NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THOMAS SYPNIEWSKI, JR., et al., Plaintiffs, v. WARREN HILLS REGIONAL BOARD OF EDUCATION, PETER MERLUZZI, BETH GODETT, RONALD GRIFFITH, PHILIP CHALUPA, ELIZABETH AMES, MARCY MATLOSZ, RAY BUSCH, SUYLING HEURICH, JAMES T. MOMARY, NANCY FALLEN, WILLIAM MILLER, BRADLEY BRESLIN, and SCOTT SCHANTZENBACH, Defendants.	:	CIVIL ACTION NO. 01-3061 (MLC) **MEMORANDUM OPINION**

COOPER, District Judge

This matter comes before the Court on the motion of plaintiffs, Thomas Sypniewski, Jr. ("T.S."), Matthew Sypniewski, and Brian Sypniewski, for partial summary judgment, pursuant to Federal Rule of Civil Procedure ("Rule") 56(c). Also before the Court is the cross motion for summary judgment seeking dismissal, on the grounds of qualified immunity, of claims asserted against defendants Peter Merluzzi, Beth Godett, Ronald Griffith, and Philip Chalupa (the "moving defendants") in their individual capacity. For the reasons stated herein, the Court will: (1) grant in part and deny in part plaintiffs' motion for partial summary judgment and (2) grant defendants' cross motion for summary judgment.

BACKGROUND

I. Undisputed Facts

"Warren Hills public schools-particularly the high school-were afflicted with pervasive racial disturbances throughout the 2000-2001 school year." Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 248 (3d Cir. 2002). These disturbances involved, inter alia, students "wearing clothing displaying the Confederate flag." Id. at 247. Students wearing the Confederate flag clothing were part of the "'gang-like' group known as 'the Hicks'" and wore the clothing in observance of "White Power Wednesdays." Id. One incident that caused significant disturbances in Warren Hills High School (the "High School") involved a student walking down a main hallway of the school waving a Confederate flag on September 20, 2000 ("Confederate flag incident"). Id. Ronald Griffith, a Vice Principal in the High School, investigated the Confederate flag incident in response to student complaints. Id. That investigation "confirmed the existence of the Hicks and White Power Wednesdays" and "revealed that the level of racial tension in the high school was significant." Id.

The Warren Hills Regional Board of Education ("School Board"), in response to "significant disruption in the school," adopted a racial harassment policy. Id. The Harassment Policy states in relevant part:

> District employees and student(s) shall not racially harass or intimidate other student(s) or employee(s) by name calling, using racial or derogatory slurs, wearing or possession of items depicting or implying racial hatred or prejudice. District employees and students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred. (Examples: clothing, articles, material, publications or any item that denotes Ku Klux Klan, Arayan (sic) Nation - White Supremacy, Black Power, Confederate flags or articles, Neo-Nazi or any other "hate" group. This list is not intended to be all inclusive.)

(Am. Compl., Ex. B.) The policy was implemented on March 13, 2001.

T.S. wore a T-shirt featuring the "Top 10 reasons you might be a Redneck Sports Fan" (the "Foxworthy T-shirt") on March 22, 2001. Sypniewski, 307 F.3d at 250. It was the first time T.S. had worn the T-shirt since the implementation of the Harassment Policy. Id. T.S., after wearing the Foxworthy T-shirt without incident, was directed to Griffith's office by a security guard the last period of the day. Id. Griffith, after conferring with Peter Merluzzi, the Superintendent of the School Board, told T.S. that the Foxworthy T-shirt violated the high school's dress code. The Dress Code provides in pertinent part:

> Students also have the responsibility to dress appropriately and to keep themselves, their clothes, and their hair clean. School officials may impose limitations on student participation in the regular instructional program where there is evidence that inappropriate dress causes disruption in the classroom and the lack of cleanliness constitutes a health or safety hazard or disruption of the education program. The following is considered inappropriate for school:

> a) Clothing displaying or imprinted with nudity, vulgarity, obscenity, profanity, double entendre pictures or slogans (including those related to alcohol, drugs, and tobacco), or portraying racial, ethnic, or religious stereotyping.

(Am. Compl., Ex. A.)

