

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

October 9, 2009

No. 08-10477

Charles R. Fulbruge III
Clerk

A M, by and through her Parents and Guardians Richard Dale McAllum Jr. and Shelby Voda McAllum; A T, by and through her Parents and Guardians Darrell Ray Thomas and Joni Ann Thomas; M T, by and through her Parents and Guardians Darrell Ray Thomas and Joni Ann Thomas

Plaintiffs - Appellants

v.

PAUL ELLIOTT CASH, in his official capacity as Principal of Burleson High School; BOARD OF TRUSTEES OF BURLESON INDEPENDENT SCHOOL DISTRICT

Defendants - Appellees

Appeal from the United States District Court
for the Northern District of Texas

Before GARWOOD, DENNIS, and PRADO, Circuit Judges.

DENNIS, Circuit Judge:

Plaintiffs are current and former students of Burleson High School, located in Burleson, Texas. In response to previous incidents, the high school adopted a policy prohibiting the display of the Confederate flag on school grounds. When plaintiffs A.M. and A.T. came to school at the beginning of the spring 2006 semester carrying purses adorned with large images of the Confederate battle flag, administrators required them to cease carrying the purses (giving them the option of leaving the purses in the administrative offices until school ended for

the day, or to have someone come and pick the purses up from the school). The girls voluntarily went home for the day rather than comply with the demand. Plaintiffs then brought the instant action, seeking damages and permanent injunctive relief on grounds, *inter alia*, that the policy and its enforcement abridges the right to free speech and expression guaranteed by the First and Fourteenth Amendments of the United States Constitution. The district court granted summary judgment to defendants, based primarily on its conclusion that the ban is permissible under the Supreme Court's decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). For the reasons set forth below, we affirm.

I. BACKGROUND

The school district's dress code states that "there will be no tolerance for clothing or accessories that ha[ve] inappropriate symbolism, especially that which discriminates against other students based on race, religion, or sex." Supplementing this district-wide policy, Burleson High School ("BHS") has a policy, enacted during the 2002-2003 academic year, that prohibits the visible display of the Confederate flag on the school's campus. This policy followed racial strife among students at the school, some of which centered on students' display of the Confederate flag.

At the beginning of the spring semester in January 2006, plaintiffs A.M. and A.T. came to school carrying purses bearing large images of the Confederate battle flag. That same day, a teacher referred the girls to the administration for discipline pursuant to the policy against visible displays of the Confederate flag. Administrators, treating the purses like any other dress code violation, gave A.M. and A.T. the options of leaving their purses in the front office until school let out or having someone come to the school to retrieve the purses. Choosing neither option, the girls chose to go home for the remainder of the day. A.M. and A.T. were not suspended, and officials took no other disciplinary action against them.

The girls subsequently appealed the policy prohibiting displays of the Confederate flag using the school district's internal administrative procedures. The first step, referred to as a "Level I" appeal, was an appeal to defendant BHS principal Paul Elliott Cash. Cash explained the history of the policy, noted the past incidences of racial tension and violence on the campus, detailed *infra*, and concluded that "the number of incidents would be higher but for the restriction on visible displays of the Confederate flag." Cash therefore denied the Level I appeal. A.M. and A.T. then pursued a "Level II" appeal, which was heard by district superintendent Mark Jackson. Jackson agreed with Cash's determination, reasoning that "if I did not enforce the Confederate flag ban, then the number and types of confrontational incidents on campus would increase dramatically, resulting in material interference and substantial disruption of the educational environment." Accordingly, Jackson denied the Level II appeal.

