

Case No. 23-002
Court of Appeals

KAUFMANN V. INDEPENDENT SCHOOL DISTRICT #84

Parties: **Appellant – Justin Kaufmann by and through his parents**
 Respondent – Independent School District #84

Issues:

- (1) Whether the school district impermissibly suspended Kaufmann for expressing “purely political speech” in violation of his First Amendment rights.
- (2) Whether the school district impermissibly suspended Kaufmann because his sweatshirt did not cause a “substantial disruption” nor did it “materially collide with the rights” of other students.

Facts:

Johnson Senior High School, one of two high schools in Independent School District #84, has a racially mixed student body—the school population is 47% white, 23% African American, 15% Latino, 11% Asian/Pacific Islander, and 4% mixed-race or other. The school has never had problems with race-related incidents and both the school and student organizations actively promote diversity. The surrounding community is also politically diverse. Approximately 45% of the district’s registered voters identify as Republicans, 45% as Democrats, and 10% as independents.

One day in the fall of 2015, Johnson High School senior Justin Kaufmann arrived at school wearing a sweatshirt bearing a large confederate flag on the back. After several students complained, Kaufmann’s homeroom teacher, Mark Hanner, ordered Kaufmann to take the sweatshirt off. When Kaufmann refused, he was immediately sent home. As the day went on, the school received calls from parents stating that they did not feel their students were safe at school. The school assured the parents that they had dealt with the issue and had a “zero-tolerance policy” for harassing or threatening apparel or behavior in the school community. The school also sent a letter to that same effect home with students at the end of the day.

The next day, Kaufmann received a letter from Johnson High principal Kathryn James, informing him that he was suspended for five days for violating the “Appropriate Dress” provision of the Code of Conduct.

The code provides, in relevant part:

Appropriate Dress. At all times, students shall dress appropriately for classes and activities. Students shall not wear clothing that is revealing or provocative. Students are prohibited from wearing or displaying any article of clothing or symbol that is likely to offend or threaten another, interfere with education, or disrupt Johnson High activities.

Upon learning of their son's suspension, the Kaufmanns sought an injunction, prohibiting the district from suspending Justin. The Kaufmanns claimed that the Code itself and the school's action had violated Justin's right to free speech.

At trial, Principal James testified about the district's attempts to promote diversity in a climate of increasing racial and political tension. James stated that the school's values include accommodating a diverse student body and making sure each student feels secure, both emotionally and physically, at school. James referenced social science research which shows that mental and emotional trauma inhibits learning capacity.

Kaufmann's teacher, Mr. Hanner, also testified that, while he understood that Kaufmann's sweatshirt could be interpreted as expressing a political viewpoint, he did consider the flag to be both "offensive" and "threatening" to other students. He testified that both white and black students complained to him about the sweatshirt. He stated that, when he asked Kaufmann to remove the sweatshirt, Kaufmann said, he had answered "No, I don't feel like it, and besides, I don't have anything else warm to wear." According to Hanner, Justin Kaufmann has poor grades and has shown difficulty with school authority. He is often in trouble for minor disciplinary problems.

On cross-examination, however, Hanner stated that, to the best of his knowledge, Kaufmann did not have particularly strong political views and had never participated in any organized activities related to race or politics. He also mentioned that he requested Justin remove the sweatshirt because he feared how other students might react. Hanner concluded by saying that on at least one previous occasion, another teacher had asked a female student to change clothes, for wearing what that teacher thought was a too-revealing blouse. That student complied, and was not suspended from school.

Justin Kaufmann testified on his own behalf, stating that his family descended from several civil war veterans. He testified that he had worn the sweatshirt to express his pride in that heritage. Kaufmann testified that he paid tribute to his ancestor's willingness to fight for what they believed in by wearing and refusing to remove the shirt. Kaufmann disputed Hanner's description of his response to the order to remove the shirt. He stated that he had informed him that he was making a statement and, if he was a good teacher, he would encourage his involvement in civic activities.

The school district submitted evidence at trial—including screenshots from Facebook and Twitter—which demonstrated that students had been discussing the sweatshirt issue on social media outside of school. Several of the students' posts showed strong disagreement, but the school admitted that none of the posts were violent or threatening in nature. The school also admitted that none of the social media activity had led to issues in the school itself, and that the school did not have a history of race-related incidents.

The trial court denied the injunction. In his order denying the injunction, the trial court judge stated that the school properly adhered to its dress code policy, which was not so broad as to violate the First Amendment. The judge found that Justin's sweatshirt was not "pure political speech" and could be interpreted as a threat to other students. Even if the shirt was pure political speech, the judge said that the school could regulate it because it caused a substantial disruption to the school community.

Authorities:

The following is a brief summary of the points of law you should keep in mind in preparing your briefs and arguments (you are not limited to these points; they are just good starter questions to think about). You will also notice some cases summaries below. These cases represent some of the materials you can use to begin your research. No further research is necessary.

