

File Name: 08a0305p.06

**UNITED STATES COURT OF APPEALS**

FOR THE SIXTH CIRCUIT

DEREK BARR; ROGER CRAIG WHITE and CHRIS  
WHITE, by and through their parent and guardian  
ROGER WHITE,

*Plaintiffs-Appellants,*

v.

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; and THE BLOUNT COUNTY SCHOOL BOARD,

*Defendants-Appellees.*

No. 07-5743

Appeal from the United States District Court  
for the Eastern District of Tennessee at Knoxville.  
No. 06-00075—Thomas A. Varlan, District Judge.

Argued: April 22, 2008

Decided and Filed: August 20, 2008

Before: MOORE and CLAY, Circuit Judges; SCHWARZER, District Judge.\*

**COUNSEL**

**ARGUED:** Van R. Irion, LAW OFFICES OF VAN R. IRION, Knoxville, Tennessee, for Appellants. LaJuana G. Atkins, CRAWFORD, CRAWFORD & NEWTON, Maryville, Tennessee, for Appellees. **ON BRIEF:** Van R. Irion, LAW OFFICES OF VAN R. IRION, Knoxville, Tennessee, for Appellants. LaJuana G. Atkins, Norman H. Newton, Jr., CRAWFORD, CRAWFORD & NEWTON, Maryville, Tennessee, Robert N. Goddard, GODDARD & GAMBLE, Maryville, Tennessee, Gary M. Prince, O'NEIL, PARKER & WILLIAMSON, Knoxville, Tennessee, for Appellees.

\*The Honorable William W Schwarzer, United States District Judge for the Northern District of California, sitting by designation

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**OPINION**

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KAREN NELSON MOORE, Circuit Judge. Derek Barr, Roger Craig White, and Chris Nicole White (“Plaintiffs-Appellants”), students at William Blount High School (“the school”) in Blount County, Tennessee, would like to express their southern heritage by wearing clothing depicting the Confederate flag at school. They appeal the district court’s grant of summary judgment to the principal of their school, Steven Lafon (“Lafon”), the director of the Blount County schools, Alvin Hord (“Hord”), and the Blount County School Board<sup>1</sup> on their First Amendment, Equal Protection Clause, and Due Process Clause claims.

**I. FACTS AND PROCEDURE****A. Factual Background****1. Written Dress Code**

The Blount County Board of Education issued a dress code on December 4, 2003 in recognition of “the effect that student dress and grooming have upon student behavior and learning.” Joint Appendix (“J.A.”) at 155 (Hord Aff. Ex. 1 at 1). Among other prohibitions, the dress code bars middle- and high-school students from wearing during the school day:

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 . . . .

J.A. at 156 (Hord Aff. Ex. 1 at ¶ 4(f)) (emphasis added). On the first day of the 2005-2006 school year, in keeping with school policy, students attended a meeting at which they received a “[p]lanner” containing an agenda and school rules. Students’ home-room teachers reviewed the planner with them, and the school asked both parents and students to sign a page of the planner indicating that they had read the policy. J.A. at 102 (Lafon Dep. at 26:19-27:7).

**2. Announcement of the Ban on Clothing Displaying the Confederate Flag**

At an assembly for the freshman class in August 2005, Principal Lafon told the class that “they would not be allowed to have Rebel flags or symbols of [the] Rebel flag on their clothing, or anything else that was a disruption to the school.” J.A. at 102 (Lafon Dep. at 28:10-12). Lafon testified at his deposition that he did not mention any other flags as similarly banned because there were not “any other flags at that point that were causing disruption or that we knew had caused a disruption in the previous year.” J.A. at 102 (Lafon Dep. at 28:17-23). Lafon told the students that “in general . . . anything that is a disruption to the school learning environment would not be tolerated.” J.A. at 103 (Lafon Dep. at 29:5-9).

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<sup>1</sup>Plaintiffs-Appellants brought suit against Lafon in his individual and official capacities. Plaintiffs-Appellants brought suit against Hord only in his official capacity. Defendants-Appellees are collectively referred to as “the Board” throughout the opinion.

