UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket no. 93-7876

LEONARD JEFFRIES,

Plaintiff-Appellee,

v

BERNARD HARLESTON, individually and in his official capacity as President of City College of New York, W. ANN REYNOLDS, individually and in her official capacity as Chancellor of the City University of New York, EDITH B. EVERETT; HERMAN BADILLO; SYLVIA BLOOM; GLADYS CARRION; LOUIS C. CENCI; MICHAEL J. DELGUIDICE; STANLEY FINK; WILLIAM R. HOWARD; HAROLD M. JACOBS; SUSAN MOORE MOUNER; CALVIN O. PRESSLEY; THOMAS TAM, individually and in their official capacities as Trustees of the City University of New York,

Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of New York
Hon. Kenneth Conboy, Presiding
92 Civ. 4180 (KC)

AMICUS CURIAE BRIEF
THE AMERICAN JEWISH COMMITTEE
IN SUPPORT OF DEFENDANTS-APPELLANTS

Kenneth S. Stern,
Counsel of Record
Samuel Rabinove
Wendy Lecker
American Jewish Committee
165 East 56th St.
New York, New York 10022
(212) 751-4000

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

United States Constitution:

Other Sources:

STATEMENT OF INTEREST

The American Jewish Committee (AJC), a national organization with over thirty chapters and approximately 40,000 members, was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. It is AJC's conviction that bigotry against any group of Americans threatens all Americans, and that bigotry on college campuses is of special concern because, in this setting, hateful messages are amplified and legitimized. The American Jewish Committee has met with over 100 university and college presidents in recent years, emphasizing that when an incident of bigotry occurs, two values must be paramount: the protection of free speech, and the denunciation of hate.[1] Our interest in the current case comes from our conclusion that the District Court misapplied the law, and thereby 1) unconstitutionally infringed on the First Amendment rights of Trustees to denounce bigotry and 2) erroneously extended the protection due Appellee in a classroom setting to his institutional role as department chairman -- a role from which the college administration has the right to remove a spokesman who preaches hate.

---

[1] See Kenneth S. Stern, Bigotry on Campus, (New York: American Jewish Committee, 1990). See especially pps. 10-12 for rejection of Hate Speech codes.

SUMMARY OF ARGUMENT

The American Jewish Committee believes that the District Court erred in four particulars that gave Appellee's hateful speech greater protection than the First Amendment to the United States Constitution affords, and concomitantly infringed on the First Amendment rights of Appellants.

First, the District Court erred when, as required by Pickering v. Board of Education, 391 U.S. 563 (1968), it balanced the interests of Appellants and Appellee. It weighed the various factors as if Appellee had been fired from his position as a tenured professor. The District Court ascribed no legal significance to the fact that Appellee had not been fired from his professional position, and that his position as departmental chair included functions as a spokesman for the College. While a college may have no inherent right to punish a professor for what he teaches or says off campus, it has every right to insure that the people who speak for the institution do not do so in a bigoted manner.

Second, the District Court erred when it failed to give any significance to the Jury's answer to question #4.[2] If, as the

---

[2] See OPINION and ORDER at 17-18. ("4. If the answer to question #3 was 'no,' have the defendants proven by a preponderance of the evidence that the defendants were motivated in their actions by a reasonable expectation that the plaintiff's July 20, 1991 speech would cause the disruption of the effective and efficient operations of the Black Studies Department, the College, or the University? 'Yes.'" [Question #3 read: "3. Have the defendants proven by a preponderance of the evidence that Leonard Jeffries' July 20, 1991 speech hampered the effective and

Jury found, the Appellants proved that they had a reasonable expectation that Appellee's speech would disrupt the operation of the institution, then Appellants' qualified immunity defense must be sustained. As the District Court itself found, if Appellee's speech had negatively impacted the effective operation of the school, Appellants could not be found liable.[3] Since they had a reasonable belief that Appellee's bigoted speech had that exact impact, Appellants must prevail.

