

File Name: 10a0358p.06

**UNITED STATES COURT OF APPEALS**  
FOR THE SIXTH CIRCUIT

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TOM DEFOE, a minor by and through his  
parent and guardian Phil Defoe; PHIL DEFOE,  
*Plaintiffs-Appellants,*

No. 09-6080

v.

SID SPIVA, in his individual and official  
capacity as Principal of Anderson County  
Career and Technical School; MERL KRULL,  
in his individual and official capacity as  
Assistant Principal of Anderson County  
Vocational and Technical School; GREG  
DEAL, in his individual and official capacity  
as Principal of Anderson County High  
School; V. L. STONECIPHER, in his official  
capacity as Director of Schools for Anderson  
County; JOHN BURRELL, in his official  
capacity as Chairman of the Anderson County  
School Board; ANDERSON COUNTY SCHOOL  
BOARD,

*Defendants-Appellees.*

Appeal from the United States District Court  
for the Eastern District of Tennessee at Knoxville.  
No. 06-00450—Thomas A. Varlan, District Judge.

Argued: June 16, 2010

Decided and Filed: November 18, 2010

Before: CLAY, ROGERS, and COOK, Circuit Judges.

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**COUNSEL**

**ARGUED:** Van R. Irion, LAW OFFICES OF VAN R. IRION, Knoxville, Tennessee, for Appellants. Jonathan Swann Taylor, TAYLOR, FLEISHMAN & KNIGHT, P.C., Knoxville, Tennessee, for Appellees. **ON BRIEF:** Van R. Irion, LAW OFFICES OF VAN R. IRION, Knoxville, Tennessee, for Appellants. Arthur F. Knight, III, TAYLOR, FLEISHMAN & KNIGHT, P.C., Knoxville, Tennessee, for Appellees.

CLAY, J., delivered the judgment of the court and an opinion. ROGERS, J. (pp. 22–28), delivered a separate concurring opinion, in which COOK, J., joined.

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## OPINION

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CLAY, Circuit Judge. Plaintiff Tom Defoe, a minor by and through his parent and guardian, Plaintiff Phil Defoe, and Plaintiff Phil Defoe, individually, appeal an order entered by the district court granting summary judgment for Defendants Sid Spiva, Merl Krull, Greg Deal, V.L. Stonecipher, John Burrell, and the Anderson County, Tennessee School Board based upon this Court’s decision in *Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2008). On appeal, Plaintiffs argue that the district court erroneously granted summary judgment in favor of Defendants based on the court’s conclusions that the evidence demonstrated that school officials banned displays of the Confederate flag based on a reasonable forecast that those displays would substantially disrupt or materially interfere with the school environment. For the reasons set forth below, we **AFFIRM** the district court’s decision.

To the extent that there are any differences between this opinion and the concurring opinion, the concurring opinion shall govern as stating the panel’s majority position.

### I. BACKGROUND

#### A. Factual Background

The Anderson County school district encompasses seventeen schools, including two high schools, Anderson County High School (“ACHS”) and Clinton High School (“Clinton”), and one vocational school, Anderson County Career and Technical Center (“ACCTC”). ACCTC, which is located on the ACHS campus, draws students from both high schools. Plaintiff Tom Defoe attended both ACHS and ACCTC through at least December 2007. Plaintiff Phil Defoe is Tom Defoe’s father.

All Anderson County schools have a code of student conduct in effect that states “[a]pparel or appearance, which tends to draw attention to an individual rather than to a learning situation, must be avoided.” (Appellees’ Br. 11.) The policy further states that “[c]lothing and accessories such as backpacks, patches, jewelry, and notebooks must not display (1) racial or ethnic slurs/symbols, (2) gang affiliations, (3) vulgar, subversive, or sexually suggestive language or images; nor, should they promote products which students may not legally buy; such as alcohol, tobacco, and illegal drugs.” (*Id.*)

According to V.L. Stonecipher, Director of Anderson County schools, a racially tense environment has existed at Clinton High School since 1956 when the school was integrated.<sup>1</sup> (Trial Tr. Vol. I 96-99.) Stonecipher has been employed by Anderson County schools since 1965 as a teacher, principal, and administrator. He testified in the court below that during his tenure with the Anderson County school system, he has dealt with several instances of racial hatred such as the name-calling experienced by black students. Stonecipher stated that displays of the Confederate flag would be a distraction to any student offended by it and could result in some sort of dangerous disagreement resulting in conflict or violence.

