November 2020 Vol. 167

FRATERNAL LAW™

A Fraternity Law Periodical Published by Fraternal Partners, a Division of Manley Burke, a Legal Professional Association

Court Upholds USC's Deferred Recruitment Even Tough USC Knows It Violates Associational Rights

Tim Burke, Fraternal Law Partners, tburke@manleyburke.com

Two years ago, the University of Southern California ("USC") instituted a deferred recruitment program that prohibited fraternities and sororities from recruiting new members from among the freshman class until those students had completed twelve credits with a minimum USC grade point average of 2.5. That essentially meant freshman members could not be recruited until the second semester.

While many have argued that deferred recruitment infringes on the First Amendment's freedom of association rights of members, would-be members, and fraternal organizations, that issue has not been previously fought in court. USC is a private University. In most states, a constitutional challenge cannot be successfully brought against a private school. However, California has a unique statue known as the Leonard Law. It provides that:

> No private post-secondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions solely on the basis of conduct, that is speech or other communication that, when engaged in outside the campus or facility of a private post-secondary institution, is protected from governmental restrictions by the First Amendment of the United States Institution or Section 2 of Article I of the California Constitution.[1]

[1] CAL. EDUC. CODE § 94367.

Fraternal Law is published by Manley Burke, LPA. Suggestions or articles for future publications are welcome at mkamrass@manleyburke.com.

Based upon the Leonard Law and with the assistance of R. Alexander Pilmer and other lawyers from the law firm of Kirkland & Ellis, LLP, the USC chapters of Kappa Alpha Theta Sorority, Sigma Chi, Beta Theta Pi, Theta Xi, and Tau Kappa Epsilon fraternities filed suit seeking to prevent USC from enforcing its deferred recruitment policy.

After a battle of more than two years, on October 22, 2020, Judge Theresa A. Beaudet of the Los Angeles Superior Court granted USC's Motion for Summary Judgment,[2] deciding the case entirely in USC's favor without requiring a trial.

Given what the Plaintiffs were able to document through discovery, the decision is particularly disappointing. As set out in the 25-page memorandum Plaintiffs filed against USC's Motion for Summary Judgment, USC actually knew and acknowledged that its deferred recruitment violated the First Amendment right to expressive association. In a 2014 memo regarding deferred recruitment, USC's Vice President for Student Affairs, Dr. Ainsley Carry, wrote that "the ability to freely associate is a right guaranteed to students via the U.S. Constitution. Placing restrictions on when and who fraternal groups are allowed to recruit infringes on the rights of all students." At that same time, the University was beginning plans for a $700,000,000 investment in a real estate project called The University Village. Dr. Carry explained that "leading up to the University Village. . . similar to membership in a Greek-letter organization, residential college members. . . [will] be identified by crest, logo, mission statement and value statement." Carry continued, "reflecting on potential threats to the residential college, no threat is more significant than the Greek-recruitment process… this is the most significant threat to the success to the residential colleges."

[2] Omicron Chapter of Kappa Alpha Theta Sorority vs. Univ. S. Cal., No. BC 672782 (Cal. Sup. Ct. Oct. 22, 2020).

While it appears that the Plaintiffs established that the motivation for the deferred recruitment policy was to damage the biggest competitor to USC's plans for the University Village and its residential colleges, the Court did not find that sufficient to establish "viewpoint discrimination." In its decision, the Court said that the test Plaintiffs had to meet was whether they could "demonstrate that the deferred recruitment was adopted 'not for any bonified academic reason, but simply because USC administrators disapproved of the viewpoint Plaintiffs espoused.'"

The University claimed to have a bonified academic reason for adopting the deferred recruitment policy and the Court cited to several of those alleged justifications in its decision. They included the fact that in 2015, the Academic Senate had adopted a resolution in support of deferred recruitment. By that time, more than twenty (20) peer institutions had implemented similar deferred recruitment policies. Additionally, sexual assaults occurred more frequently in fraternity and sorority houses than other places on campus. Dr. Carry even cited a concern about hazing deaths based on a news report of a freshman fraternity member dying at Penn State. Finally, the Court cited USC's statistics comparing the GPA's of freshmen who took part in fraternity and sorority recruitment to those who did not.

