

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech

Keefe v. Adams, No. 14-2988 (8th Cir., 2016)

Craig Keefe was a licensed practical nurse and enrolled in an associate degree nursing program at Central Lakes College to train to become a registered nurse. Another student in the program complained to a course instructor that Keefe had posted threatening messages relating to the class on his public Facebook page, including musing that there was “not enough whiskey to control that anger” about his classmates. The college removed Keefe from the nursing program but told him that he could remain enrolled in the school in another program of study. His removal was characterized as a violation of the professionalism requirements of the academic program rather than a disciplinary sanction. Keefe filed suit in federal district court seeking his reinstatement arguing that the college had violated his First Amendment rights to free speech. The district court found in favor of the college, and on appeal the First Circuit Court affirmed that ruling.

JUDGE LOKEN,

...

Keefe argues that defendants violated his First Amendment right to free speech by removing him from the Nursing Program at a public college “for comments on the internet which were done outside of class and unrelated to any course assignments or requirements, and did not violate any specific rules.” Keefe’s Reply Brief frames this contention categorically—a college student may not be punished for off-campus speech, he contends, unless it is speech that is unprotected by the First Amendment, such as obscenity. To our knowledge, no court has adopted this extreme position, and we decline to do so.

The first question raised by Keefe’s claim is significant—whether the First Amendment precludes a public university from adopting, as part of its curriculum for obtaining a graduate degree in a health care profession, the Code of Ethics adopted by a nationally recognized association of practicing professionals. . . .

Many courts have upheld enforcement of academic requirements of professionalism and fitness, particularly for a program training licensed medical professionals. Fitness to practice as a health care professional goes beyond satisfactory performance of academic course work. As the Supreme Court said in *Board of Curators of University of Missouri v. Horowitz* (1978), “Personal hygiene and timeliness may be as important factors in a school’s determination of whether a student will make a good medical doctor as the student’s ability to take a case history or diagnose an illness.”

Given the strong state interest in regulating health professions, teaching and enforcing viewpoint-neutral professional codes of ethics are a legitimate part of a professional school’s curriculum that do not, at least on their face, run afoul of the First Amendment. . . . Here, Keefe made no allegation, and presented no evidence, that defendants’ reliance on the Nurses Association Code of Ethics was a pretext for viewpoint, or any other kind of discrimination.

If compliance with professional ethical standards is a permissible academic requirement, then determinations of non-compliance will almost always be based at least in part on a student’s speech. That

a graduate student's unprofessional speech leads to academic disadvantage does not "prohibit" that speech, or render it unprotected; the university simply imposes an adverse consequence on the student for exercising his right to speak at the wrong place and time, like the student who receives a failing grade for submitting a paper on the wrong subject.

A serious question raised by Keefe in this case is whether the First Amendment protected his unprofessional speech from academic disadvantage because it was made in on-line, off-campus Facebook postings. . . . We reject this categorical contention. A student may demonstrate an unacceptable lack of professionalism off campus, as well as in the classroom, and by speech as well as conduct. . . .

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. . . Courts should be particularly cautious before interfering with the "degree requirements in the health care field when the conferral of a degree places the school's imprimatur upon the student as qualified to pursue his chosen profession." *Doherty v. Southern College of Optometry*, 862 F 2d 570 (6th Cir., 1988).

...

In our view, it is clear that defendants' decision to remove Keefe from the Nursing Program "rested on an academic judgment that is not beyond the pale of reasoned academic decision-making." Defendants' action in quietly removing Keefe from Central Lakes' Nursing Program for behavior he admitted was "unethical and unprofessional," while allowing him to remain in school, was far from conscience shocking. "When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgement." *Regents of the University of Michigan v. Ewing* (1985).

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Affirmed.

JUDGE KELLY, CONCURRING IN PART AND DISSENTING IN PART.

. . . [B]ecause I think there is a genuine issue of material fact as to whether the school could constitutionally regulate Keefe's off-campus, non-academic speech, I would reverse the district court's grant of summary judgment in favor of defendants on Keefe's First Amendment claim.

