

Not NORML: Blunt Speech in Gerlich v. Leath

Education Law Notes

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A recent decision by the United States Court of Appeals for the Eighth Circuit serves as a cautionary reminder that once an educational institution creates a limited public forum for speech, it cannot then pick and choose which speech it will permit. The Eighth Circuit's decision in *Gerlich v Leath* arose from Iowa State University's attempt to restrict the use of its trademarks by the Iowa State University ["ISU"] chapter of the National Organization for the Reform of Marijuana Laws ["NORML ISU"]. More specifically, although ISU initially permitted NORML ISU to use the university's trademarks – as it did with other officially recognized student organizations -- when the *Des Moines Register* reported that ISU had approved a t-shirt that featured the school's mascot in front and a cannabis leaf on the back, the resultant political fallout led ISU to reverse its position.

In part, ISU rejected NORML ISU's reorder for additional t-shirts, informed NORML ISU that it would not approve any t-shirt that used the school's trademark in conjunction with a cannabis leaf, and required it to obtain prior approval of any future designs. ISU also changed its guidelines for allowing student organizations to use the school's trademarks, subsequent to which ISU rejected every NORML ISU design application that included a cannabis leaf. In response, NORML ISU's president and vice-president filed suit in federal court against ISU's president as well as other senior administrators, charging that ISU's actions violated their First Amendment free speech rights.

The United States District Court entered summary judgment for the plaintiffs, in addition to which it entered a permanent injunction, prohibiting the defendants:

from enforcing trademark licensing policies against Plaintiffs in a viewpoint discriminatory manner and from further prohibiting Plaintiffs from producing licensed apparel on the basis that their designs include the image of a . . . cannabis leaf.

On appeal, the Eighth Circuit affirmed the trial court, holding that ISU created a limited public forum when it made its trademarks available for student organizations, and that ISU's rejection of NORML ISU's designs constituted "viewpoint discrimination," as it attempted to regulate speech based upon the organization's "specific motivating ideology" or its "opinion or perspective."

Although the defendants repeatedly argued otherwise, the evidence cited by the Eighth Circuit, particularly the defendants' e-mails and some surprisingly frank admissions during their depositions, essentially removed any ambiguity as to the causal link between NORML ISU's message and ISU's subsequent actions.

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What Does It Mean?

As the Eighth Circuit held in *Gerlich*, ISU created a forum for public speech by routinely granting its approximately 800 officially recognized student organizations permission to use its trademarks. Although the court did recognize, at least implicitly, that ISU could restrict the use of those trademarks when their use suggested the university's endorsement of false claims, particular religious causes, or corporate interests, it forcefully proscribed ISU's attempt to restrict viewpoints simply because they were politically unpalatable. In short, having created an opportunity for student speech, ISU was precluded from shaping the viewpoint of that speech.

While *Gerlich* involved student-organization merchandising, the same principles that governed the court's decision could apply to something as prosaic as a high school bulletin board on which students are permitted to post notices. In both cases, the educational entity that has permitted the use of its facilities or resources to promulgate student speech could find itself coupled with perspectives that most people would find noxious. Consequently, when contemplating the creation of even a limited public forum for student speech, *Gerlich* is a reminder that there are times when entities believe they are in control of a situation, only to discover that, in fact, it is the situation that controls them.

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