Cash's affidavit and the affidavit of the preceding principal, Mark Crummel, document the history of racial tension and hostility at BHS. This evidence is largely uncontroverted. BHS has approximately 2,300 students. At all relevant times, less than sixty of those students were African-American. Cash reviewed the school's disciplinary records and averred that during the 2002-2003 school year, there were 35 reported incidences of race-related problems. The next year brought one referral based on a student's use of a racial epithet against another student. During the 2004-2005 school year, there were ten referrals involving racial incidents. One of these incidents involved a student who drew a Confederate flag in his notebook accompanied by the statement "No niggers; subject to hanging." Finally, during the 2005-2006 school year (the year in which A.M. and A.T. brought their purses), there were seven race-related referrals. One involved a student who drew a noose and made comments about hanging minorities. Cash noted that these numbers likely do not represent the full extent of race-related incidents as many invariably go unnoticed by administrators and unreported by students. For example, it was

apparently common to find racially hostile graffiti in the restrooms, but this rarely resulted in disciplinary referrals because the offending student could not be identified. This racial hostility occasionally resulted in physical confrontations. During the 2002-2003 school year, there was a fight in the lobby area of the gymnasium prior to the start of a basketball game between BHS students and supporters of a predominantly African-American high school. The local police were called and “had to assist in restoring order.” This prompted increased police presence at future athletic events.

Also during the 2002-2003 school year, a BHS student “shoved a Confederate Flag in the face of several members” of another high school’s all-black girls volleyball team as they walked through the BHS hallways. According to Crummel, this incident caused tension and required Crummel, who was then the principal at BHS, to apologize on behalf of the school. Thereafter, BHS students attempted to display the flag at athletic events, prompting BHS administration and staff to “intervene.” The same school year (2002-2003), supporters of a predominantly African-American school left BHS during a sporting event because a BHS student waived the flag from his pick-up truck in front of them. This caused the state high school athletics governing body to view the display of the flag at BHS events as a racial insult and a means of intimidation, and led to the consideration of sanctions against BHS because the school was “identified [as] having a reputation . . . as being openly hostile to African-Americans; if not simply racist.” That year, some white BHS students also waved a Confederate flag in the direction of a group of fellow African-American students as they waited for the bus. According to Crummel, the staff viewed this “as an attempt to intimidate our African-American students.” Following these incidents, during the 2002-2003 school year, BHS instituted the ban on visible displays of the Confederate flag.¹

¹ Plaintiffs have not offered evidence refuting that these incidents occurred. Rather, they aver only that they did not know about the incidents, and have provided the affidavit of

During the 2005-2006 school year, administrators found graffiti in a boys restroom containing racial epithets (which was apparently common) accompanied by a drawing of the Confederate battle flag. On Martin Luther King, Jr. Day in 2006 -- less than a month after A.M. and A.T. carried their purses to school -- a homemade Confederate battle flag was raised on the BHS flagpole and graffiti representing the flag was drawn on the sidewalk below. In December 2006, the following academic year, a white BHS student attempted to wrap his belt around an African-American student's neck while using racial epithets and threatening to hang him. That school year also saw three disciplinary referrals of students who used racial epithets.

A.M. has averred that her purse did not cause a disruption and that she had never heard of the 2002 incident involving the display of the flag in front of an opposing team. A.M. also states that she has seen numerous violations of the dress code, including sexually crude t-shirts, clothing promoting drug and alcohol use, and clothing identifiable with a particular ethnic or social group (e.g., Mexican flag t-shirts, t-shirts with Malcolm X, or rainbow belts) that she claims violates the dress code yet did not result in discipline against the students. As to her purse, A.M. asserts that her ancestors fought in the Civil War and that the "flag is a venerated symbol of my ancestry, a symbol of my Christian religious faith, and a symbol of the South, a symbol of American history and a political symbol, to me, of limited government and resistance to unconstitutional authority." She further claims that there has not been a "single fight related to the racial abuse," and states that "[m]ore importantly none of this stuff is related to our purses or even to the Confederate flag."

Like A.M., A.T. states that she is "upset that [BHS] has tried to link the harmless carrying of my Confederate purse with racial intimidation and

a school security guard who stated that, although he had no personal knowledge of the volleyball incident, there was no recollection of the event among students and faculty members.

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