

**DRAFT TRANSCRIPT OF COMMENTS BY JUDGE RICHARD SMOAK UPON GRANTING
PERMANENT INJUNCTION IN FAVOR OF HEATHER GILLMAN**

THE COURT: All right, this case presents issues that
15:43 are obviously of great concern to any community, and I would
15:43 recognize in Holmes County. It's a matter of the issue of
15:43 homosexuality, the issue of relatively young children, and I
15:43 can understand that to many people that would seem to be an
15:43 issue that needed no discussion, that they simply should not be
15:43 mentioned in the same breath. And we're talking about students
15:43 in middle school and high school.

15:43 But I don't think this case -- and I TPHAOEUPBD it is
15:44 not about the promotion or sanctioning of homosexuality; that :
15:44 the activity that the plaintiff undertook was to seek the equal :
15:44 and fair treatment of her homosexual friends. The speech that :
15:44 is in question, that is exhibit 2, are certainly not sexual in
15:44 meaning. To say that God loves me just the way I am, to find a
15:44 sexual connotation in that, I think just can't be made. The
15:44 word gay appears a total of six times. Two of the symbols with
15:44 the spectrum of the rainbow, it's hard to drive across town
15:45 without seeing that on the bumper of a car in front of you, and
15:45 I doubt that this was the first time that these young people
15:45 had ever seen that.

15:45 And I think there were separate issues here, that the :
15:45 evidence established. There was a reaction by the students to
15:45 two other real or imagined events that really should not have a
15:45 bearing on this question of the propriety of the banning of
15:45 this speech. The first was the rumor that a minister would be
15:45 speaking at the school against homosexuals. And the second
15:46 were reports, rumors amongst the students that the principal
15:46 had condemned homosexuality, that he may have injected his own
15:46 religious beliefs into the school, and that he had suspended a
15:46 student for being homosexual.

15:46 I think there was substantial evidence that the
15:46 vandalism which consisted of some spray painting or painting of :
15:46 graph feet TEU, and some disorder, the most precise description
15:46 of that disorder were loud voices in the corridors during a :
15:46 change of classes, and a period of about ten minutes of :
15:46 disruption in a class one morning before that teacher who did

15:47 not testify got the matter under control. And I don't think
15:47 that it is more reasonable to attribute that vandalism and
15:47 disorder to a reaction against (s-z) (s-z) the plaintiff's :
15:47 speech than it is to the indignation that apparently spread
15:47 through the school about the rumor about the minister which
15:47 prompted the plan for the students to walk out in protest., and
15:47 also the rumor that a homosexual student had been expelled :
15:47 slight mischaracterization
15:47 because of their sexual preference.

15:48 I think a more reasonable perception of much that was
15:48 said about the claimed interruption and disorder was really
15:48 much the usual background noise of a middle and high school.:

15:48 And I did not hear any evidence of any effort by the
15:48 defendant to deal with this fear of disorder or interruption by :
15:48 any other reasonable means less drastic than banning the speech
15:48 and suspending the students who were promoting that speech.

15:49 And this probably had an opportunity, as the courts :
15:49 have pointed out, in the learning environment of schools, where
15:49 not just comfortable issues are to be learned or debated; that
15:49 this would have been an opportunity for leadership, it would
15:49 have been an opportunity for understanding and an opportunity
15:49 for civil discourse and a learning opportunity about tolerance
15:49 and diversity.

15:49 Unfortunately those opportunities were missed. :

15:50 Some concern or argument was made yesterday starting
15:50 -- and I was concerned about it, that because of the
15:50 consolidated nature of the high school and the middle school
15:50 and the near proximity of the elementary school and perhaps the
15:50 students of all ages riding the buses, that somehow this speech
15:50 in question became more out of bounds and more justified the
15:50 banning by the school. And nobody has provided me any cases
15:50 that really deal with this question of how young is too young.
15:50 The plaintiff's counsel has certainly pointed out in Tinker
15:50 that plaintiff was 13 years old who wore the black armband.

15:51 We had the three young women testify, the plaintiff,
15:51 and two young women today, and I was particularly impressed
15:51 that notwithstanding their nervousness and probably justifiable
15:51 fright at being in a federal courtroom, how poised they were

15:51 and how they were -- had become so interested in this very
15:51 controversial topic in our society, and quite frankly, I
15:51 thought that they were far more insightful and more articulate
15:51 than I would have expected for their years.