The Plaintiffs responded to those claimed justifications by pointing out that most of them were after-the-fact pretextual justifications for the policy, developed only after the policy was challenged. Plaintiffs also pointed out that USC's own evidence showed that Greeks have higher GPA's than the general student population. For example, in the fall of 2017, Kappa Alpha Theta Sorority had an average GPA of 3.53 while the general student body had an average of 3.37. And the average GPA for all women who were members of sororities was 3.45. Even the Court noted that the Director of Fraternity and Sorority Leadership Development at USC had testified in her

deposition that "over [her] five years… most semesters, the Greek community, which is all five councils, are usually at or above the undergraduate GPA."

Plaintiffs argued strenuously that deferred recruitment was, on its face, viewpoint discriminatory in that it allowed freshmen to join any other organization on campus except for those "disfavored by USC." Plaintiffs summarized their position this way:

> Here, the policy fails the limited-public-forum test: it is unreasonable because it frustrates the forum's purpose and that it is not viewpoint neutral because it discriminates against Greek-letter organizations.

Citing to *Christian Legal Society vs. Martinez*, 561 U.S. 661(2010), Plaintiffs quoted the late Justice Ruth Bater Ginsburg, who made it clear that the courts remain "the final arbiter[s] of the question whether a public university has exceeded constitutional constraints, and we owe no deference to universities when we consider that question."

Plaintiffs' arguments, as strong as they were, did not satisfy the Judge who summed up her decision as follows:

> But Plaintiffs overlook a key phrase: 'because of their points of view'. Singling out an organization is not the same as singling out an organization because of its *point of view*. Here, Plaintiffs offer no evidence that raises a triable issue of fact that USC singled out its fraternities and sororities because of their point of view. And as argued persuasively by USC to the extent that Plaintiffs contend that fraternities and sororities were singled out because USC viewed the Greeks as a threat to the success of the University's residential colleges, that is not a viewpoint motivating ideology, an opinion or a perspective.
>
> As of this writing, Plaintiffs have not decided whether or not an appeal will be filed.

A New Supreme Court Justice: What Does It Mean for Sororities and Fraternities?

Micah Kamrass, Fraternal Law Partners, mkamrass@manleyburke.com

On October 27, 2020 Amy Coney Barrett became a new Association Justice of the Supreme Court of the United States when she assumed the seat previously held by Associate Justice Ruth Bader Ginsburg. Many Supreme Court scholars believe that Barrett assuming a seat previously held by Ginsburg represents a dramatic shift in the ideological balance of the Court. Numerous publications and scholars have opined about what this shift may mean in many different areas of the law. So, we at Fraternal Law felt it may be helpful to share with our readers how Justice Barrett may impact Fraternities and Sororities.

Prior to joining the Supreme Court, Justice Barrett was a Judge on the United States Court of Appeals for the Seventh Circuit for almost three years. While serving in that capacity, she authored what has become one of the key judicial decisions on the question of Title IX and due process. In Doe v. Purdue [1], Judge Barrett held that for a variety of reasons that it was possible that Purdue University's Title IX proceedings discriminated against a male student accused of sexual assault on the basis of his sex. These reasons include the following: pressure from the federal government to discipline sexual assailants, determining that the complainant was more credible than the accused without ever speaking to the complainant, refusing to allow the accused to present witnesses, a lack of familiarity with the details of the case from the fact finders, and social media posts from the University's Center for Advocacy, Response, and Education (CARE). While Judge Barrett's decision was controversial, her call for greater

[1] 928 F.3d 652 (7th Cir., 2019)

procedural protections for those accused of violating Title IX was very much aligned with the new Title IX regulations that were subsequently promulgated by the Department of Education earlier this school year. It is unclear if questions of Title IX due process will reach the Supreme Court any time soon, but it is very clear where Justice Barrett stands on that issue. Title IX procedures are and will continue to remain deeply relevant to the members of sororities and fraternities.

Another area of law that has the potential to change as a result of Justice Barrett joining the Supreme Court is a possible revisiting of the Supreme Court's 2010 decision in the Christian Legal Society v. Martinez [2] case, which remains the most recent of the Supreme Court's decisions on student organization recognition at public universities. In a 5-4 decision authored by Justice Ginsburg (and concurred with by Justice Kennedy) the Court held that it is constitutionally permissible for public universities to impose viewpoint neutral conditions for student organizations as a basis for university recognition (and the resources and benefits that may flow from university recognition). The specific regulation that the Court reviewed in this case was whether a public university may require its recognized student organizations to open their membership to any student who is interested in joining. This is called an "all-comers policy."

