



Student Protest Activity Leads to Massive Verdict Against University

SCHOOLS FACE LEGAL RISKS RELATED TO PROTEST MOVEMENT

Insights

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It may be common to see protest activity on your campus – but thankfully it is not common to see a massive jury award rendered against an educational institute due to that activity. An ongoing dispute at an Ohio college that led to a multimillion-dollar verdict may serve as a cautionary tale for your school, and may end up setting the precedent for how future conflicts of this nature are resolved by courts.

What Happened?

The conflict started when a group of Oberlin College students accused a local bakery of a history of racial misconduct, including alleged racial profiling. The students called for a protest and a boycott of the business. The bakery, in turn, filed a defamation lawsuit against Oberlin, not against the students themselves. After a trial in May and June 2019, an Ohio jury returned a verdict in favor of the bakery and its owners, and the trial court entered a judgment against Oberlin College and its Dean of Students for over \$25 million in compensatory and punitive damages. The court later awarded more than \$6 million in attorneys' fees and litigation costs.

Both sides appealed; the bakery owners objected to the trial court's application of statutory damages caps to reduce the punitive damages award to an amount included in the \$25 million judgment, and Oberlin College sought to overturn the jury's verdict and requested that the appellate court enter judgment in its favor, or alternatively send the case back to the lower court for a new trial or to reduce the damages award. Briefing was just completed in the appeals filed by both parties, and we expect to see a ruling by the appeals court during 2021 in this pivotal conflict.

Implications of Decision Are Profound

The trial verdict has alarmed leaders of academic institutions across the country, and the recent protests of racially charged incidents involving law enforcement across the country have only caused the alarm bells to ring louder. If the Oberlin College verdict is allowed to stand, administrators of educational institutions face an almost-intractable dilemma: how does a school balance its mission to encourage students to express their opinions in the classroom and even outside the institution against the risk of multimillion dollar jury verdicts resulting from students' speech?

Oberlin College has asserted a number of legal arguments on appeal that are persuasive, and they are joined by “friends of the court” who have filed briefs supporting its positions. First and foremost, the school argues that the statements were made by the students, and that therefore the school did not publish the statements alleging a pattern of racial profiling and discrimination by the bakery and its owners.

The bakery argued that Oberlin officials “aided and abetted” the students in publishing their speech by allowing the students to use the school’s email servers, permitting the student Senate to post a student government resolution on a school-owned bulletin board, and failing to be “the adult in the room” by preventing students from engaging in the protest speech. The irony of the latter argument, of course, is that the students are themselves “adults,” and the suggestion that Oberlin College must censor its students’ speech in order to avoid a defamation judgment runs counter to its mission as an institution of higher learning.

At trial, there was no dispute that it was the students, and not the college, that wrote the student Senate resolution and a flyer distributed at the protest. (For some reason, the court ruled before trial that student chants at the protests were not actionable but that the resolution and flyer were.) While administrators ultimately became aware of the resolution and the flyer, they had no reason to believe that the statements contained provably false statements of fact.

Fact or Opinion?

Indeed, whether the allegations against the bakery contained in the both written statements were “verifiable facts” – which could be actionable for defamation – or rather constitutionally protected “opinion” was a hotly contested issue in the litigation. Many cases have found that statements alleging that a person’s actions are “racist” are inherently subjective, since they are made through the prism of the experiences of the individuals asserting the conclusion.

A review of social media posts makes it inherently clear that people have wildly divergent views about whether an action or statement of a public official, for example, is “racist.” Moreover, terms that are “loosely definable” or “variously interpretable” cannot generally support claims for defamation, as opposed to allegations that are clear statements of fact.

When speech is in the context of debate over issues of public importance and a call to action by the speaker, statements made in connection with that advocacy (in the case of the flyer, a request by student protestors that citizens of Oberlin “stand with us” and boycott the bakery) are generally understood to be the speaker’s opinion, not provable facts.

Other Important Defense Points

Oberlin College asserted numerous other points on appeal, including the fact that it was not permitted to introduce evidence of information that it learned on the question of whether members of the community had themselves observed or experienced racial discrimination at the bakery. In addition, the college also argued that the jury’s finding in the first stage of the trial that the school had not acted with malice was binding and should have precluded the case from proceeding at all

had not acted with malice was binding, and should have precluded the case from proceeding at all to the punitive damages phase. Instead, the judge permitted the jury to revisit the question in punitive damages phase.

This finding by the jury was significant for two additional reasons: (1) if the court had agreed with Oberlin that the bakery owners were “public figures” due to their notoriety in the community, the absence of malice would have made a claim of defamation impossible; and, (2) in the absence of actual malice, the bakery owners could not recover “presumed” damages but instead would have had to prove actual injury to reputation proximately caused by the flyer and the resolution, which they did not do during the trial. No witness testified that they read the flyer or resolution, believed them, thought less of the plaintiffs as a result, or declined to do business with them.

Unfortunately for Oberlin College, Ohio does not have an “anti-SLAPP” statute, which could have been helpful in its defense. These types of laws, which states pass to prevent lawsuits intended to chill participation in matters of public importance, often provide support for early dispositive motions which can end a defamation case before it begins. Some provide for a stay of the proceedings while an early motion to dismiss is considered, and others provide for the recovery of attorneys’ fees for the prevailing defendant. Ohio legislators have introduced anti-SLAPP bills as recently as 2019, but so far none have passed.

What This Means for Your School

Ultimately, it is up to your school administrators to decide whether more aggressive monitoring of student speech is warranted. Some schools, fearful of lawsuits, may do so. But the majority are more likely to take steps to clearly distance themselves from student speech or require that student speech on controversial subjects more explicitly indicate that the statements are opinion.

It is unlikely that the Ohio appellate court will decide the Oberlin College case this year, particularly in light of COVID pandemic. No doubt, however, that schools and colleges will be anxiously awaiting the decision until the court rules on the matter and provides a better framework for navigating this area of concern.

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