John Burrell, Chairman of the Anderson County School Board, stated that the Board decided to ban anything it felt would be disruptive to students, and the Confederate flag fell into that category. Burrell stated that he would not consider lifting the ban as long as the flag was disruptive to any students in the school system. Specifically, Burrell said he “would be against removing the ban as long as we have a racially mixed group with some of those students who I think [the flag] would be offensive to.” (Trial Tr. Vol. I 49.) Burrell stated that after a student becomes offended, “the next step is a fight, a riot, that type of situation.” (Trial Tr. Vol. I 63.) Burrell also

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<sup>1</sup>On August 27, 1956 twelve black students, known as the Clinton 12, integrated Clinton High School. Because of the backlash that subsequently ensued, the National Guard was brought in to restore and maintain order. On October 5, 1958, Clinton High School was bombed. The school was rebuilt and reopened in 1960. The campus of what once was Clinton High School is now the campus of Clinton Middle School.

testified that if a child was sitting in class and something is offensive to him or her, that could affect the child's learning.

Several racial incidents have occurred at both ACHS and ACCTC. Examples of such happenings are detailed below.

### 1. Anderson County High School

Greg Deal, the ACHS principal, testified that racial tension has existed in the community for years. (Trial Tr. Vol. II 117-19.) Deal recalled an incident that occurred in 2003 where a Hispanic male student had a verbal confrontation with a white female student in class about a paper on her desk and a white male student told the Hispanic student to shut up. After class and on the way to lunch, the same white male student called the Hispanic student a "sand nigger, dirty mexican." (*Id.* at 122-23.) The Hispanic student went to his older brother and told him what happened. The student's big brother subsequently got into a physical confrontation with the white male student. Also in 2003, two Hispanic students approached Deal complaining that they were being called "dirty niggers, sand niggers and dirty mexicans" and told that they need to leave ACHS when they walked down the "redneck hallway."<sup>2</sup> (*Id.* at 126.) Deal noted that when he went to talk to the self-proclaimed "rednecks," some of them were wearing the Confederate flag.

In January 2005, there was a basketball game between ACHS and Clinton High School. Clinton had a biracial basketball player. Prior to the commencement of the game, ACHS students threw Oreo cookies onto the basketball court as the biracial player was completing warm-up drills. (*Id.* at 123.) Deal's investigation into this incident

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<sup>2</sup>Deal testified that various groups of students hang out in different areas of the campus. The "redneck hallway" referred to by the Hispanic students was where "the John Deere gang or the rednecks, the young men who liked to wear [Carhartts]" hung out with each other. (Trial Tr. Vol. II 125.) UrbanDictionary.com defines the term "redneck" as a "[m]ildly offensive term for a lower class white person from the southeastern states of the [United States]."

revealed that the students threw the Oreo cookies at the player because one of his parents is black and one is white.<sup>3</sup> (*Id.* at 123.)

In August 2005, two black male students, one of whom had been displaced by Hurricane Katrina, enrolled at ACHS. Deal testified that, according to his recollection, a black student had not attended ACHS since 1990 or 1991. Two days after the two black male students enrolled, a large Confederate flag was draped in a school hallway. Deal testified that he had never seen a Confederate flag hanging in the hallway before, yet, two days after two black male students enrolled at the school, there was a Confederate flag hanging in the hallway. When Deal went over to remove the flag from the wall, he observed the “rednecks” or John Deere gang “laughing and snickering” as he took the flag down. (*Id.* at 109.) Deal considered the flag to be a message to the administration “that, hey, we don’t want these black young men enrolled in our school.” (*Id.*)

There was also an incident where a black student from Clinton High School attending a leadership class at ACHS was called a “nigger” by a group of white students. (*Id.* at 131.) In 2008, racially-charged graffiti was discovered in the school auditorium and in two areas of the high school football stadium. In the auditorium, a Swastika was found along with the terms “niggers” and “white power.” (*Id.* at 133.) On the football bleachers, graffiti included comments like “White 4 Life” and “I Hate Niggas, J/K AVM.”<sup>4</sup> (*Id.* at 140.) In 2008, graffiti discovered on the track pole vault pit was determined to be the names of a black male student and a white female student along with “something about nigger-lover, white girl, black boy, in my school” and a picture of a hangman’s noose (*Id.* at 142-43.) The two students whose names were written were dating at the time. Deal stated that he believed lifting the Confederate flag ban would disrupt the learning environment.

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<sup>3</sup> Although often used to describe persons deemed “[b]lack on the outside, [w]hite on the inside,” UrbanDictionary.com, the term “oreo” is sometimes used to refer to a person of black and white heritage.

<sup>4</sup> Deal testified that he understood “J/K” to mean “joking” and AVM to stand for “Andersonville Mafia,” which is a group of students Deal characterized as a “[g]ang[] or gang ‘wannabes’” who think they are “gangsters.” (*Trial Tr.* Vol. II 140-41.)

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