Issue 1 – Summary of the Issues and Legal Background

The First Amendment to the United States Constitution protects Americans' rights to free speech, among other things, but that freedom has some important limits. For example, the First Amendment does not protect "fighting words"—personally abusive words or phrases which are commonly known or inherently likely to provoke a violent reaction from the listener. The First Amendment also does not protect speech which incites or encourages violence, and the First Amendment does not protect "true threats"—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. Speakers do not need to actually intend to do harm in order to communicate a "true threat."

Thus, First Amendment protection exists on a spectrum. On one end, purely political, nonthreatening speech is completely protected. On the other end, speech which is purely designed to inspire fear or encourage harm is completely unprotected, meaning that public authorities—such as schools or state governments—can regulate it or ban it outright without violating the First Amendment.

Sometimes, speech or symbols which would ordinarily be protected as "pure political speech" are not protected or are less protected because they carry some threatening implications, or cause people to feel threatened. In these cases, courts have to do a balancing act—what is more important, the right to express political or ideological views, or a person's right to feel safe? Does that balance change in the school environment? First Amendment protection is often about balancing values and priorities. Thus, the people, places involved as well as cultural context, are all important considerations.

For the purposes of this case, here are some questions to think about:

- Is the school's dress code policy too broad "on its face" (by itself)? That is, does it potentially cover speech which is protected by the first amendment such as offensive, but ultimately harmless, viewpoints?
- Was Justin expressing political speech by wearing his sweatshirt? Does it matter if he was just wearing the sweatshirt to wear it?
- To what extent can a symbol be a threat if it is not accompanied by any violent or intimidating conduct? Does this calculus change in the school environment or where children are concerned?
- When it comes to threats, what is more important, the intent of the speaker, or the message communicated to the listener? Again, does this balance change in the school environment?

Use the case summaries below to help you answer these questions.

<i>Tinker v. Des Moines</i> , United States Supreme Court (1969)	
Facts	Officials at the Des Moines public schools became aware of a plan to wear black armbands to protest the Vietnam War. They adopted a “policy” that any student wearing a black armband would be asked to take it off, and if they did not, they would be suspended. Two students—John Tinker and Christopher Eckhardt—wore black armbands to their high school in Des Moines. They refused to remove the armbands when asked, and were suspended.
Issue	Whether the school could permissibly regulate the student’s speech (the armband protest).
Holding	NO. The armbands represented purely political speech, which the school cannot regulate unless it causes a substantial disruption or materially interfere with school discipline.
Reasoning	Schools have greater latitude to regulate speech inside the school walls because of the “special characteristics of the school environment,” but students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” The students’ armbands were a silent protest to a purely political issue. Public schools may not silence viewpoints simply because they are uncomfortable or unpopular. Without evidence that the armbands substantially interfered with the school environment or materially impinged on the rights of other students, the school cannot discipline the students. Furthermore, the school adopted a policy <i>specifically</i> against the armband protest rather than adopting a broad policy that combated other unpopular or political symbols such as buttons for political campaigns or symbols of Nazism. Because the policy specifically targeted these students and this protest, the “policy” was an impermissible regulation of political speech.

<i>Virginia v. Black</i> , United States Supreme Court (2003)	
Facts	The state of Virginia passed a law which made it a crime to burn crosses because they represented an "intent to intimidate." The Respondents—Barry Black, Richard Elliott, and Jonathan O'Mara—were charged and convicted under the statute after they participated in a Ku Klux Klan rally where members burned a cross. The rally took place on private property. The Respondents sued the state, arguing that the statute was an unconstitutional infringement on their freedom to express political views.
Issue	Whether the statute unconstitutionally infringed on First Amendment freedom to express political views.
Holding	NO. Because cross burning can be interpreted as a true threat, the state of Virginia can constitutionally regulate it.
Reasoning	Cross burning has a long history of being associated with the Ku Klux Klan, racial violence, and messages of racial hatred. The Supreme Court discussed this history, and concluded that, while burning a cross is not <i>always</i> intended as a symbol of intimidation, "the burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm. Moreover, the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical... it is a serious threat." Because cross burning is such a powerful, historical symbol that is often accompanied by physical violence, it is not unconstitutional for the state to categorically ban it.

<i>Snyder v. Phelps</i> , United States Supreme Court (2011)	
Facts	The father of a deceased American soldier sued members of the Westboro Baptist Church after they protested his son's funeral. The Westboro Baptist Church frequently protests military funerals carrying signs with offensive messages such as "God Hates the USA," "Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers." Some of the signs also contained offensive messages regarding homosexuality and the Catholic Church. The church members notified local police of their plan to protest the funeral and complied with police instructions for staging their demonstration. They picketed in a fenced-off area approximately 1,000 feet away from the funeral. They did not yell or use profanity, and there was no violence associated with the protest.
Issue	Whether the speech concerned "matters of public concern," protecting it by the First Amendment.
Holding	YES. The Church's peaceful protest related to "matters of public concern," entitling it to special protection under the First Amendment.
Reasoning	Although the Church's signs were offensive and caused the family of the fallen soldier significant distress, the protest was organized and peaceful, and its message related to matters of broad social and political issues such as gays in the military and misconduct amongst the Catholic clergy. The Supreme Court rejected the argument that the protest represented a personal attack on the soldier and his family because the Church conducted their protest in public space and did not actually interfere with the funeral.

