NO. 11-41359

In the United States Court of Appeals
For the Fifth Circuit

BARBARA WYATT
Plaintiff - Appellee

v.

RHONDA FLETCHER; CASSANDRA NEWELL,
Defendants - Appellants

Reply Brief of Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION
CIVIL ACTION NO. 6:10-CV-674
JOHN D. LOVE, JUDGE PRESIDING

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I. S.W.'s constitutional rights were not violated as a result of the events giving rise to this litigation.

Officials are entitled to qualified immunity if their actions did not violate the constitutional rights of a plaintiff. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001); *Stotter v. Univ. of Tex.*, 508 F.3d 812, 823 (5th Cir. 2007). In the present case, there is no summary judgment evidence which would show that S.W.'s constitutional rights were violated as a result of the events giving rise to this litigation.

First, the district court "erred in assessing the legal significance of the conduct that the district court deemed sufficiently supported for purposes of summary judgment" because it did not assess any relevance to the fact that the events giving rise to this litigation occurred in a public school setting. *Kinney v. Weaver*, 367 F.3d 337, 347 (5th Cir. 2004) (en banc). The Supreme Court has held that a student's privacy interests are limited in a public school setting in order to accommodate the state's responsibility to nurture pupils' discipline, health, and safety. *Bd. of Ed. v. Earls*, 536 U.S. 822, 830-31, 122 S. Ct. 2559, 153 L. Ed. 2d 735 (2002); *see also Milligan v. City of Slidell, La.*, 226 F.3d 652, 655 (5th Cir. 2000) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995)) ("[S]tudents in a school environment have a lesser expectation of privacy than members of the population generally.") (internal quotation marks omitted). "Securing order in the

school environment sometimes requires that students be subjected to greater controls than those appropriate for adults." *Id*.

This Court has never specifically determined what types of disclosures are of such a personal nature that they constitute a constitutional violation of a student's right to privacy. *See, e.g.*, ROA Vol. II, p. USCA5 730. It is clear, however, that courts must balance one's expectation of privacy against the need for disclosure. *Nat. Treas. Employees Union v. U.S. Dept. of the Treas.*, 25 F.3d 237, 242-43 (5th Cir. 1994); *see, e.g., Zuffuto v. City of Hammond, La.*, 308 F.3d 485, 490 (5th Cir. 2002). ". . . [W]hen the privacy right is invoked to protect confidentiality, there is no violation if a legitimate state interest outweighs the plaintiff's privacy interest." *Cinel v. Connick*, 15 F.3d 1338, 1342 (5th Cir. 1994) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). This balancing test has not been applied to determine whether a public school student's privacy interest in his or her sexual orientation, if any, outweighs a teacher's need to maintain order in the school and openly converse with parents regarding the health, safety, and well-being of their children. It is clear, however, that school officials' interest in maintaining order in public schools and safeguarding the discipline, health, and safety of students outweighs any privacy interest a student may have in his or her sexual orientation. Additionally, teachers and parents and guardians of students must be permitted to maintain open lines of

communication in order to maintain order in school environments and instill traits of good citizenship within the students. The district court held that students are entitled to an absolute privacy interest in their sexual orientation regardless of the circumstances. This holding does not attempt to balance students' privacy interests, if any, with teachers' responsibility to "prepare pupils for citizenship in the Republic [and] inculcate the habits and good manners of civility as values in themselves conductive to happiness and as indispensable to the practice of self-government in the community and the nation." *Earls*, 536 U.S. at 842, 122 S. Ct. 2559 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986)).

As the district court noted, this Court has never found that students have an absolute and unchecked privacy interest in their sexual orientation. *Amici*, however, cite the Court to a case which involved facts starkly different from those in the present case. In *American Civil Liberties Union of Mississippi, Incorporated v. Mississippi*, this Court reviewed a district court's order requiring full disclosure of the records of a then-defunct state agency whose mission it was to perpetuate the state's system of segregation. *ACLU of Miss., Inc. v. Miss.*, 911 F.2d 1066, 1067-68 (5th Cir. 1990). Three-fourths of the documents at issue were already in public circulation. *Id*. at 1068. The remaining one-fourth of the information related to persons suspected to