Third, the District Court erred when it applied a "but for" analysis of Appellee's speech[4] -- that is, by holding that Appellee would win if Appellants failed to show that they would have denied Appellee his full three-year term even if he had not given his July 20, 1991 speech. While Appellants, arguendo, may not have been able to take action against Appellee simply because they disagreed with his speech, they were certainly able to take cognizance of his speech in ways that did not contravene his First Amendment rights. The "but for" analysis of the District Court removed the need for a causal link to be shown between the speech and the alleged unconstitutional action, and resulted in unconstitutionally catapulting Appellee's First Amendment rights to a superior, and unwarranted, position.

Fourth, the District Court erred in allowing punitive

---

efficient operation of the Black Studies Department, the College, or the University? 'No.'"])

[3] See OPINION and ORDER, pp. 27-30.

[4] See question #2 to the jury (OPINION and ORDER at 17), and OPINION and ORDER at pp. 26-27.

damages against the four trustees. These trustees either voted against or abstained from the vote that gave Appellee his cause of action. The trustees whose votes actually limited Appellee's term were found not to be liable, while those whose votes did no harm to Appellee were found liable. The only reason for this Alice-in-Wonderland result is that these four trustees spoke out strongly to denounce Appellees' bigoted speech. These trustees are being punished for their exercise of their own First Amendment rights, and not for any action on their part. Punitive damages exist to punish bad acts, not good acts that may have been engaged in for "incorrect" motives.

ARGUMENT

I.

THE DISTRICT COURT IMPROPERLY BALANCED THE RELEVANT INTERESTS UNDER PICKERING V. BOARD OF EDUCATION, FAILING TO ASCRIBE LEGAL SIGNIFICANCE TO THE FACT THAT APPELLEE WAS REMOVED FROM HIS POSITION AS AN ADMINISTRATOR AND UNIVERSITY SPOKESMAN, NOT FROM HIS POSITION AS A TENURED PROFESSOR.

Appellee is a tenured professor at the City College of New York. After his hateful and anti-Semitic July 20, 1991 speech,[5] Appellants took various actions that impacted Appellee's position as a departmental chair. None of those actions targeted

---

[5] The District Court termed Respondent's Albany speech "hateful," "poisonous," "reprehensible," "vulgar," "caustic," "destructive," "egregiously offensive" and "repugnant." See OPINION and ORDER at 1, 50, 53, 65.

Appellee's role as a tenured professor.

The District Court found that Appellee, in his role as departmental chair, was, inter alia, "a spokesperson for his department"[6] and "a formal leader of the College administration."[7] A spokesperson of a department, by necessity, represents that department to the world beyond that department, whether it be to other parts of the campus, to other universities, or to the general public.

While the District Court noted the factual distinction between the roles of a departmental chair and a tenured professor, it failed to understand the legal significance of this distinction, and to alter the balancing Pickering mandates accordingly.[8] In fact, the District Court wrote exactly the same opinion, and conducted the same analysis, as if Appellee had been terminated from his tenured position.[9]

The legal significance of the District Court's failure to distinguish between a chairman and a tenured professor is illustrated, in part, by the following example. Assume, arguendo,

---

[6] OPINION and ORDER at 47.

[7] Id., at 11.

[8] See OPINION and ORDER, pp 46-47, fn. 31.

[9] Even at the beginning of its OPINION and ORDER, the District Court suggested that the same legal standard applies regardless of whether the action taken was to impact Respondent's teaching, or his role as a university spokesman. "[T]he University is in no way restricted from monitoring the Professor's classes and his on-campus stewardship of the Chairmanship, and that he may be removed from either if a good cause basis for abusive or indecent behavior is adequately established."

that a public university's president made a speech during which he or she referred to blacks as "niggers" and Jews as "kikes," and said that every person not a male Aryan was inherently inferior. Would the board of trustees have to ignore such hateful speech, and be legally enjoined to keep the president on? Or could it, reasonably under the circumstances, conclude that the speech would, by necessity, negatively impact the administration of the university, and its relation to the outside world? Could the board not simply conclude that it does not want to have a president who spouts such hatred as an appointed agent of the university's image to the outside world, and fire the president?

