

Chris Bishop

**IN THE UNITED STATES DISTRICT COURT FOR THE EAST-  
ERN DISTRICT OF TENNESSEE**

\_\_\_\_\_- - - - - Rebekah Fitzgerald, )

Plaintiff, )

vs. )

Victory Mountain High School )

and )

David Jacobson, )

Defendants )

\*\*) \*\*

\*\*) \*\*

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**Civil Action No. CV-15-12345**

**Memorandum in Support of Defendants' Motion for Summary  
Judgment**

**Statement of the Case**

\*\*\*\*Plaintiff Fitzgerald has filed a § 1983 claim against Defendants Victory Mountain High School ("VMHS") and David Jacobson. Fitzgerald alleges that the Defendants infringed upon her First Amendment rights because she wished to submit an article for publication in the school's newspaper but did not because she feared punishment for violating a VMHS student conduct policy. Defendants move for summary judgment because the Plaintiff voluntarily chilled her own speech and, therefore, did not suffer the injury in fact required to establish standing. Additionally, if standing were to be found, the school newspaper is not a public forum. Consequently, school officials may impose reasonable restrictions on student speech without violating the students' First Amendment rights.

**Facts**

Plaintiff Fitzgerald is a senior at VMHS and a student in Defendant Jacobson's journalism class. Fitzgerald Dep. 1:16-23. The journalism class is an elective

course that helps put together the school newspaper “The Mountain.” *Id.* 1:26-27. Students in the class research, write, and edit articles and postings that are eventually published in the paper. *Id.* Before being allowed to participate in the journalism class students are required to read and sign an acknowledgement form that states, “the faculty advisor for the newspaper is the ultimate decision-maker as to what articles are researched and published.” *Id.* 2:20-24. “The Mountain” is funded entirely by the VMHS and the school does not seek nor receive any outside advertising fees or funding. Jacobson Aff. ¶ 7. The newspaper is published for student-use only and distributed only at the school. *Id.*

Early in the school year VMHS sponsored a voluntary sex education program for students. Fitzgerald Dep. 3:1-3. The program taught students about abstinence, birth control, and sexually transmitted diseases. Chang Aff. ¶ 6. Defendant Jacobson’s journalism class considered writing an article discussing the sex education program but ultimately decided to write about the school’s football team instead. Jacobson Aff. ¶ 9.

Plaintiff Fitzgerald had strong views opposing the sex education program, and pre-marital sex in general. Fitzgerald Dep. 3:8-11. She wished to write an article for “The Mountain” expressing her opinions about the program and pre-marital sex. *Id.* 3:15-16. However, Plaintiff Fitzgerald ultimately decided not research or write an article because she feared she might be punished for violating VMHS Student Code of Conduct 45, a policy which prohibits students from using language that may “insult, demean, or criticize” other students or teachers. *Id.* 3:23-27.

Plaintiff Fitzgerald never discussed her desire to write an article with any of the students or staff at VMHS. *Id.* 4:1-27. No one at the school knew that she wanted to write such an article. No one at VMHS discouraged, threatened, or punished Plaintiff Fitzgerald because of the article. *Id.* Plaintiff Fitzgerald remained in the journalism class for the duration of the semester and earned a grade of A-. *Id.* 5:3.

### **Argument**

The court should grant the Defendants’ motion for summary judgment. Summary judgment is proper “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The substantive law identifies which facts are material, and only a dispute “over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Moreover, a dispute over facts is genuine only “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* A movant satisfies its burden by showing “that there is an absence of evidence to support the nonmoving party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

Defendants satisfy their burden because the undisputed summary judgment evidence shows that the Plaintiff voluntarily chilled her own speech and, therefore,

did not suffer the injury in fact required to establish standing. Furthermore, even if standing were to be found, the school newspaper, The Mountain, is not a public forum. Consequently, school officials may impose reasonable restrictions on student speech without violating the student's First Amendment rights.

**I. Plaintiff lacks standing to assert a First Amendment violation because she subjectively chilled her own speech and, therefore, did not sustain an injury in fact.**

\*\*\*\*In order to establish Article III, constitutional standing, a plaintiff must show that she has suffered an injury in fact that is traceable to the Defendant. *McGlone v. Bell*, 681 F.3d 718, 729 (6th Cir. 2012). This injury in fact must be both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* at 729. With respect to the standing of First Amendment litigants, "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Morrison v. Bd. of Educ. of Boyd Cty.*, 521 F.3d 602, 608 (6th Cir. 2008).