### 3. Rationale for the Ban on the Confederate Flag and Racially Divisive Symbols

According to Hord, racial tensions at the school comprised the context for the clothing ban. Relevant incidents included racist graffiti that made general threats against the lives of African-Americans, graffiti containing “hit lists” of specific students’ names, physical altercations between African-American and white students, and a police lockdown at the school. J.A. at 53-54 (Hord Aff. 3/10/06 at ¶¶ 3-4); J.A. at 111, 113-14, 115-16 (Hord Dep. at 17-18, 25-31, 36-39). Hord attests that “[b]ased upon the aforementioned incidents, the wearing of the ‘Confederate flag’ by students during school hours has a significant disruptive effect on the proper educational environment of the students at the Blount County high school.” J.A. at 54 (Hord Aff. 3/10/06 at ¶ 5). Of the approximately 1,750 students attending the school, less than ten percent are African-American. J.A. at 153 (Hord Aff. 4/3/07 at ¶ 10).

#### a. February 22, 2005 Altercation and other Altercations

Both sides in the instant case cite an incident that occurred on February 22, 2005 as the catalyst of heightened racial tension in the school. Barr recounted his observation of the incident. According to Barr, the incident involved a physical altercation at a basketball game in the gym, between an African-American student (whose name Barr did not know) and a Caucasian student named J.H. J.A. at 235 (Barr Dep. at 8:12-20). Barr did not remember exactly what the argument was about. J.A. at 235 (Barr Dep. at 8:21-23). Barr indicated that a third “racist” white student named C.P. “didn’t like what the African-American kid was saying, and they got into it.” J.A. at 235-36 (Barr Dep. at 8:24-9:3). The African-American student rounded up a group of friends, and Barr joined a “couple of other kids . . . because [J.H.] was our friend and we didn’t want to see him getting jumped by anybody.” J.A. at 236 (Barr Dep. at 9:3-9). Before a physical altercation began, “the teachers and everybody got down there and split them up and everything like that and told them to go to class. And from then on there was a tight racist thing going on in the school.” J.A. at 236 (Barr Dep. at 9:10-13). Barr testified that by “tight racist thing,” he meant that the African-American students “tried to find anything they could to get” Caucasian students “in trouble.” J.A. at 236 (Barr Dep. at 9:15-20).

The incident resulted in the parent of the African-American student involved in the February 22 altercation, whom the school suspended, filing a complaint with the Office of Civil Rights (“OCR”) at the Department of Education alleging that the complainant’s son received harsher discipline than a white student who did not receive a suspension. J.A. at 111 (Hord Dep. at 17-18); J.A. at 289 (OCR Letter at 1). OCR investigated the incident and concluded “that the witnesses did not substantiate the allegations that Student #2 [a Caucasian student] engaged in fighting. All witnesses stated that Student #2 had not pushed back when Student #1 pushed him into the bleachers.” J.A. at 291 (OCR Letter at 3).<sup>2</sup> Furthermore, OCR concluded although “[t]he complainant reported that the two [Caucasian] HHS students threatened, used racial slurs or intimidating conduct (noose gestures) against [her son, African-American] Student #1[,] . . . that allegation was not corroborated by witnesses.” *Id.*

In addition to the February 22 incident, Hord attests that the school experienced “multiple racially motivated threats and physical altercations,” but Hord does not specifically describe other

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<sup>2</sup>The OCR report states that Student #2 attended Heritage High School and not William Blount High School. J.A. at 289 (OCR Letter at 1). Both Heritage and William Blount High Schools, however, lie within the Blount County School District and both are subject to the district’s policies regarding discrimination and harassment. J.A. at 290 (OCR Letter at 2). OCR did not find material to its investigation the fact that students #1 and #2 attended different high schools. Moreover, it is possible that OCR received misinformation from William Blount High School regarding which high school Student #2 attended. Barr’s testimony at deposition implies that all students involved in the February 22 altercation attended William Blount High School. J.A. at 70-71 (Barr Dep. at 8:4-9:22).

physical altercations. J.A. at 53 (Hord Aff. 3/10/06 at ¶ 3(b)). Hord mentioned at his deposition an incident in January 2005 involving a mixed-race step team that he believed contributed to racial tensions at the school. J.A. at 111 (17:7-16).

