Court Rules that Inconsistent Application of Written Policies Could Create an Inference of Unlawful Intent

BY ROBERT G. YOUNG • APRIL 29, 2019

On April 10, 2019, the Eastern District of Wisconsin issued an interesting decision on a First Amendment retaliation claim.

A student had sued three administrators at the University of Wisconsin-Milwaukee, claiming that they had barred him from participating in a student government Board of Trustees ("Board") as retaliation against him for statements that he had made regarding students' rights to self-government. While the Court ultimately dismissed the claims against the administrators on qualified immunity grounds, what the Court said about the merits of the retaliation claim itself was of note.

The Court found that the student had submitted sufficient evidence to get to a jury on the question of retaliatory intent. The administrators had defended their decision to bar the student from the Board on the grounds that he was not enrolled in any classes at the time he sought to participate on the Board (which was during the summer), contravening a university policy that permitted only enrolled students to hold "leadership" positions in extracurricular organizations.

However, the Court noted that the student came forward with evidence that this was not a uniformly-enforced policy, even with regard to the Board, because at least one other student on the Board also was not enrolled in any classes at the time of joining the Board. Therefore, the Court found that the administrators' decision to apply the policy arbitrarily to a particular student could be viewed as evidence of retaliatory motive.

Client Tip: This case serves as a reminder that justifying a specific decision under the wording of a written policy may not always serve a shield to legal claims. Institutions should take care to ensure that their policies are implemented on a regular and consistent basis as to all students (as well as faculty and staff).

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