...

The cases where we have characterized a dismissal as academic illustrate why Keefe's dismissal was not. The students in those cases were dismissed based at least in part on issues related to the school's curriculum, like failing to complete coursework, failing exams, lack of preparation, and absenteeism, or cheating on an exam and then lying about it. These cases are consistent with *Horowitz*, which described an academic dismissal as one based on "failure to attain a standard of scholarship." Keefe was dismissed as a result of a conflict with classmates on Facebook. Case law does not support classifying as "academic" dismissals based on off-campus speech that merely happened to be about the school or its students.

Furthermore, administrators treated Keefe's dismissal like a disciplinary one: They dismissed him immediately after learning of his Facebook posts, with no attempt to work with him to improve his conduct. Academic dismissals receive less stringent procedural protections in part because they involve an educational process that is "not by nature adversary." . . . Rather than a cooperative, non-adversarial effort to improve Keefe's professionalism that proved unsuccessful over time, the dismissal was an immediate imposition of discipline for misbehavior.

The College's Code of Conduct sets forth such ostensibly academic goals as "Human Flourishing, Nursing Judgment, Professional Identity, and Spirit of Inquiry." It goes on to state that the College aims to instill in its graduates qualities like "evidence-based practice, life-long learning, service learning/civic engagement, caring, advocacy, excellence, and safe quality care for diverse patients within a family and community context." The Code of Conduct also requires students to uphold the American Nurses Association Code of Ethics, which sets forth similar requirements. These goals are admirable, and

describe commendable traits for a person entering the nursing profession. Yet with such general requirements of character, excellence, and virtue, it is difficult to imagine any type of misconduct that would not, in some way, violate one or more of these requirements. The court's holding allows the school to treat any action it deems violative of the Code of Conduct as an academic problem rather than a disciplinary problem. This interpretation collapses the distinction between academic and disciplinary dismissals, and I am not inclined to signal the end of the latter as a meaningful category.

No doubt Keefe's attitudes toward his classmates left something to be desired. And no doubt all educational institutions, perhaps professional degree programs in particular, want to make sure that their future alumni treat their colleagues, clients, and the general public with respect. But a public college cannot transform a punishment for "disruptive or insubordinate behavior," into an academic decision simply by declaring it an academic goal of the school to cultivate civility in its students. I would categorize Keefe's dismissal disciplinary, rather than academic, and therefore turn to the question of whether Keefe received sufficient process throughout his disciplinary expulsion proceedings.

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... [W]e are not faced with a situation where the school is punishing a student's failure to abide by rules of conduct akin to a professor's marking down a student for what he says as part of an academic assignment. ... Keefe's Facebook posts were not made as part of fulfilling a program requirement and did not express an intention to break specific curricular rules. ... Furthermore, *Oyama v. University of Hawaii*, 813 F. 3d 850 (9th Cir., 2015) affirmatively rejects the notion that students can be disciplined based on speech unrelated to the fulfillment of a curricular requirement.

...

The College and the district court felt that Keefe's Facebook posts constituted "behavior unbecoming of the profession and transgression of professional boundaries," in violation of the Code of Conduct. Keefe's statements may indeed violate the administrators' interpretation of certain provisions of the College's professionalism Code, but that does not answer the question of whether that interpretation is consistent with the First Amendment. ... Quite simply, Code requirements that nurses treat others with "respect and compassion" and avoid "any and all forms of prejudicial actions" or "disregard for the effect of one's actions on others" could easily be used to restrict protected speech. See, e.g., *McCauley v. University of the Virgin Islands*, 618 F. 3d 332 (3rd Cir., 2010). ... In addition, when a college applies a generalized Code of Conduct to speech after the fact, I question whether students like Keefe are provided sufficient notice of what the Code prohibited and what it allowed.

...

Based on the record before us, I think that summary judgment was improperly granted to the administrators on Keefe's First Amendment claim. Genuine issues of material fact remain concerning whether the administrators could permissibly restrict the speech at issue in this case in the manner that they did.