### **b. Racist Graffiti and “Hit Lists”**

In the spring of 2005, the school experienced multiple incidents of racist graffiti and graffiti containing “hit lists” with students’ names. On March 23, 2005, School Resource Officer and Deputy Sheriff Joe Crisp investigated graffiti in the girls’ restroom after an Assistant Principal at the school contacted him. J.A. at 183 (Crisp Aff. at ¶ 2). He did not take pictures because the custodians had painted over the graffiti before he arrived; however, he filed an incident report with the Sheriff’s Office. J.A. at 183 (Crisp Aff. at ¶ 2). According to his report, the Assistant Principal told him that the phrase “all niggers must die” was accompanied by a list with future victims’ names. J.A. at 188 (Incident Report).

Another incident involving racist graffiti occurred on April 1, 2005; the principal of the school contacted Crisp to ask him to investigate racial remarks on a restroom stall. J.A. at 183 (Crisp Aff. at ¶ 3). Crisp took pictures, J.A. at 377-384 (Photographs), and filed an incident report. J.A. at 183 (Crisp Aff. at ¶ 3); J.A. at 191 (Incident Report). Four days later, on April 5, 2005, Crisp took photographs of graffiti in a boys’ restroom, J.A. at 202; the graffiti stated: “All niggers will still die on 4-13-05[.] It’s time for a new revolution[.] KKK.” J.A. at 184 (Crisp Aff. at ¶ 4); J.A. at 386 (Crisp Aff. Ex. 4). Deputy Sheriff Andy Waters took photographs of the graffiti in a boys restroom in the vocational wing of the school. J.A. at 392-411 (Photographs); J.A. at 206 (Investigative Report). The graffiti included the scrawled statements: “The South Will Rise Again,” J.A. at 398-99 (Waters Aff. Ex. 2), and “Niggers ‘Hang em,’” written above a drawing of a noose next to the Confederate flag. J.A. at 404-09 (Waters Aff. Ex. 2).

The graffiti included a “hit list” with students’ names. J.A. at 113-14 (Hord Dep. at 25-31); J.A. at 367 (Crisp Aff. at ¶ 2); J.A. at 369-72 (Crisp Aff. Ex. 1). Hord testified that he was not certain whether all the names on the list were those of minority students. J.A. at 114 (Hord Dep. at 29). Deputy Sheriff David Henderson stated in his report that the graffiti threatened “rednecks” as well as African-Americans. J.A. at 231 (Henderson Report). Plaintiff-Appellant Barr testified that the list was on paper and was shown to various students. J.A. at 238 (Barr Dep. at 11:19-24). Barr testified that “it wasn’t just Caucasian kids doing it.” J.A. at 238 (Barr Dep. at 11:7-8). He testified that he knew “a lot” of the people on the list, some Caucasian and some African-American. J.A. at 239 (Barr Dep. at 12:2-7).

### **c. Lockdown**

After a meeting with representatives from the Sheriff’s Department and an FBI agent, Hord decided to implement a lockdown at the school in early April 2005<sup>3</sup> to “be proactive” and “show that the school [was] secure and it [was] safe and we [were] interested in keeping it that way.” J.A. at 54 (Hord Aff. 3/10/06 at ¶ 4); J.A. at 115 (Hord Dep. at 36:20-22); J.A. at 117-18 (Hord Dep. at 44:24-45:2) (reiterating the need to demonstrate that the school was safe and free of guns). Hord pointed out that there had been “threats to bring guns, to hang people, to do all of this stuff. I had been accused by some people of not taking this serious[ly].” J.A. at 115 (Hord Dep. at 36:17-19). One parent Hord remembered in particular, John Cleveland, called Hord because his daughter had been called racially derogatory names, threatened because of her race, and “exposed to being taunted by the [Rebel] flag or something to that nature.” J.A. at 116 (Hord Dep. at 40:4-7, 20). Hord was concerned about violence. J.A. at 116 (Hord Dep. at 37:15-16).