In the opinion permitting the public university to mandate that its recognized student organizations accept all interested students as members, Justice Ginsburg wrote, "[p]rivate groups, from fraternities and sororities to social clubs and secret societies, commonly maintain a presence at universities without official school affiliation."[3] Essentially, Justice Ginsburg rationalized that universities can force recognized groups to abide by viewpoint neutral

[2] 561 U.S. 661 (2010).
[3] *Id.* at 691.

restrictions, but in exchange, if groups do not like those restrictions, they can continue to operate independent of university recognition and any resources associated with this recognition.

Justice Alito dissented from this opinion, and was joined by Justice Scalia, whom Justice Barrett clerked for from 1998-1999. Since the Christian Legal Society decision was a 5-4 vote with Justices Kennedy and Ginsburg in the majority, and since both of those Justices have now been replaced by Justice Kavanaugh and Justice Barrett (who are both members of fraternal organizations), there is really no way to predict how the current Supreme Court would rule on a case involving student organization recognition today. However, it is safe to assume that there is a very good chance that the current Court majority may be more ideologically compatible with the dissenters in the Christian Legal Society case that it is with the majority opinion authored by Justice Ginsburg in 2010. Any revisiting of that case or similar issues related to student organization recognition at public universities could have major impacts on fraternities and sororities.

Indiana University Uses Student ID Cards To Track Student Movements

Tim Burke, Fraternal Law Partners, tburke@manleyburke.com

In 2018, Indiana University ("IU") launched an investigation into allegations of hazing by the Beta Theta Pi chapter on campus. It ultimately resulted in sanctions against the chapter. What is now apparent, based on a lawsuit recently filed in United States District Court in Indianapolis, is that the University used the University student ID cards, which students were required to carry, in order to track the movements of at least some members of the 2018 pledge class of the chapter. The lawsuit filed by four students who were members of that pledge class alleges that the students "were subject to illegal surveillance by the University that violated the Fourth Amendment's

prohibition on unreasonable searches and breached the University's contractual obligations to the Plaintiffs."[1] The students are being represented by attorneys from the Liberty Justice Center, a Chicago, non-profit, public-interest law firm.

"Students don't give up their constitutional rights just because they live in public university dormitories," said Jeffrey Schwab, senior attorney at the Liberty Justice Center. "If state universities are going to collect data on student movements in and out of college buildings and dorm rooms, then they must take steps to protect that data and establish a process to protect their student's privacy before accessing it."

In setting up the two main claims in the Complaint—the Fourth Amendment violation and the University's breach of contract—a detailed statement of facts is provided. Students are required as a "condition of their attendance at the University" to carry the ID card known as a "Crimson Card." The University's website explains that a card is "much more than a photo ID, it's a print-release card, key-card to authorized University buildings, library card, and if your enrolled in the dining services plan, it is your meal plan."[2] It can also be used to access parking garages, use parking meters, purchase sodas and snacks from campus vending machines, and use laundry machines. Like a credit card, it can also be used to make payments at numerous businesses near campus, including restaurants, grocery stores, pharmacies, airport shuttles, tanning salons, and wellness centers. And every time it is used, it creates a record maintained by the University.

The four Plaintiffs, freshman pledges at the time, were part of the University's investigation related to an off-campus hazing incident. The Plaintiffs had "testified they were in their dorm rooms at the time" of the alleged off-campus hazing incident. The University used the swipe data from the Plaintiffs' Crimson Cards to check those alibis.

[1] Complaint at 1, Gutterman v. Ind. Univ., No. 1:20-CV-2801 (S.D. Ind. Oct. 29, 2020).
[2] *CrimsonCard*, https://crimsoncard.iu.edu (last visited Nov. 16, 2020).

The Plaintiffs were not found guilty of any wrong-doing by the University. The Complaint compares the University's use of that swipe data to a warrantless search into the home of the Plaintiffs, making the point that University dormitory rooms enjoy the same constitutional protection of a home, and provides case law to support that.

According to the Complaint, the University gives permission to access its institutional data to "all eligible employees and designated appointees of the University for all legitimate University purposes." At the heart of the Complaint's Fourth Amendment claim is the allegation that the University does not afford the subject of a search of the individual's swipe data "the opportunity to obtain pre-compliance review before a neutral decision maker."

By comparison, a search of an individual's home or property typically requires a search warrant to be issued by a neutral decision maker to ensure that the constitutional rights of the individual(s) involved are being respected.