For example, in *Morrison*, a high school student alleged that a school policy prohibiting students from making harassing or derogatory statements to other students based on their sexual orientation chilled his speech. *Id.* at 605. The student believed that his religion required him to tell homosexual students that their sexual orientation was a sin. *Id.* The Sixth Circuit held that the student did not have standing to bring his claim because he had not suffered an injury in fact. *Id.* at 608. The court emphasized that the student's claim was based solely on the apprehension of punishment and lacked any specific action by the administration that supported his fear. *Id.*

Conversely, when a plaintiff can show some action by the defendant that has objectively chilled his speech, standing should be found. For example, in *McGlone v. Bell* a professing evangelical Christian was told that he must obtain a waiver before he would be allowed to speak on a college campus. *McGlone*, 681 F.3d at 723. The plaintiff applied for, and was denied the waiver, and afterwards he "was approached by a campus police officer who threatened to arrest him for trespass if he did not stop speaking and leave the campus." *Id.* at 730. The court found that\*\*the plaintiff did have standing because the chill of his speech was based on more than a subjective fear of punishment. *Id.* at 730. The court emphasized that the plaintiff "is alleging more than the apprehension based on a written policy" *Id.* Rather, there was enough evidence to show that the actions of the defendant objectively chilled his speech. *Id.*

In the present case, even when the facts are viewed in the Plaintiff's favor, the undisputed summary judgment evidence shows that the Plaintiff subjectively chilled her own speech and, therefore, did not sustain the injury in fact necessary to establish standing. Although the Plaintiff Fitzgerald desired to write an article for the school newspaper expressing her views opposing premarital sex, she did not express this desire to Defendant Jacobson or anyone else at Victory Mountain High School. Fitzgerald Dep. 3:21-24. As in *Morrison*, Fitzgerald

subjectively feared that writing such an article would violate the VMHS Student Code of Conduct Policy 45 and result in punishment. Fitzgerald Dep. 3:26-27. However, no one at VMHS ever knew that Fitzgerald wanted to write the article, and no one at VHMS ever discouraged, threatened, or warned Fitzgerald not to write an article regarding sex education or premarital sex.\*\*Fitzgerald Dep. 4:4-23. Therefore, unlike in *McGlone*, there is no action by the Defendants that objectively chilled Fitzgerald's speech.

Therefore, like the plaintiff in *Morrison*, Fitzgerald's claim is based solely on the apprehension of punishment and lacks any specific action by the Defendants that support her fear. Like in *Morrison*, Fitzgerald subjectively chilled her own speech and suffered no concrete harm. As such, Plaintiff Fitzgerald does not have standing to bring this action because she experienced no injury in fact.

**II. Even if Plaintiff has standing there has been no First Amendment violation because the school paper is a non public forum and school officials may impose reasonable restrictions on the speech of students in a non public forum.**

"First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 260 (1988). If a school facility has not been characterized as a forum for public expression, "school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community." *Id.* at 267.

"[S]chool facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public" *Id.* at 261. When it comes to school papers, the Supreme Court has held that no public forum has been created if the paper is intended "as a supervised learning experience for journalism students." *Id.* at 270. Specifically, the Court has emphasized that if the paper is "part of the educational curriculum and a regular classroom activity under the journalism teacher's control" it cannot be considered a public forum. *Id.* at 261 (holding that a school paper that was produced by a journalism class, taken for school credit, and part of a regular classroom activity was not a public forum). If a school paper is considered a non public forum "[e]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech . . . so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 261.

In this case, it is clear that "The Mountain" is a non public forum. "The Mountain" is a school-funded newspaper that does not receive any outside funding. Jacobson Aff. ¶ 7. The newspaper is published for student-use only and distributed only at school: there is no circulation of the paper outside of VMHS. *Id.* The paper is published by Defendant Jacobson's journalism class as a way to promote student involvement in practical journalism. Fitzgerald Dep.

2:19-20. Before being allowed to participate in the journalism class students are required to sign an acknowledgement for that states, “the faculty advisor for the newspaper is the ultimate decision-maker as to what articles are researched and published.” Fitzgerald Dep. 2:5-22. As such, there is no indication that Defendant Jacobson or VMHS intended for The Mountain to be anything more than a “supervised learning experience for journalism students.”

Since The Mountain is a non public forum, Defendants Jacobson and VMHS are able to exercise editorial control over the style and content of student speech so long as their actions are reasonably related to legitimate concerns. Protecting students and teachers from insulting or harassing language is certainly a legitimate concern. Therefore, had Plaintiff Fitzgerald chosen to write and submit her article for publication, the Defendants could have chosen to refuse to publish it if they believed that the article insulted, demeaned, stigmatized, criticized, or harassed another student or teacher.

### **Conclusion**

The undisputed evidence shows that Plaintiff Fitzgerald chilled her own speech and, therefore, does not have standing to bring this case. Furthermore, “The Mountain” is a non public forum and consequently, even if Plaintiff Fitzgerald had submitted her article for publication the Defendants could have refused to publish it without violating Plaintiff’s First Amendment rights.

For all of the foregoing reasons, the Defendants respectfully request that this court grant their motion for summary judgment.

Word Count: 1961