IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THOMAS HAYDEN BARNES,	*	
	*	
Plaintiff,	*	
	*	
-vs-	*	
	*	Case No. 1:08-cv-00077-CAP
RONALD M. ZACCARI, *et al.*,	*	
	*	
Defendants.	*	
	*	

MEMOR

A little more that a week after the Complaint was filed,

violated by the lack of any pre-deprivation hearing, or by a post-deprivation "process

concerns about the construction of a $30-million parking garage, and he summoned Barnes for a meeting in his office. Compl. ¶¶ 2, 23-31; Statement of Undisputed Facts ¶¶ 12-15; Pl.'s Ex. K.

Coincidentally, Barnes meeting with Zaccari took place on April 16, 200

Zaccari, and a picture of a public bus under a no-smoking-style “not allowed” red circle and slash. Pl.’s Ex. B. The collage also included text such as “more smog,” “bus system that might have been,” “climate change stateme

further observations and communications confirming expert evaluations that Barnes n

hearing, or other formal process, to expel Barnes from VSU. Compl. ¶ 51; Statement of Undisputed Facts ¶¶ 10, 33-34; Pl.'s Ex. A (hereinafter "Expulsion Ltr.").

On May 7, 2007, Zaccari notified Barnes of his expulsion from VSU via letter. Compl. ¶ 52; Statement of Undisputed Facts ¶¶ 10, 35, 36. The notice was not delivered to Barnes personally, but was merely deposited under the door to his dorm room. Compl. ¶ 52. With a copy of Barnes' Facebook collage attached, the letter said that Barnes was "considered to present a clear and present danger to this campus" and that he was "administratively withdrawn" pursuant to "Board of Regents' policy 1902."[4] Expulsion Letter.

VSU has no policy that provides for "administrative withdrawals."

which will be assigned to hear a given case; (2) five days' prior notice in writing of the charges made against the student and the date, time and place of a hearing to be held regarding those cha

On May 21, Barnes appealed his expulsion to the Board of Regents. Compl. ¶ 63; Statement of Un

Defendant McMillan, who is separately represented, also filed a motion to dismiss. McMillan asserts that the Complaint does not allege unlawful action on her part, but that instead it highlights the fact that she reported "to VSU Pre

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Eberhardt v. Waters*, 901 F.2d 1578, 1580 (11th Cir. 1990). The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judg

University and guaranteed by the Constitution. Applying settled law to this stark scenario clearl

commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

This major premise of Defendants

cons

retaliator

McMillan and Morgan. VSU Defs.' Mem. at 8-9; McMillan Mem. at 2-3. But each of the Defendants participated in the collective decision to expel Barnes. *Id.*; *see also* Compl

Mem. at 2-3. Although McMillan, to her credit, repeatedly informed the other

id. at 2, the Defendants assert that his speech about the parking garage was "not protected by the First Amendment." *Id*. at 5. That's their story, and they are sticking to it. But there are a couple of problems with this stratagem: There is no factual support whatsoever for this shameful attempt to explo

points." *Id*. at 2. After Barnes discontinued the flyers, Defendant Zaccari then became concerned because – as he put it – Barnes

After the Board approved the proposed parking garage, Zaccari claimed that, with the assistance of Defendant Mast, he became aware of Barnes

assessing the psychological status of an individual,

how far out to sea the Defendants are on the law.[10] The current state of First Amendment jurisprudence, as articulated in *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969) (per curiam), prohibits restrictions on

only if the Defendants were somehow trying to suggest that Barnes' Facebook page was likely to send President Zaccari into a violent rage. Even then, the fight

imminent prospect of execution.

disruption or the mere theoretical possibility of discord, or even some *de minimis*,

in *Dwyer v. Oceanport Sch. Dist.*, No. 03-cv-6005, mem. op. at 9-19 (D.N.J. Mar. 31, 2005) (unpublished op.), the district court held that a student website was protected by the First Amendment despite the fact that it contained photographic negative of the school

While the law is clear even in the elementary and secondary school setting, Hayden Barnes is not a high school student and his speech is entitled to full First Amendment protection. As the Supreme Court highlighted in *Healy*, 408 U.S. at 180,

In light of the abundant case law, Defendants' assertion that Barnes' expression "does not constitute protected speech,

afforded all rights required by due process," including (in addition to the above hearing procedures) the right top question one

Zaccari Ltr. to Neely at 4. Accordingly, there can be no dispute about Defendants' failure to provide Barnes to protections spelled ou

explain, and defend." However, as the Defendants frankly admit in this case, Hayden Barnes was accorded no such rights.

2. Substantive Due Process

In addition to the procedural vacuum, Defendants

rights. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interest, especially his interest in freedom of speech"); *Greenbriar*

because Barnes at least was given

for suits against such officials for injunctive relief. *Kentucky v. Graham*, 473 U.S. 159, 167 n.4 (1985).[18]

In any event, the fact that the Board rescinded Barnes' expulsion does not moot the need for injunctive relief. The Complaint seeks both declaratory and injunctive relief, including "such relief as the Court deems just and proper." Such relief would include, at a minimum, reinstating Barnes at VSU, ensuring he does not face further retaliation, and expunging all University records that inappropriately label Hayden Barnes as a "clear and present dang

the defendant free to return to his own ways,

disability discrimination statutes, a plaintiff must show that he was excluded from participation in, or denied the benefits of, a program or service offered by a public entity, or subjected to discrimination by the entity. 42 U.S.C. § 12132; 29 U.S.C. § 794(a). Plaintiff

factor. *See Baird ex rel. Baird v. Rose*, 1

through private causes of action and the States are not immune from federal suits to enforce this provision. *Barnes v. Gorman*, 536 U.S. 181, 185 (2002). Consequently, Defendants' motion t

forth in VSU's handbook, it is frivolous for the Defendants to assert that there was no

right was clearly established.

d.

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/s/ Cary Stephen Wiggins
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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on May 2, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record. I also certify, pursuant to LR 7.1.D., that this brief has been prepared in Times New Roman 14-point font.

/s/ Cary Stephen Wiggins
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