One paragraph of the Complaint describes the potential abuse and intrusion into an individual's private business this way:

> The privacy concerns in this sort of data are significant: IU officials could use this kind of swipe-card data to determine who attended the meetings of a disfavored political organization, or who is seeking medical services, or even who a student is romantically involved with. And since it could potentially be stored indefinitely, investigators need not determine that there is probable cause before tracking it—historical records could be consulted for anyone who falls under suspension.[3]

Beyond the claim that the Fourth Amendment violation deprives the Plaintiffs of their reasonable expectation of privacy, the Complaint alleges that the manner in which the University uses the swipe data violates their own published policies and thereby breaches the University's contract with their students. The University's published policy on the use of swipe data does not entitle it to be used

[3] *Complaint* at ¶ 26, *supra* note 1.

> to access, use or release this swipe data and the swipe data to check past entries to University buildings, to check the alibis of students during an investigation does not comport with the intended purpose of the card, to contemporaneously verify the identity and manage access to University services and facilities by cardholders.[4]

The Complaint relies on numerous prior cases to support the point that a university's published student handbook, catalog, and regulations are a part of its contract with its students.

Because Indiana University is a state university, its officials utilizing the swipe data are state actors. Therefore, when their actions violate the civil rights of the University students, they are subject to suit under the U.S. Civil Rights Act 42 U.S.C § 1983, and can be required to pay Plaintiff's attorney fees under 42 U.S.C § 1988. Plaintiff seek only nominal damages of $1.00 as well as attorney fees but they also seek specific relief against the University, including both a declaratory judgment that the manner in which the swipe data is used is a violation of the Fourth Amendment and a breach of contract, and an injunction prohibiting the University from the use of such data in investigations, "except where the University has obtained a warrant or can demonstrate exigent circumstances."[5]

Given that the suit was only filed on October 29, 2020, this case is in its very early stages. It will deserve being closely watched as it progresses.

[4] *Id.* at ¶ 33.
[5] *Id*. at 13.

"Off-Campus" Does Not Always Mean "Off the Hook"

Ilana L. Linder, Fraternal Law Partners, Ilana.linder@manleyburke.com

In April 2015, Joseph Koch, a student at Kean University, was injured when he was shot by another individual while both were guests at a party at an off-campus house occupied by several members of the Sigma Theta Chi Fraternity (STC). At the time of the party and shooting, STC was suspended by Kean University and was not permitted to host social events or gatherings, and therefore was continuing to host such events at the off-campus house. It is alleged that the party "was being hosted by fraternity members at a fraternity house, and [was] understood to be a fraternity event."[1] Koch filed suit against several defendants, including the assailant, Kean University, Sigma Theta Chi Fraternity, and the STC members who occupied the house.

Finding that the shooting was an unforeseeable criminal act of a third-party to the non-assailant Defendants, the trial court held that no duty could have been imposed upon the majority of the Defendants. As such, the court granted summary judgment to the University and the Fraternity.

On appeal, however, the Superior Court of New Jersey's Appellate Division vacated the order that granted summary judgment to Sigma Theta Chi and remanded for further proceedings.

Here, the issue came down to a matter of agency: was one of the occupants of the home, a Defendant for whom summary judgment had been denied by the trial court, acting as an agent of the fraternity at the time of the shooting? Because the trial court had not considered this issue, the appellate court held it was improper to grant summary judgment to the fraternity. Importantly, if

[1] Koch v. State, N. A-5570-17T4, 2020 WL 256448, *9 (N.J. Super. Ct. App. Div. Jan. 16, 2020).

one or more of the fraternity members who lived in the house where the shooting occurred had been acting as an agent for the fraternity, and that agent had advance knowledge of the potential for a shooting to occur based on threats made by the assailant prior to the shooting, the fraternity could have potentially be held liable.

However, because Koch reached a settlement agreement at the end of October 2020 with Sigma Theta Chi, the trial court will not have to actually examine the facts and give special consideration to the agency issue. This case nonetheless serves to caution that there is a potential for national fraternities and local chapters to be deemed liable based on the actions (or inactions) of their members, even when those members are engaged in private, off-campus activities.

AKA National Sorority Dismissed from Hankins' Lawsuit

Ilana L. Linder, Fraternal Law Partners, Ilana.linder@manleyburke.com

---

Back in January 2019, *Fraternal Law* reported that a new lawsuit had been filed by the family of Jordan Hankins, a Northwestern University basketball player and Alpha Kappa Alpha (AKA) pledge who committed suicide.[1]

The Complaint, which was brought primarily against the national sorority, local and alumni chapters, and multiple individuals affiliated with AKA, alleged sixteen wrongful-death and survival claims against the Defendants. In essence, the Hankins family believes that the "post-initiation pledge process" in which Jordan was physically, mentally, verbally, and financially abused or exploited led Jordan to take her own life.