Issue 2 – Summary of the Issues and Legal Background

In addition to the “true threat” exception to the First Amendment, the Supreme Court has said that public schools, in particular, may regulate speech if it is a **substantial disruption** to the school environment or if it **materially interferes with the rights of other students** in the school community. Schools are allowed to employ this special exception to the First Amendment due to the “special characteristics of the school environment” and the fact that public school students are minors. Thus, speech which would ordinarily be fully protected by the First Amendment may be limited or restricted inside the school because it is substantially disruptive.

Like in Issue 1, these considerations also exist on a spectrum. If speech addresses a political or social issue, it is likely to be protected even if it bothers some other people in the school. However, if political or social speech has a serious negative effect on the school community, or even if it is likely to have that effect, school officials can potentially regulate it. The closer the content of speech is to areas which are objectively damaging to schools—such as plainly sexual or harassing speech or speech which promotes illegal activity such as drug use—the more likely it is that schools can properly regulate it.

For the purposes of this case, here are some questions to think about:

- To the extent that Justin’s sweatshirt can be viewed as a “protest” or an expression of political views, is it “passive” like the armbands in *Tinker*? Or is it hurting people?
- How many students or teachers need to be affected before the sweatshirt becomes a substantial disruption? Or is enough that the school can forecast a substantial disruption due to the history and context surrounding the Confederate flag?
- If wearing the Confederate flag can be construed as speech related to a political or social issue, is it disruptive enough or inconsistent enough with the mission of schools—promoting discourse *and* keeping students safe—for the school to regulate it?
- What other types of symbols or speech (particularly those represented on or by clothing choices) might a school be able to regulate?

Use the case summaries below to help you answer these questions.

<i>Tinker v. Des Moines</i> , United States Supreme Court (1969)	
Facts	Two students—John Tinker and Christopher Eckhardt—wore black armbands to their high school in Des Moines to protest the Vietnam War. Other than wearing the armbands, the students did not engage in any unordinary behavior at school. There was no evidence that the protest disrupted any school activities, or had any effect at all except causing discussion outside of classrooms. They refused to remove the armbands when asked, and were suspended.
Issue	Whether the armbands caused a substantial disruption.
Holding	NO. There was no evidence that the armband protest was actually disruptive and there was no evidence that school officials had reason to believe the school environment would be disrupted before they suspended the students.
Reasoning	Because the armband protest was purely political/symbolic speech, and there was no substantial disruption or foreseeable disruption to the school environment, the school's suspension violated the students' First Amendment rights. Furthermore, there was no evidence that the armbands were threatening other student's rights to feel secure in school.

<i>Hazelwood School District v. Kuhlmeier</i> , United States Supreme Court (1988)	
Facts	Students working on a school-sponsored student newspaper submitted two stories for publication in the newspaper—one interviewing anonymous female students at the school regarding their experiences with pregnancy, the other detailing the impact of divorce on students at the school. Believing that the stories were not appropriate for the school paper, the faculty advisor for the paper cut the stories before the paper went to publication. The students sued the school, arguing that the school had impermissibly infringed on their first amendment rights.
Issue	Whether the school impermissibly infringed on the students' First Amendment rights.
Holding	NO. School authorities have the authority to restrict speech in the school environment which is inconsistent with the school's mission and they have good reason to believe will cause a substantial disruption.
Reasoning	The school paper was part of the school environment for First Amendment purposes—the students on the paper were participants in a journalism class, the school paid for the publication of the paper, and the paper was widely distributed in the school community. Accordingly, the school had broad authority to regulate its content. The Supreme Court determined that schools "need not tolerate speech which is plainly inconsistent with the school's mission" because such speech is "likely to substantially interfere with the school's work or materially infringe on the rights of other students." In the court's view, it did not matter that the paper had not actually published the story (and therefore it did not actually cause a disruption in the school community), it only mattered that school authorities could "reasonably forecast" a disruption and sought to prevent it.

<i>Hawk v. Easton Area School Dist.</i> , United States Court of Appeals (2013)	
Facts	As part of a breast cancer awareness campaign, a non-profit foundation distributed silicone bracelets to high school students which said "I ♥ Boobies!" on them. The campaign was incredibly popular and evidence showed that the bracelets were actually promoting cancer awareness and activism amongst high school students. After two reported instances where male students pointed at the bracelets on female students and then made lewd gestures and comments, the school district instituted a district-wide ban on the bracelets, citing <i>Tinker's</i> "substantial disruption" standard.
Issue	Whether bracelets actually caused a "substantial disruption" such that the school district could permissibly regulate them on school grounds.
Holding	NO. <i>Tinker</i> does not give schools the authority to regulate political or social speech even if it has potentially lewd implications.
Reasoning	The bracelets, like the armbands in <i>Tinker</i> , represented a passive commentary on a political/social issue. Two isolated incidents where students made lewd gestures or comments do not amount to a "substantial disruption." Two isolated incidents also did not show how the bracelets were promoting "an environment of pervasive and severe harassment" which would collide with the rights of students to be secure at school.