There is no case that we are aware of that mandates a university to keep such a mouthpiece of bigotry on as president, regardless of whatever else the president may have said in his or her offending speech. This hypothetical case is not one like Piesco v. City of New York Dept. of Personnel, 933 F.2d 1149 (2nd Cir., 1991), cert. denied, 112 S. Ct. 331 (1992), which involved the public interest in a high-level employee's right to give testimony critical of her employer. There is no public interest in mandating that a public institution must do nothing when its image is being defined by the spouting of bigotry. A president may have every right to say or do anything he or she wants; but when he or she accepts the position as president, part of his or her job is to represent the campus as a place welcoming to all students. By broadcasting bigotry while representing the university, he or she is failing in that task. It is the

functional equivalent of a chief of a public fire department speaking in favor of arson.

If the board of trustees can fire a president for such outrageous conduct via his or her speech, can the president be insulated from such action if he or she also happens to be a member of the faculty? Logically, the two institutional roles are so diverse that the faculty status of the president should not insulate him or her from board of trustee actions appropriate to the role and function of the presidency. But, in the instant case, that is exactly the equivalent of what the District Court did. It failed to distinguish between Leonard Jeffries's role of chairman and tenured professor, granting some of the protection designed for the latter to the former.

Furthermore, the case law relied upon by the District Court dealt with the firing of a public employee. Appellee, however, was not fired, nor was his ability to teach hampered. (Cf. Levin v. Harleston, 770 F. Supp. 895 [S.D.N.Y., 1991], aff'd in part, vacated in part, 966 F.2d 85 [2nd Cir., 1992]). Rather, he was removed from a ministerial position as a spokesman for the university. Assuming, arguendo, that the facts presented in the District Court did not create a record that would justify the firing of Appellee, that same record cannot, ipso facto, be said to fail to justify the Appellants' actions regarding Appellee's role as departmental chair. The key factor the District Court ignored in its balance under Pickering was any nexus of Appellee's speech with Appellee's role as a public agent for the

College and University. It was reasonable for Appellants to conclude that, while they could not take action against Appellee in his classroom because of his hateful speech, they nevertheless had every right not to be represented by a hatemonger. The District Court offered no legal analysis that took cognizance of the different institutional interests and roles of both Appellants and Appellee in these two entirely diverse situations.

II.

THE DISTRICT COURT'S ALLOWANCE OF PUNITIVE DAMAGES DISREGARDS THE JURORS' FINDING THAT APPELLANTS WERE MOTIVATED NOT BY BAD FAITH, BUT BY A REASONABLE BELIEF THAT APPELLEE'S SPEECH WOULD CAUSE DISRUPTION.

The Jury found, as fact, that the Appellants proved that they had a reasonable expectation that Appellee's hateful speech would disrupt the operation of the institution. Nonetheless, the District Court found that punitive damages against Appellants were warranted. This conclusion contradicts logic and law.

Punitive damages, as the District Court correctly noted, are "a measure of the bad faith of defendants."[10] If Appellants believed, as the Jury found, that the speech would disrupt the institution, then their actions against Appellee's position as departmental chair, even if illegal, could not have been in "bad faith," especially as the District Court found that actual disruption would have provided a defense for Appellants'

---

[10] OPINION and ORDER at 3.

actions.[11] The District Court's attempts to explain bad faith where the jury found none are wholly unpersuasive.[12]

III.

THE DISTRICT COURT IMPROPERLY REMOVED FROM APPELLEE ANY REQUIREMENT OF PROVING A CAUSAL CONNECTION BETWEEN HIS SPEECH AND APPELLANTS' ACTIONS.

By holding that Appellee would win unless the Appellants could show they would have taken the same action against Appellee even if he had not given his speech, the District Court erroneously removed from Appellee any requirement to prove either causation or a constitutional infringement.[13] The following example illustrates the District Court's error.

