

HIGHER EDUCATION INFORMATION MEMO

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Recent Cases Demonstrate the Need for Caution When Disciplining Students

Two cases were decided at the end of November 2022 concerning institutions of higher education disciplining students for alleged misconduct.

In *Matter of Mozdziak v. SUNY Maritime*, 2022 NY Slip Op 06759 (Nov. 29, 2022), the New York State Appellate Division, First Department overruled the State University of New York Maritime College's determination, which had affirmed its disciplinary hearing board's expulsion of a student upon findings that he engaged in misconduct. The student was alleged to have carved a racial epithet into a dormitory elevator door. Two students made a joint, unsworn written statement alleging that they had witnessed the student engage in this misconduct. Notwithstanding that these two students who wrote the statement did not testify at the hearing, their two-sentence statement was credited over actual alibi witnesses who testified that the student was elsewhere when the claimed misconduct occurred.

The First Department ultimately found that the school's denial of the student's administrative appeal was arbitrary and capricious, in that the school failed "to consider new evidence, sufficient to alter a finding or other relevant facts not brought out at the original hearing, because such evidence and/or facts were not known to the person appealing at the time of the original hearing."

What was this new evidence? After the administrative hearing, the University Police Department disclosed that it had received a complaint reporting to have seen the same racial epithet in the elevator six days *prior* to the date the accused student was alleged to have engaged in the misconduct. The First Department found that the school appeared to have egregiously and intentionally withheld and suppressed this exculpatory evidence until after the hearing despite the fact that this evidence had been in the school's police department's possession for approximately two months prior to the hearing.

The First Department found that the school's failure to turn over exculpatory evidence in its possession prior to the hearing violated its own policies and procedures, thereby violating the student's due process rights. The court concluded that the student had not received a fair hearing and that the exculpatory evidence, coupled with the extensive alibi witness evidence of the student's innocence, rendered the charges unsupported as a matter of law. This exculpatory material warranted a vacatur of the exclusion penalty, expungement of all references in the student's academic record to the disciplinary charges, and reinstatement of the student in good standing.

Institutions of higher education should be sure to note the importance of following their own codes of conduct, as failure to do so could create grounds for an appeal of a disciplinary determination on a theory relating to due process. Institutions should also ensure that the various involved departments work collaboratively, especially with student conduct proceedings, to ensure all departments are coordinating with one another.

In *Radwan v. Manuel*, 20-2194-cv (Nov. 30, 2022), Radwan, a women's soccer player at the University of Connecticut (UConn) and recipient of a one-year athletic scholarship, raised her middle finger to a television camera during her team's post-game celebration after winning a tournament championship. The game was being nationally televised and Radwan's gesture was captured on the broadcast. Although she initially was suspended from further tournament games for her gesture, Radwan was ultimately also punished by UConn

with a mid-year termination of her athletic scholarship. Radwan brought this lawsuit against UCONN and several university officials alleging violations of her First Amendment and procedural due process rights under 42 U.S.C. § 1983, as well as a violation of Title IX of the Education Amendments Act of 1972 (Title IX), in connection with the termination of her scholarship. The U.S. Court of Appeals for the Second Circuit held that Radwan put forward sufficient evidence, including a detailed comparison of her punishment with that meted out by UCONN to male student-athletes, to create a triable issue of fact as to whether she was subjected to more serious disciplinary standards because of her gender.

As to the First Amendment claim, the Second Circuit concluded that in light of the absence of a decision by the Supreme Court or the Second Circuit on the application of the First Amendment to vulgar speech by a university student while representing a university at a school-sponsored event, as well as the lack of any consensus among other courts on the issue, the defendants were entitled to qualified immunity, and affirmed the dismissal of the claim.

On the due process claim, the appellate court held that Radwan's one-year athletic scholarship created a contractual right that rose to the level of a constitutionally protected property interest because it was for a fixed period and terminable only for cause, and because Radwan reasonably expected to retain the scholarship's benefits for that set period. However, because no precedent in the Second Circuit or in the Supreme Court had conclusively established that student-athletes have a constitutionally protected property interest in athletic scholarships, the court found that the defendants were entitled to qualified immunity. Therefore, the Second Circuit affirmed the lower court's grant of summary judgment on this issue.

Radwan also asserted a Title IX claim in which she alleged that her scholarship was terminated on the basis of her sex. The lower court found that Radwan failed to present any evidence of male student-athletes at UCONN similarly situated to her who received better treatment as it related to alleged misconduct, or any other evidence suggesting discriminatory intent by UCONN and accordingly granted summary judgment to UCONN. However, the Second Circuit disagreed and held that the evidence was sufficient to create a genuine issue of material fact as to whether Radwan received a more serious disciplinary sanction at UCONN because of her sex.

The Second Circuit discussed several examples put forward by Radwan of how she was disciplined more severely for misconduct than her male counterparts. In light of these examples, the court concluded that it would be appropriate for a jury to decide whether Radwan was similarly situated to the male student-athletes who had engaged in misconduct. Whether UCONN was consistent in its discipline of this student or singled her out based upon her sex will therefore be decided at trial.

Institutions of higher education should remain cognizant that judges are especially concerned about free speech claims among college and university students, as evidenced by the Second Circuit's lengthy opinion. In addition, as with all matters of discipline, schools must ensure that the disciplinary process is fair and consistent and performed in a non-discriminatory manner.

If you have any questions, please contact [James McGrath](#), [Catherine Graziose](#), any attorney in Bond's [higher education practice](#) or the Bond attorney with whom you are regularly in contact.