support the civil rights movement. *Id*. This Court did not decide which documents implicated privacy issues, but discussed proper treatment of files in which privacy interests were present. It also stated that its holding was "narrow" and "turned upon the peculiar facts present in [that] case." *Id*. at 1069; 1071. In overruling the district court's order, this Court noted that "[a]n intrusion into the interest in avoiding disclosure of personal information will . . . only be upheld when the government demonstrates a legitimate state interest which is found to outweigh the threat to the plaintiff's privacy interest." *Id*. at 1070 (quoting *Fadjo*, 633 F.2d at 1176). This Court found that the government's interest in assembling the information was the unconstitutional suppression of individuals' first, fourth, and fourteenth amendment rights. *Id*. at. 1070. The Court also noted the fact that the information obtained by the state was "often unlawfully obtained" and "to the extent that [such] information is a matter of public concern, any public need to know could be satisfied by release of the information in a more limited format." *Id*. at 1071. The state's interest in releasing such information did not outweigh the individuals' privacy interests in the information which the Commission collected. *Id*. at 1075.

The present case is clearly distinguishable from the admittedly narrow holding in *ACLU*. *See Id*. at 1071. Here, Coaches Fletcher's and Newell's interest in keeping S.W. safe, determining whether she was involved in an inappropriate relationship with

an adult, making sure that she was not the victim of abuse, and maintaining discipline on the softball team outweighed any interest S.W. may have had in keeping her sexual orientation from her mother. (ROA Vol. I, pp. USCA5 357; USCA5 367 - USCA5 370; Vol. II, pp. USCA5 379 - USCA5 380; USCA5 383; USCA5 393 - USCA5 394; USCA5 429; USCA5 435; USCA5 443 - USCA5 444; USCA5 446.) The uncontroverted summary judgment evidence shows that their actions were of the type which the Supreme Court has previously held are properly taken by public school teachers. *See Earls*, 536 U.S. at 842, 122 S. Ct. 2559. Therefore, the District Court erred in determining that S.W.'s constitutional rights were violated, and Coaches Fletcher and Newell are entitled to qualified immunity from Plaintiff's claims.

Additionally, S.W.'s constitutional rights were not violated as a result of being required to remain in the locker room during the conference with Coaches Fletcher and Newell. This Court has openly doubted that students have a right not to be summoned to a school official's office and questioned on disciplinary matters because such a right would not comport with the school's duty to instill in students the habits and manners necessary to good citizenship. *Milligan*, 226 F.3d at 655 (quoting *Fraser*, 478 U.S. at 681, 106 S. Ct. 3195). "Teachers . . . control [students'] movements from the moment they arrive at school; for example, students cannot simply walk out of a classroom . . . [or] walk out of a principal's . . . office in the

middle of any official conference. Students at school thus have a significantly lesser expectation of privacy in regard to the temporary "seizure" of their persons than does the general population." *Id.* In light of this Court's previous rulings, it is clear that S.W.'s Fourth Amendment rights were not treated with deliberate indifference as a result of the meeting she had in the locker room with Coaches Fletcher and Newell. Any right S.W. may have had to be free from being required to attend a student-teacher conference regarding her behavior and safety was far outweighed by the educators' interest in protecting S.W.'s safety and maintaining discipline on the softball team. Therefore, S.W.'s constitutional rights were not violated as a result of being required to attend the student-teacher conference.

Additionally, S.W.'s claims that Coaches Fletcher and Newell yelled at her during the conference are not actionable. Verbal abuse and threatening language and gestures do not constitute a constitutional claim. *Bender v. Brumley,* 1 F.3d 271, 274 n. (5th Cir. 1993); *Calhoun v. Hargrove*, 312 F.3d 730, 734 (5th Cir. 2002). Indeed, the Eighth Circuit found that a teacher's yelling at students, calling them "stupid," and referring to them as "bimbos," "fatso," and the "welfare bunch,"–while shocking and unconscionable–did not rise to the level of a constitutional violation. *Doe v. Gooden*, 214 F.3d 952, 955 (8th Cir. 2000) (citing *Martin v. Sargent,* 780 F.2d 1334, 1339 (8th Cir. 1985)).

In short, S.W.'s constitutional rights were not violated as a result of the events giving rise to this litigation. The district court therefore erred in denying their Motion for Summary Judgment on the issue of qualified immunity.