Assume, arguendo, that a public elementary school has been disquieted by rumors of child abuse of a sexual nature. While none of the rumors have been substantiated, every year new rumors appear. Then, over the summer, the school's principal is seen on

---

[11] The American Jewish Committee has no official position on whether the potential for withdrawing of alumni funding would be a reasonable ground for taking action against a public employee. (See OPINION and ORDER at 10-11.) We are concerned, however, that such a standard would not pass constitutional muster, and would be violative of public policy, as it might be interpreted as allowing universities to rid themselves of professors for their unpopular views (or skin color, religion, sex, or sexual orientation) simply because of the impact on alumni donations.

[12] OPINION and ORDER at 37-38.

[13] In fact, the District Court's holding -- that if any action by Petitioners had been "motivated" by the speech, Petitioners would lose -- deprived Petitioners of an opportunity to present a case, consistent with Pickering, showing that the speech motivated actions on their part which were constitutionally proper. See OPINION and ORDER 25-26.

television explaining why he is an active member of the Man-Boy Love Association, and the virtues of sex with six-year-olds.

Assume, also arguendo, that the nature of the principal's job, as well as the applicable law, were not such as to discipline the principal because of disagreement with or disapproval of his speech. Would this circuit's holdings also require that the school's board of trustees be enjoined from taking notice of the speech as a reason to investigate further the persistent rumors of child abuse?

What if the principal's speech were a motivating factor for the board to investigate the rumors more completely, and further facts were then found that justified action against the principal? By the reasoning of the District Court, such evidence could neither be relied upon for disciplinary action, nor be introduced in court, because without the speech, the investigation, and therefore action based thereon, would not have been taken. Neither reason nor law requires such a tortured result. (Conversely, what if, the next year, child abuse was proven, and the Board had not acted after the principal's speech? Is it not possible [in fact, probable] that the board would be sued for malfeasance or nonfeasance?)

Appellants should have been allowed to make the case that Appellee's "hateful," "poisonous," "reprehensible," "vulgar," "caustic," "destructive," "egregiously offensive" and "repugnant" speech was, for them, an alarm -- an alarm that made them look closer to the administration of the Black Studies Department. It

is one thing to hold that Appellee should not be punished for his speech, and another to hold that Board members -- entrusted with oversight of the efficient functioning of the University -- should be enjoined from viewing the speech as a legitimate catalyst toward scrutinizing the operation of the Department more closely.[14]

The District Court's view -- that Appellee automatically prevailed on a First Amendment claim if Appellants could not establish that he would have been removed from his chairmanship even if he had not given his speech -- is plain error. It also offers no nuanced analysis of what are constitutional and unconstitutional reactions to protected speech, and exalts Appellee's First Amendment rights to a stature neither law nor logic requires.[15]

---

[14] In fact, this nuanced view of Respondent's conduct is exactly that envisioned by the U.S. Supreme Court in Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed. 2d 471 (1977). The Supreme Court recognized, in that case, that a "candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision." 429 U.S. at 285-86, 50 L.Ed. 2d at 482-83. See also Wisconsin v. Mitchell, 124 L.Ed.2d 436, 448 (1993), wherein the Court held that the First Amendment "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."

[15] By this same analysis, a publicly-employed CPA who gives a speech professing, in part, a love of artful larceny could never be disciplined for unlawful acts uncovered after an investigation motivated by the speech. The District Court's holding might also lead lawyers to advise public employee clients who worry about discovery of their bad acts to confess in a public forum -- and thereby rest assured that no action based on a resulting investigation would pass constitutional muster.

IV.

THE DISTRICT COURT'S AWARD OF PUNITIVE DAMAGES AGAINST FOUR TRUSTEES WAS PREDICATED NOT ON THEIR ACTIONS, BUT AS PUNISHMENT FOR THEIR SPEECH.

As stated in the Statement of Interest, the American Jewish Committee believes, as a matter of fundamental principle, that both freedom of expression and denunciation of bigotry are essential themes that must permeate the culture and actions of campuses in response to any incident of hate. Campuses should be places where debate is heated, not chilled, and where any student should be fully welcome. Essential to that second goal is the role of institutional leadership in speaking out against bigotry.

