ms. Doninger's state constitutional claims and therefore dismissed those claims without prejudice to renewal in state court; and (3) denied Plaintiff's Motion for Partial Summary Judgment.

the Court to certify its decision on the blog entry First Amendment claim under 28 U.S.C. § 1292(b) so that on appeal the Second Circuit can address both aspects of Plaintiff's First Amendment claims – the blog entry as well as the t-shirt claims. *See* Plaintiff's Request for Certification to Appeal [doc. # 105].[2]

The Court has some doubts about the wisdom of certification in this case, for it is not at all clear to this Court that Defendants' qualified immunity appeal of the t-shirt ruling is proper. The Court denied summary judgment on the t-shirt claim because of the existence of disputed issues of material fact. While an interlocutory appeal from a denial of summary judgment on the basis of qualified immunity may be taken because "the qualified immunity issue should be resolved early in the proceedings since qualified immunity protects [a public official] from suit," *Cowan ex rel. Estate of Cooper v. Breen*, 352 F.3d 756, 760 (2d Cir. 2003), a district court's denial of a claim of qualified immunity is immediately appealable only "to the extent that it turns on an issue of law," *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). A defendant "may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995).

Nonetheless, Defendants assure the Court that they will focus their appeal on legal issues

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[2] Plaintiff's motion also asks for entry of judgment under Rule 54(b) of the *Federal Rules of Civil Procedure*. However, the Court is skeptical that Rule 54(b) provides authority to enter final judgment on the blog entry claim. Case law under that provision generally requires that the district court's decision on one of many claims to be entirely separate from the remaining claims in the case. *See* 10 Wright, Miller & Kane, Federal Practice & Procedure § 2654, at 33 ("The basic purpose of Rule 54(b) is to avoid the possible injustice of a delay in entering judgment on a *distinctly separate claim* . . . "). As the Second Circuit has noted, "those claims [that are] . . . "inextricably interrelated" to each other are inappropriate for rule 54(b) certification." *Ginett v. Computer Task Group*, 962 F.2d 1085, 1093 (2d Cir. 1992) In her motion, Plaintiff asserts that the blog entry claim is "inextricably intertwined" with the t-shirt claim, thus making the Court's ruling on the blog entry claim inappropriate for entry of judgment under Rule 54(b).

only. If the Court of Appeals intends to proceed to consider qualified immunity on the t-shirt claim, then this Court believes that it would be most efficient for the Second Circuit to examine qualified immunity on the blog entry claim at the same time. Therefore, the Court will grant the certification request and stay the trial on the t-shirt claim, which had been scheduled for June.

Section 1292(b) provides, in pertinent part, as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal form the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b). If the district court makes such a certification and if timely application is made to the Court of Appeals, that court may, in its discretion, permit an immediate appeal to be taken. *Id.* Certification under § 1292(b) should be granted sparingly because it undermines the policy against piecemeal appeals. To certify an order for interlocutory appeal, the order must satisfy three criteria: (1) it must involve a "controlling question of law"; (2) "as to which there is substantial ground for difference of opinion"; and (3) "an immediate appeal may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see, e.g., Casey v. Long Island R. Co.*, 406 F.3d 142, 146 (2d Cir. 2005). The Court believes all three criteria are satisfied regarding the Court's ruling that Defendants have qualified immunity from Plaintiff's First Amendment blog entry claim.[3]

1. Controlling Question of Law. Whether a school may discipline a student for inappropriate comments made off campus on a blog, or whether school officials have qualified immunity in such situations, presents controlling questions of law regarding the First Amendment. As the Court

[3] The Court is not willing to certify the Equal Protection ruling or any other ruling adverse to Plaintiff in its summary judgment decision, because there are not substantial grounds for difference of opinion on those issues.

indicated in its summary judgment ruling, the basic facts regarding the blog entry claim are not in substantial dispute and to the extent there are differences of views regarding those basic facts, they do not matter insofar as the qualified immunity claim is concerned, as the Court noted in its ruling. Therefore, the blog entry claim presents issues of law. *See Harriscom Svenska AB v. Harris Corp*., 947 F.2d 627, 631 (2d Cir.1991) (by its terms, Section 1292(b) may only be used to challenge legal determinations). Moreover, the First Amendment and qualified immunity questions are controlling in the sense that they will completely resolve the blog entry claim.