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<sup>3</sup>Lafon was a teacher at the school at this time; he assumed the principalship in the summer of 2005. J.A. at 97 (Lafon Dep. at 6:18-20); J.A. at 120 (Hord Dep. at 53:21-25).

The Sheriff's Office "maintained a continued presence," J.A. at 228 (Henderson Aff. at ¶ 3), at the school on April 7-8, 2005. The office assigned "approximately 40-50 officers" "to secure" the high school and "investigate racial incidents." J.A. at 228 (Henderson Aff. at ¶ 3). Officer Waters "checked purses and backpacks at the school entrance as part of the security assigned" to the school. J.A. at 204 (Waters Aff. at ¶ 3). "The investigation did not reveal any suspects for the graffiti, racial threats[,] or racial slurs." J.A. at 184 (Crisp Aff. at ¶ 5). One student, J.H., "was charged and delivered to the Blount County Juvenile Detention Center after he admitted that he stated that he and his friends were going to bring a gun to school and kill all African American students and other people they did not like." J.A. at 184 (Crisp Aff. at ¶ 5).

#### **d. Hord's Conclusions Regarding the Disruptive Effect of the Confederate Flag**

Hord attests that in making the decision to ban the Confederate flag and other "racially divisive symbols," he "relied upon numerous conversations with students and parents of students which revealed that students were taunted by the Confederate flag and were fearful for their safety as a result of the racial tensions at William Blount High School." J.A. at 152 (Hord Aff. 4/3/07 at ¶ 5). Hord further attests that "[t]he parents' and the students' fears were evidenced by a dramatic increase in absenteeism during the time of racial tension prior to the lockdown and the ban." *Id.*

Hord characterized the Confederate flag as both offensive and disruptive: "I think when that offense becomes something that you have to deal with day-in and day-out [] it is disruptive to what our normal process is, yes." J.A. at 115 (Hord Dep. at 34:6-8); *see also* J.A. at 112 (Hord Dep. at 21:7-16). Hord believed that student offense as a result of the flag would lead to disruption. J.A. at 122-23 (Hord Dep. at 64:18-65:2). Hord stated that he was not banning the Confederate flag because it was a "racist symbol": he based the continued ban on the events that began in January 2005 and information that he continues to gain

that says to me, when you have it, you have disruption, you have—you have interference with the learning process. And you have hurt feelings and you have people that are offended and it is something that we have to deal with. My primary purpose is to take us forward instructionally and that prohibits that and you're worried about the insecurity and safety and all of those things rather than the instruction process.

J.A. at 115 (Hord Dep. at 33:5-16). Lafon believed that were the ban lifted, the Confederate flag "would be a source of confrontation and a symbol that would cause unrest with the student body." J.A. at 99 (Lafon Dep. at 14: 19-20). Lafon also believed that the presence of the flag would lead to racially motivated physical altercations. J.A. at 99 (Lafon Dep. at 14:23-24). Hord, however, stated in his deposition that he intended "at this point" to keep the ban in place, even if appearances of the Confederate flag (despite the ban) did not cause disruption. J.A. at 121 (Hord Dep. at 59:9-60:10).

#### **4. Enforcement of the Ban on Racially Divisive Symbols**

According to Lafon, between August 2005 and March 2006, the school witnessed "over 452 documented violations of the dress code policy . . . twenty-three (23) of which involved the wearing of the 'Confederate flag' by students." J.A. at 51 (Lafon Aff. at ¶ 4). Plaintiff-Appellant Barr declares:

On or about September 1, 2005, to express pride in my southern heritage, I wore a T-shirt to school bearing a small image of the Confederate flag, a picture of two dogs, and the words "Guarding our Southern Heritage" on the back. I was confronted by Defendant Lafon. Prior to my encounter with Mr. Lafon, no student or teacher had commented on my shirt that day. I was informed by Mr. Lafon that

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