[1] Ilana Linder, *Lawsuit Filed After Tragic Death of Northwestern Student*, 158 Fraternal L. 22 (Jan. 2019).

Since the filing of the Complaint, the Defendants all moved to dismiss the Complaint. In March 2020, the U.S. District Court for the Northern District of Illinois granted the national sorority's motion to dismiss, but denied the motions of both the local chapter and the individual sorority members named in the Complaint.[2]

Individual Sorority Members:

The district court concluded that the claims against the individual sorority members had been sufficiently pled to survive the motion to dismiss phase. The claims asserted against the individual members are all rooted in the general theory of negligence, raising the question of whether the individual members owed a duty to refrain from hazing Jordan and, if that duty was breached, whether the hazing proximately caused Jordan's suicide.

Relying on *Bogenberger v. Pi Kappa Alpha Corp. Inc.*,[3] the court easily concluded that the individual sorority members who physically hazed Jordan did indeed owe a duty to protect Jordan from hazing. After all, as the Illinois Supreme Court explained in *Bogenberger*, hazing injuries are both reasonably foreseeable and likely to occur, as evinced by the enactment of state anti-hazing statutes and the fact that national fraternities/sororities themselves prohibit hazing. Moreover, although the court acknowledged that establishing that an individual's own choice to take her life was proximately caused by specific actions of certain individuals, it nonetheless found that the Plaintiff's Complaint contained explicit allegations that were enough to hold that suicide would have been a reasonably foreseeable outcome of Jordan's hazing. Specifically, because the Complaint alleged that Jordan had expressly communicated to the individual members that she *had a plan* to commit suicide, not just that she was depressed or generally

[2] *Hankins v. Alpha Kappa Alpha Sorority, Inc*., 447 F.Supp.3d 672 (N.D. Ill. 2020).
[3] 104 N.E.3d 1110 (Ill. 2018).

suicidal. For these reasons, the court denied the individual defendants' motion to dismiss and the case against them will proceed.

Local Chapter(s):

For reasons nearly identical to those applied to the individual sorority members, the Court also denied the local (graduate) chapter's motion to dismiss.[4]

Here, the *Bogenberger* decision again controlled, as the Court noted that "it is reasonable to place the burden of guarding against hazing injury on the 'very people who are in charge of planning and carrying out the pledge event.'"[5] Given the personal involvement in Jordan's initiation (and post-initiation) activities, including the hazing that allegedly led her to commit suicide, by "officers" of the local (graduate) chapter, the court concluded that this local chapter also owed a duty to Jordan to protect her from hazing.

National Sorority:

In seeking to hold the national organization vicariously and directly liable for Jordan's death, the Complaint asserted claims of negligent supervision, negligent entrustment, and ordinary negligence against AKA National. Here, the Court concluded that, even if the Plaintiff could establish the requisite level of control over the chapter/individual members by the national sorority—which the Court recognized as a very high bar to reach—so as to establish an agency relationship between the national organization and the local chapter(s), the Plaintiff's claims of vicarious liability against AKA National failed. Specifically, because hazing conduct falls outside the scope of any alleged agency relationship given the National's anti-hazing policies,

[4] At the time the Court ruled on the various motions to dismiss, service had not yet been perfected on the local (undergraduate) chapter. Therefore, the Court only discussed the merits of the local (graduate) chapter's motion to dismiss.

[5] *Hankins*, 447 F.Supp.3d at 690 (citing *Bogenberger*, 104 N.E.3d at 1125).

the Plaintiff could not maintain an action against AKA National as being vicariously liable for the conduct of its local chapters or individual members.

The Plaintiff's attempt to hold AKA National directly liable for Jordan's death on account of its "failure to protect" Jordan (from third-party hazing) also failed because the Complaint did not adequately alleged the existence of a special relationship between Jordan and AKA National. Therefore, AKA National's motion to dismiss was granted.

As of the time of this publication, the case was proceeding into the discovery stage against the remaining Defendants.

Fraternal Law is published four times a year as a non-profit service of Manley Burke, LPA, 225 West Court Street, Cincinnati, Ohio 45202, (513) 721-5525. Please address all editorial inquiries and all subscription correspondence to this address or to mkamrass@manleyburke.com.

Printed in the U.S.A