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No. 06-5982

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

D.B., A MINOR, BY AND THROUGH HIS PARENT AND GUARDIAN, SHARON BROGDON; R.W. AND C.W., BOTH MINORS, BY AND THROUGH THEIR PARENT AND GUARDIAN, ROGER WHITE,	)	
Plaintiffs-Appellants,	)	
	)	On Appeal from the United States
v.	)	District Court for the Eastern
	)	District of Tennessee
STEVE LAFON, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS PRINCIPAL OF WILLIAM BLOUNT HIGH SCHOOL; ALVIN HORD, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF SCHOOLS; BLOUNT COUNTY SCHOOL BOARD,	)	
Defendants-Appellees.	)	

Before: **DAUGHTREY** and **COOK**, **Circuit Judge**s; and **WEBER, District Judge**.[1]

PER CURIAM.

Plaintiffs/Appellants Sharon Brogdon and Roger White bring this appeal on behalf of their respective minor children, identified as "D.B.," "C.W." and "R.W.," from a district court order denying their motion for preliminary injunction. For the reasons stated below, we AFFIRM.

[1]The Honorable Herman J. Weber, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

I.

On March 2, 2006, the plaintiffs brought suit under 42 U.S.C. § 1983 against the director and school board of Blount County Schools and the principal of William Blount High School, alleging that the defendants violated the First and Fourteenth Amendment rights of the plaintiffs' minor children by prohibiting students from wearing clothing that depicts the Confederate battle flag. In addition to the complaint's prayer for relief, the plaintiffs filed a separate motion for preliminary injunction and temporary restraining order.

On May 4, 2006, the district court held a hearing on the preliminary injunction motion. The parties presented no witnesses, the plaintiffs instead relying upon affidavits submitted as attachments to their complaint, and the defendants upon affidavits submitted in opposition to the motion. In its subsequent order denying the plaintiffs' motion, the court made findings of fact, set forth as follows in pertinent part:

> The Blount County Board of Education has adopted a dress code that applies to all high school students. That dress code prohibits students from wearing certain items, including the following:
>
> > f. clothing which exhibits written, pictorial, or implied references to illegal substances, drugs or alcohol, negative slogans, vulgarities, or causes disruption to the educational process; wearing apparel that is sexually suggestive or that features crude or vulgar commercial lettering or printing and/or pictures that depict drugs, tobacco, alcohol beverages, racial/ethnic slurs or gang affiliation . . .
>
> The ban at issue in this case was imposed pursuant to the provision prohibiting clothing that "causes disruption to the educational process."
>
> . . . [P]laintiffs allege that on May 30, 2005, during the 2004-05

school year, they, along with the other students at William Blount High School, were informed that depictions of the confederate battle flag on students' clothing would be considered a violation of the school's dress code, even though such depictions were not previously considered violations. On September 1, 2005, during the 2005-06 school year, despite the prohibition and "to express pride in his southern heritage," plaintiff D.B. wore a shirt depicting the confederate battle flag, two dogs, and the words "Guarding our Southern Heritage." He was allegedly confronted by defendant LaFon [sic], the school's principal, who reminded D.B. about the ban, told him to turn his shirt inside out or take it off, and threatened him with suspension if he refused. A similar incident involving plaintiff C.W. allegedly occurred on January 13, 2006. There is no evidence whether plaintiff R.W. had a similar experience.

Plaintiffs allege that William Blount High School permits other expressions "of political or controversial significance," and [that] there have been no disruptions resulting from the depiction of the confederate battle flag . . . Plaintiffs D.B. and C.W. also explain in their [affidavits] that they have seen other students wearing foreign flags, Malcolm X symbols, and political slogans.

Defendants have responded in opposition . . . and have included two affidavits. In the first affidavit, defendant LaFon [sic] explains that defendant Hord [the director of Blount County Schools] directed him to apply the dress code without viewpoint discrimination and that during the 2005-06 school year there were "over 452 documented violations of the dress code policy . . . 23 of which involved the wearing of the 'Confederate flag' by students." Defendant LaFon [sic] goes on to explain that while "there have been no reported incidents of students wearing clothing emblazoned with Malcolm X words or caricatures[ ] or international flags[,] [t]here have been numerous non-documented incidents of violations . . . beyond those documented."

In the second affidavit, defendant Hord . . . describes racial tensions at William Blount High School. According to the affidavit, on February 22, 2005, there was a "physical altercation between a white student and an African-American student," which resulted in a civil rights complaint against the school system. On April 7, 2005, defendant Hord requested that the school be locked down with the presence of sheriff's deputies "due to threats of violence against African-American students."

> For the remainder of the 2004-05 school year, defendant Hord explains that sheriff's deputies remained at the school, and there were "multiple racially motivated threats and physical altercations" that resulted in suspensions and civil rights complaints and a civil lawsuit that alleges the school system is "a racially hostile educational environment." During the 2005-06 school year, two more racial harassment complaints were made to the board of education. Based upon those events, defendant Hord concluded that "the wearing of the 'Confederate flag' by students during school hours has a significant disruptive effect on the proper education environment of the students at the Blount County high school."

(R.22-24, citations omitted).

Applying the balancing test for injunctive relief set forth in *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 888 (6th Cir. 2000), to the facts before it, the district court concluded that the plaintiffs could not demonstrate a substantial likelihood of success on the merits. On June 30, 2006, the court entered an order denying the motion for preliminary injunction. The plaintiffs filed this timely appeal.

II.

A district court's decision to grant or to deny a motion for preliminary injunction is reviewed for abuse of discretion. *Jones v. City of Monroe*, 341 F.3d 474, 476 (6th Cir. 2003). The lower court's determination will be disturbed only if that court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard. *City of Paducah*, 202 F.3d at 888. Under that standard, the district court's legal conclusions are reviewed *de novo* and its factual findings for clear error. *Taubman v. Webfeats*, 319 F.3d 770, 774 (6th Cir. 2003). A factual finding is clearly erroneous "when the reviewing court is left with the definite and firm conviction that a mistake has been made." *United States v. Smith*, 263 F.3d 571, 581 (6th Cir. 2001).

In determining the appropriateness of the requested injunctive relief, the district court applied

the correct four factor balancing test: 1) whether the plaintiff has established a substantial likelihood or probability of success on the merits; 2) whether there is a threat of irreparable harm to the plaintiff; 3) whether issuance of the injunction would cause substantial harm to others; and 4) whether the public interest would be served by granting injunctive relief. *City of Paducah*, 202 F.3d at 888. In the context of First Amendment violations, the "likelihood of success" factor frequently is determinative. *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998), *cert. denied*, 526 U.S. 1087 (1999).

Under case law applicable to free speech claims, "the loss of First Amendment freedoms, for even minimal periods of time," is presumed to constitute irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Such protection extends to public school students, who do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Nevertheless, "the First Amendment rights of students in public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment." *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366 (10th Cir.), *cert. denied*, 531 U.S. 825 (2000). Schools need not tolerate student speech deemed inconsistent with the educational mission even if similar speech would not be subject to censor outside the school setting. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988). Still, schools may not punish "silent, passive expression of opinion, unaccompanied by any disorder or disturbance" attributable to such expression, and "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508.

The wearing of clothing depicting the Confederate flag as an expression of pride in one's

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