These two principles -- opposing bigotry and promoting free speech -- are sometimes in tension, perhaps at no time more so than when the rights of tenured professors are involved. And, certainly, there is a risk (as in the instant case) that the university leadership's protestations over a professor's bigotry will later be introduced as evidence of unlawful action or bad faith. If that was all that happened in this case, we would have no complaint.

Simply stated, there is no basis for the punitive damages against the four trustees except for their outspokenness against the bigotry inherent in Appellee's remarks and actions.

The record reflects, as the District Court found, that the Board of Trustees damaged Appellee first when it, "upon the recommendation of President Harleston, voted to limit Professor Jeffries's appointment as Chair to one year rather than the

customary three-year term."[16] If this was the action that harmed Appellee, how could the actions of the only four trustees who did not vote for this resolution (three voted against, one abstained) damage Appellee in any way, let alone serve as the basis for the extraordinary remedy of punitive damages?

The issue before the Board was not a tripartite decision (no Dr. Jeffries, Dr. Jeffries for one year, Dr. Jeffries for three years). The decision was a yes-or-no vote on a one-year term. Appellee's cause of action was predicated on the theory that the decision to appoint him to a one-year term was punishment inflicted for his constitutionally protected speech. The passing of this resolution by the Board was what predicated his cause of action. What Appellee and the Judge and the Jury would have wanted would have been for the trustees to reject this limitation on his proposed term.

But that is exactly the position that the four trustees found liable for damages took. It is certainly true that these were the trustees most outspoken about Appellee's speech. But the purpose of punitive damages is to change behavior engaged in in bad faith, not to punish hypothetical bad motives for proper behavior.[17] If punitive damages served their purpose, and the

---

[16] OPINION and ORDER at 11.

[17] In R.A.V. v. St. Paul, 120 L.Ed.2d 305, 321 (1992), the Supreme Court held that a "valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the speech.'" That holding was transgressed by the District Court,

Board could magically be transported back in time to take its vote over again, the trustees whose vote harmed Jeffries (but who had no damage award against them) would have changed their votes to that actually cast by the four trustees who were found liable (i.e, not approving a one-year term).

The Court's allowing of punitive damages against these four trustees results in a tautology -- Appellee's damages are predicated upon the Board's decision to reappoint him for a one-year term, and that the Board members are individually liable regardless of how they voted. A vote to limit his term would provide Appellee a cause of action, and leave the trustee exposed to the possibility of punitive damages. A vote against the motion for a one-year term would leave the trustee exposed to the possibility of punitive damages. An abstention would leave the trustee exposed to the possibility of punitive damages. If, according to the inherent logic of the Court's holding, it did not matter how the trustees voted, then how could any trustee be liable? What "bad faith" behavior would the District Court want to change? And where is the causation requirement under 42 U.S.C. Section 1983?

The only answer that can be gleaned from the record is that the court imposed upon each and every Board of Trustees member the affirmative obligation of refusing to vote on the proposal

---

which held the subclass of the Board which caused Plaintiff-Appellee less damage was more liable than their colleagues, based on the one thing that distinguished these four trustees from the larger class -- their speech.

offered to them by President Harleston (reappointment for a one-year term), and instead introducing on their own a motion to reappoint Appellee to a three-year term. But there is no authority for holding any university board member liable for punitive damages for failure to refuse to vote on a motion put before him or her by a college president. To find liability in such circumstances would impose fantastic burdens on trustees, and chill any desire for service. It is one thing to find liability for a college president offering such a motion; it is quite another to find liability against a trustee no matter what he or she does -- for voting yes, no, or abstaining.[18]

The District Court implicitly acknowledges the weakness of its reasoning upholding the punitive damage award. At page 33, fn. 24, the Court wrote:

> The Court notes that testimony in the record indicates that the four trustees opposed the continued Chairmanship of Professor Jeffries and that this opposition was a result of the plaintiff's July 20, 1991 speech. See Trial Tr. 679-81. 1081. 1627, 1664-54, 1675. We believe that this testimony was sufficient evidence from which a jury could reasonably infer that the opposition of the four trustees to the speech caused them to vote for the appointment of Professor

---

[18] Since even an abstention created liability under the Court's theory, would just showing up for the board meeting have been enough to find liability? Would an absent board member be liable too?