2. Substantial Ground for Difference of Opinion. There seems little doubt that the First Amendment issues raised by the blog entry claim are ones for which there is a substantial difference of opinion. Indeed, when this case was on appeal in connection with a motion for preliminary injunction, the Second Circuit expressly declined to decide whether the Supreme Court's decision in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), applied to off-campus speech, and analyzed the claim under the framework of *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). *See Doninger v. Niehoff*, 527 F.3d 41, 49 (2d Cir. 2008) (noting that "[i]t is not clear [whether] *Fraser* applies to off-campus speech"). That question remains undecided by the Second Circuit. Moreover, as the Court noted in its summary judgment ruling, a recent law review article observes that "when it comes to student cyber-speech, the lower courts are in complete disarray, handing down ad hoc decisions that, even when they reach an instinctively correct conclusion, lack consistent, controlling legal principles." Kenneth R. Pike, *Locating the Mislaid Gate: Revitalizing* Tinker *by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech*, 2008 B.Y.U. L. Rev. 971, 990 (2008). That "disarray" certainly confirms the fact that there is a substantial ground for difference of opinions on the First Amendment and qualified

immunity issues presented by the blog entry claim.

3. Materially Advance the Litigation. It seems to this Court that this prong is the most difficult one. However, since the Court of Appeals will have before it the qualified immunity issues regarding the t-shirt claim, it would be efficient to consider those same issues regarding the blog entry claim as well. The Court says this because it is apparent that the blog entry claim, not the t-shirt claim, is the central claim in this case.

There appear to be three possible scenarios and in each, efficiency is promoted by considering the blog entry claim along with the t-shirt claim:

* First, if the Second Circuit decides that Defendants are entitled to qualified immunity on both claims, that will obviously end the litigation.

* Second, if the Second Circuit decides that Defendants are not entitled to qualified immunity on either the blog entry or the t-shirt claim, the case would proceed to a single trial of both claims.

* Third, if the Second Circuit affirms this Court's summary judgment ruling, the blog entry claim will be forever gone and the potential for a trial of just the t-shirt claim would still exist. However, the parties have informed the Court that they are likely to be able to resolve that claim amicably if the only remaining claim in this case is the t-shirt claim.

Therefore, it appears that a Second Circuit's ruling will either end the case or ensure that there will be only one trial of Plaintiff's claims, not two. In these circumstances, the Court believes that certification will materially advance the ultimate termination of the litigation. *See Benzman v. Whitman*, 523 F.3d 119, 124 (2d Cir. 2008) (cross-appeal certified under § 1292(b) in connection with defendant's qualified immunity appeal).

Accordingly, the Court grants Plaintiff's motion [doc. # 105], and amends its Memorandum of Decision [doc. # 93] to certify the following questions to the Second Circuit:

1. Did Defendants' discipline of Plaintiff in response to her blog entry violate the First Amendment;

2. Do Defendants have qualified immunity on Plaintiff's First Amendment claim because the right at issue was not clearly established at the time of the events and/or a reasonable official would not have understood that the discipline imposed violated that right.

Of course, the Court understands that by certifying these questions, the Court's entire order is certified, not just the questions presented above. *See United States v. Stanley*, 483 U.S. 669, 676-77 (1987) (explaining that 28 U.S.C. § 1292(b) "brings the 'order,' not the question, before the [appellate] court"); *City of New York v. Beretta U.S.A. Corp*., 524 F.3d 384, 391-92 (2d Cir. 2008) ("When a district court certifies, pursuant to 28 U.S.C. § 1292(b), a question of controlling law, the entire order is certified and we may assume jurisdiction over the entire order, not merely over the question as framed by the district court."). However, it may assist the Second Circuit in evaluating the Court's certification to set forth the questions on which this Court believes there are substantial grounds for a difference of opinion.

IT IS SO ORDERED.

/s/ Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut: May 14, 2009.