15:52 So I don't really find that there has been some :
15:52 showing that there was going to be some interruption or :
15:52 disruption that warranted a ban just because of the age of :
15:52 these children.

15:52 This speech certainly, I think, even the principal
15:52 acknowledged that -- had trouble with arguing that these
15:52 somehow had a sexual connotation or promoted the practice of
15:52 homosexuality.

15:52 I find that the core message here is that of tolerance :
15:52 and fairness, and that the issue of sexual preference is really
15:53 not the thrust of the argument. : so to speak

15:53 But this has certainly been an issue for a number of
15:53 years all across the country. Some states have addressed it
15:53 with laws, certainly any number of state legislatures have
15:53 debated this issue vigorously. As we know it's an issue now in
15:53 Florida. Some of the Supreme Courts of other states have taken
15:53 the lead in dealing with this issue. In short this is not a :
15:53 taboo issue. It's an issue that I think we encounter close to
15:54 a daily basis and to the extent that it is less taboo or more
15:54 tolerated and accepted now, as I mentioned earlier today, you
15:54 simply have to look at the popular television shows of recent
15:54 years, the situation comedies in which on several -- some of
15:54 the main characters are identified as openly homosexual but
15:54 basically living responsible lives.

15:54 I was concerned that the -- when the ACLU wrote the
15:55 School Board, I think it really gave a pretty clear notice of
15:55 the contentions about the problems. But I was particularly
15:55 concerned about the School Board's response. I don't know :
15:55 whether he was the author of this strange notion about a secret
15:55 organization or secret society, he really gave very short
15:55 acknowledgement, almost a bump and run, to the requirements of:
15:55 Tinker and Holliman. I don't know if that is where this case
15:55 got off track. I think the School Board may have taken a
15:55 different direction in this case and responded differently

15:55 perhaps with wiser counsel.

15:56 And as far as the concern about further discord or
15:56 interruption that might be attributable to the 16 phrases and
15:56 symbols, if you look at what Tinker and Holliman say about
15:56 that, it's sort of a guess. It's certainly -- I really heard
15:56 no real basis from the principal to warrant his fear that chaos
15:56 was imminent. In fact in Tinker the court noted that the trial
15:56 court had sort of agreed with the school authorities in banning
15:57 the armbands and they said it was because of their fear of a
15:57 disturbance from the wearing of the armbands. But in our
15:57 system, undifferentiated fear or apprehension of disturbance is :
15:57 not enough to overcome the right of freedom of representation.
15:57 It said any departure from absolute regimentation may cause
15:57 trouble, any variation from the majority's opinion may inspire
15:57 fear. Any words spoken in class, in the lunch room or on the
15:57 campus that deviates from the views of another person may start
15:57 an argument or cause a disturbance, but our constitution says
15:57 we must take this risk. And our history says it is this sort
15:58 of hazardous freedom, this kind of openness that is the basis
15:58 of our national strength and the independence and vigors of
15:58 Americans who grow up and live in this relatively permissive
15:58 often disputatious society. (s-z).

15:58 The court went on then and said in order for the state :
15:58 in the person of school officials to justify prohibition of a
15:58 particular expression of opinion, it must be able to show that
15:58 its action was caused by something more than a mere desire to
15:58 avoid the discomfort and unpleasantness that always accompany
15:58 an unpopular viewpoint. Certainly there -- where there is no
15:58 finding and no showing that engaging in the forbidden conduct
15:59 would materially and substantially interfere with the
15:59 requirements of appropriate discipline in the operation of the
15:59 school, the prohibition cannot be sustained.

15:59 Now I find that the speech, conduct in this case, :
15:59 would not materially and substantially interfere with the
15:59 requirements of appropriate discipline in the operation of the
15:59 Ponce de Leon school. And I think the record as in Tinker
15:59 fails, and I am quoting "yield evidence that the school
15:59 authorities had reason to anticipate that the wearing of the

15:59 armbands would substantially interfere with the work of the
16:00 school or imping on the rights of other students."