II. Even if S.W.'s constitutional rights were treated with deliberate indifference, neither this Court nor the Supreme Court has ever found that students in a public school setting have an absolute right to confidentiality of their sexual orientation. Therefore, the rule enunciated by the district court was not clearly established and Coaches Fletcher and Newell are entitled to qualified immunity from Plaintiff's claims.

An official is entitled to qualified immunity from civil damages for performing discretionary functions "insofar as [the official's] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 732 L. Ed. 2d 396 (1982). "To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, ___U.S.___, 132 S. Ct. 2088, 2093 ___L. Ed. 2d___ (2012) (quoting *Ashcroft v. al-Kidd*, ___U.S.___, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)) (internal quotation marks and brackets omitted). Therefore, "existing precedent must have placed the statutory or constitutional question beyond debate." *Id*. (internal quotation marks omitted). The "'clearly established' standard protects the balance between vindication of constitutional rights and government officials' effective performance of their duties by ensuring that officials can reasonably

anticipate when their conduct may give rise to liability for damages." *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (internal quotation marks and ellipses omitted).

In *Reichle v. Howards*, the Supreme Court recently considered whether "a First Amendment right to be free from a retaliatory arrest that is supported by probable cause" was clearly established for the purposes of the qualified immunity analysis. Because it had never recognized such a right, the Supreme Court determined that "[t]he 'clearly established standard is not satisfied. . . ." *Reichle*, ___U.S.___, 132 S. Ct. 2088, 2093.

In the present case, the district court noted in its opinion that neither this Court nor the Fifth Circuit has ever addressed the issue of whether a student has a confidentiality interest in his or her sexual orientation. Therefore, such a right was not clearly established at the time of the events giving rise to this litigation. *See Id*. Because no such right was clearly established at the time of the events giving rise to this litigation, Coaches Fletcher and Newell are entitled to the defense of qualified immunity. *See Harlow*, 457 U.S. at 818, 102 S. Ct. 2727.

Additionally, there was no clearly established law at the time of the events giving rise to this litigation which would have prevented Coaches Fletcher and Newell from conducting the conference or from raising their voices at her. As mentioned

above, teachers control the movements of students during the school day. *Milligan*, 226 F.3d at 655. Therefore, they are impliedly permitted to conduct conferences with students. Additionally, the clearly established law at the time of the events giving rise to this litigation did not prevent Coaches Fletcher and Newell from raising their voices at S.W. On the contrary, verbal abuse and threatening language and gestures do not constitute a constitutional claim. *Bender*, 1 F.3d at 274 n. 4; *Calhoun*, 312 F.3d at 734; *Gooden*, 214 F.3d at 955; *Martin*, 780 F.2d at 1339. Therefore, Coaches Fletcher and Newell are entitled to the defense of qualified immunity because their conduct did not violate clearly established law.

III. Not all similarly-situated educators would have agreed that the events giving rise to this litigation violated S.W.'s constitutional rights.

It is well established that "a defendant's acts are held to be objectively reasonable unless all reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the United States Constitution or the federal statute as alleged by the plaintiff." *Thompson v. Upshur Cnty., Tex.*, 245 F.3d 447, 457 (5th Cir. 2001) (emphasis in original); *see also Wooley v. City of Baton Rouge*, 211 F.3d 913, 918-19 (5th Cir. 2000). In the present case, the summary judgment evidence clearly shows that not all teachers in the positions of Coaches Fletcher and Newell would have believed that their conduct would have violated S.W.'s constitutional rights. This is clearly demonstrated by the competing expert

testimony in the present case. Coaches Fletcher's and Newell's expert, Dr. Mike Moses, and former educator Terry George have both testified that the actions of Coaches Fletcher and Newell in having the conference with S.W. and Barbara Wyatt were reasonable and that they did not believe that they violated her constitutional rights. (ROA Vol. I, pp. USCA5 307- USCA5 308; Vol. II, p. USCA5 454–USCA5 465.) By definition, Dr. Moses' and Mr. George's opinions entitle Coaches Fletcher and Newell to qualified immunity because not "all reasonable officials would have realized the particular challenged conduct violated the constitutional provisions sued on." *Wooley*, 211 F.3d at 918-19.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Coaches Fletcher and Newell respectfully request that the Court hold that they are entitled to qualified immunity from Plaintiff's claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing instrument was served upon all counsel of record in the above entitled and numbered cause on July 2, 2012, in the following manner:

_X_ Via ECF

/s/ David Iglesias
David Iglesias