Gordon at the March 23, 1992 meeting. . . .

In other words, the District Court ruled that these four trustees were liable because they voted with the majority in a later vote to appoint Dr. Gordon as chair of the department. (See OPINION and ORDER at 31-33.) But this explanation of liability also fails for two reasons. First, these four trustees voted no differently than their colleagues on March 23rd, appointing Gordon. Their speech, and not their votes, distinguishes them from their colleagues who were not found liable for either vote. Second, the appointment of Gordon must be an irrelevancy. The vote in March was not whether to appoint Gordon or Jeffries, but whether to appoint Gordon or not. Jeffries was no part of the discussion, was not nominated, was not considered, nor did he have a right to be. As the District Court itself ruled, Jeffries had no property interest in the job -- a job that ended at the termination of his one-year term.

If the Board damaged him at all, it was from the October vote that limited his term to one year. The limitation on his term, and not the failure to consider him again at the expiration of his term when he was not nominated by the president of the college, is what gave him a cause of action against the trustees. Since the Board had no affirmative obligation to consider whether it wanted Jeffries rather than Gordon in its March vote, any action by any member of the Board could cause Jeffries no

damage.[19] Thus, the award of damages against the four trustees could not be predicated, as the judge held, on their March 23rd vote.

The only thing that distinguishes these four trustees from any other is that they were outspoken against Professor Jeffries. They even voted the way the District Court would have wanted all the Board to (refusing to go along with a one-year term). Damage, damage awards, and legal rulings must be based on actions, not on what people might have done in a hypothetical situation that never unfolded (e.g., a vote for or against Dr. Jeffries on a three-year term), and certainly not for being outspoken.

If the punitive damage award against these four trustees is not overturned, all trustees at every university, regardless of any action they may or may not take regarding a bigoted campus professional, will be chilled from exercising their First Amendment rights. A professor has a right not to be punished for what he says or thinks. But no court, in seeking to validate that right, should enjoin campus leadership from mere expressions of their disapproval of a professor's or department chairman's bigotry, nor offering opinions of what should be done. It is enough to hold trustees liable in the extraordinary circumstance where bad faith leads to bad acts; it is unconscionable to hold them liable when there are no bad acts, but only strong words

---

[19] Conversely, if Jeffries had been nominated in March by Harleston, and appointed by the Board for a new term, that would not have obviated whatever damage he could allege from the prior decision to limit his term to one year.

spoken against hate.

CONCLUSION

For the foregoing reasons, the OPINION and ORDER of the District Court should be reversed.

Dated: October 14, 1993

Respectfully submitted,

Kenneth S. Stern,
Counsel of Record
Samuel Rabinove
Wendy Lecker
American Jewish Committee
165 East 56th St.
New York, New York 10022

Attorneys for Amicus Curiae

The assistance of Penina Goldstein, Esq., is gratefully acknowledged.

CERTIFICATE OF SERVICE

I, Kenneth S. Stern, hereby certify that I served copies of this brief Amicus Curiae on the attorneys of record in this case on October 14, 1993, by mailing first class postage paid copies to:

Joseph Fleming, Esq.
58 John Street, 8th Floor
New York, NY 10038

Attorney for Plaintiff-Appellee

Robert Abrams,
Attorney General of the
State of New York,
Kathie Ann Whipple
Clement J. Colucci
Roy P. Moskowitz
120 Broadway
New York, NY 10271

Attorneys for Defendants-Appellants

Kenneth S. Stern
American Jewish Committee
165 East 56th Street
New York, NY 10022

Attorney for Amicus Curiae