16:00 Tinker cited justice Brennan in earlier --ishian
16:00 versus board of regents case. (s-z) (s-z) he said the Vick
16:00 HRAPBT protection of constitutional freedoms is nowhere more
16:00 vital than in the community of American schools. Classroom is
16:00 peculiarly the marketplace of ideas. The nation's future
16:00 depends upon leaders trained through wide exposure to that
16:00 robust exchange of ideas which discovers truth out of a
16:00 multitude of tongues and rather than through any kind of
16:01 authoritative selection.

16:01 They said the constitution says that Congress and the
16:01 states -- this is the First Amendment and the 14th -- may not
16:01 abridge the right of free speech. This provision means what it
16:01 says.

16:01 While many people, perhaps the Holmes County community
16:02 disagree with the plaintiff, but I hope they will keep in mind
16:02 that this is one of the most fundamental constitutional rights,
16:02 that of the freedom of speech, and that we are not making up
16:02 the law today. This law has been long settled by the United
16:02 States Supreme Court for almost 50 years.

16:02 I find that the investigation conducted by the School :
16:02 Board through its superintendent was so deficient that it was
16:02 the equivalent of no investigation at all. I would have
16:03 expected a detailed report on all issues raised by the ACLU
16:03 September 25th letter.

16:03 As I understood the testimony from the superintendent,
16:03 he was basically told look into this, he called the principal,
16:03 the principal said it didn't happen. And that was his report
16:03 back to the Scho to the School Board. No one else was
16:03 interviewed.

16:03 I find that the plaintiff has properly proved the
16:03 allegations of the complaint and that the relief requested :
16:04 should be granted.

16:04 Counsel, I will afford you an opportunity from Friday :
16:04 of next week to submit anything to me that would warrant
16:04 amending the relief so that it is proper, but in the meantime,
16:04 I do declare that the defendants have violated the plaintiff's :

16:04 rights protected under the first and 14th amendments of the
16:04 United States Constitution, that the defendants, their
16:04 officers, agents, affiliates, subsidiaries, servants employees
16:04 and all other PERPBTS or entities in active concert or privity
16:04 or active participation with them are permanently enjoined from
16:05 restraining, prohibiting or suppressing the plaintiff or any
16:05 other student within the Holmes County school district from
16:05 expressing their support for the respect, equal treatment and
16:05 fair accept answer of homosexuals and this includes but not
16:05 limited to the phrases and symbols which appear on exhibit
16:05 2 which is before us now (s-z).

16:05 I find that the argument raised by defendants about
16:05 illegal organizations or secret societies is imperm imper miss I
16:05 believely bake as applied to the plaintiffs and to the
16:05 activities (s-z) which have been prescribed by the defendants.
16:06 And the enforcement of the defendant's policies concerning
16:06 expression related to illegal organizations or secret societies
16:06 is applied to the as applied to the plaintiffs is enjoined.
16:06 (s-z).

16:06 Defendants are ordered to take such affirmative steps
16:06 necessary to remediate the past restraints of the expression of
16:06 the support for respect, equal treatment and acceptance of
16:06 homosexuals, including but not limited to notifying in writing
16:06 the Ponce de Leon High School student body and the middle
16:06 school students and school officials within Holmes County
16:06 school district that students are permitted to express support
16:07 for, respect, equal treatment and fair acceptance of
16:07 homosexuals pursuant to reasonable time, place and manner
16:07 restrictions that do not substantially interfere or disrupt the
16:07 missions of the schools.

16:07 Defendants, their officers, agents, affiliates,
16:07 subsidiaries, servants, employees, all other persons or
16:07 entities in active concert participation or privity with them
16:07 are enjoined from taking retaliatory action against plaintiff :
16:07 for bringing this lawsuit or against any students for their
16:07 past or future expressions of support for the respect, equal
16:07 treatment and fair acceptance of homosexuals.

16:08 The clerk is directed to enter judgment for plaintiff

16:08 against the defendant School Board for nominal damages of \$one.

16:08 The parties are to address the issue of attorneys fees :

16:08 and costs in the manner prescribed by the local rule of the :

16:08 Northern District of Florida, which essentially requires that

16:08 you first attempt to work it out by agreement and if that is

16:08 not successful, that you then follow the procedure to bring it

16:08 for my determination.

16:08 And I will retain jurisdiction of this case to enforce

16:08 the terms of these orders.

16:08 Counsel, are there any questions?