Free Speech on Campus: Fresno State Student Activist Permitted to Pursue Retaliation Claim

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On April 7, 2016, the Ninth Circuit Court of Appeals handed down its opinion in O'Brien v. Welty, strengthening political speech protections for college students on the west coast. However, the decision may be seen as a setback for students who question university faculty or policies in a way that may be considered "threatening or endangering health or safety."

Neil O'Brien, an outspoken conservative student activist attending Fresno State, was disciplined in September 2011 after he confronted two professors at their offices with a video camera in hand, asking questions about their involvement in a campus magazine that O'Brien believed to have a liberal bias. After the incident, O'Brien was disciplined by the school for violating a state regulation against threats, harassment or intimidation. A college disciplinary board put O'Brien on probation and barred him from holding any positions in campus organizations or coming within 100 feet of the professors involved in the confrontation. O'Brien filed suit alleging the punishment violated his First Amendment rights, and that his probation was retaliation for his conservative views. In May 2013, a U.S. district judge in the Eastern District of California granted Fresno State's motion to dismiss the complaint.

The Court of Appeals found that O'Brien's behavior could be interpreted as "intimidating" by a reasonable person, affirming the college's right to discipline him. Significantly, however, the Appeals Court reversed the decision of the district court as to the retaliation claim, holding that based on the facts alleged, "a reasonable jury could conclude that defendants sought to punish O'Brien for his expression of his opinions, and to deter him from engaging in speech and conduct protected by the First Amendment."

Client Tip: *The Court specifically cautioned against over-reading this opinion, disclaiming that it does not provide a "free pass" to students who violate university rules simply because they can plausibly show that faculty or administrators disapprove of their political views. This decision simply reaffirms that colleges must be evenhanded in their enforcement of university rules. A copy of the Court's opinion can be found here.*

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