The Foxworthy T-shirt not only referenced "Rednecks," it also referenced the terms "Bud Bowl" and "Hooters." Sypniewski, 307 F.3d at 251. Griffith noticed these references and recognized that the Foxworthy T-shirt was inappropriate under the Dress Code because of its alcohol and sexual innuendo references. Id. (See also Griffith Cert., at ¶ 15.) Griffith, however, was more concerned that the Foxworthy T-shirt's "Redneck" reference was offensive "given the racial climate in the school and was not acceptable as it was in violation of [the School's] dress code." (Merluzzi Cert., at ¶ 48; see also Griffith Cert., at ¶ 15.) Griffith informed T.S. that the Foxworthy T-shirt violated the Dress Code because of its "Redneck" reference and asked T.S. several times to take the T-shirt off or turn it inside out. (Griffith Cert., at ¶¶ 15-16.) T.S. refused. (Id.) Griffith, therefore, suspended T.S. for three days "for insubordination as a result of his violation of the dress code."[1] (Id. at ¶ 16.)

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[1] We recognize that there may be an issue of fact as to why T.S. was suspended. Griffith testifies that T.S. was suspended because the "Redneck" reference on his T-shirt violated the School's dress code. (Griffith Cert., at ¶ 15; Russo Aff., Ex. A, 66:5-25.) Merluzzi, however, in his recent deposition testimony, stated that T.S. was not suspended because of the T-shirt's "Redneck" reference. (Walpin Aff., Ex. 4, at 203:17-23.) T.S., rather, according to Merluzzi, was suspended because the T-

Griffith, after consulting with Merluzzi, decided to suspend T.S. under the Dress Code and not the harsher, newly implemented, Harassment Policy. Sypniewski, 307 F.3d at 251.

T.S. appealed his suspension to the School Board on March 26, 2001. Id. at 251. T.S. appeared in an Express Times newspaper article on March 29, 2001 wearing the T-shirt he was suspended for. (Zaiter Aff., Ex. B.) T.S., in the article, defended his wearing of the Foxworthy T-shirt and indicated the date on which the School Board would be considering his

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shirt's references to alcohol and Hooters violated the Dress Code. (Id.) Defendants echo Merluzzi's testimony, contending that T.S. was suspended for refusing to "remove the [T]-shirt because it referenced 'Bud Bowl' and the term 'Hooters', both of which violated the dress code at the High School." (Def. Br. in Opp. to Mot. ("Def. Opp. Br.") at 1; 1-12-05 Oral Arg. of John M. Zaiter.)

The focus of this case, however, has consistently been on the T-shirt's violation of the Dress Code because of its "Redneck" reference.

The press release issued by defendants relating to T.S.'s suspension stated that T.S. was suspended for wearing a T-shirt referencing the term "Redneck," making no mention of the T-shirt's reference to alcohol or Hooters. (Walpin Aff., Ex. 12). The letter sent to T.S.'s parents also indicated that T.S. was suspended because of the "Redneck" reference. (Id., Ex. 13.) Deposition testimony of the parties and moving papers have all focused on the racial tensions at the High School and the impact a T-shirt referencing "Rednecks" could have on the school's activities. Merluzzi, himself, after all, has stated that T.S. was suspended because of the "Redneck" reference. (See Merluzzi Cert., at ¶ 48 ("I fully and wholeheartedly agree with the decision made by Mr. Griffith as the time that the shirt was offensive at this time of great racial tension in the school, the term 'redneck' and 'hick' were not appropriate on display on t-shirts because of their representation to certain racially intolerant groups present in the school.").) We, therefore, will focus our analysis on the issue of T.S.'s suspension as a result of his wearing a T-shirt referencing "Rednecks."

suspension. (Id.) The School Board denied T.S.'s appeal and upheld his suspension under the Dress Code and on the grounds of insubordination. Sypniewski, 307 F.3d at 251. The School Board issued a press release explaining its decision. (Walpin Aff., Ex. 12.) The press release, explaining why the School Board adopted the Harassment Policy, cited past racial incidents and acknowledged that the School Board was "concerned about the climate of racial harassment and intimidation practiced by certain students in the District." (Id.) The release then stated that "the student in question was found to be wearing a shirt bearing the term 'redneck' on it." (Id.) The press release went on to state:

> That the student intended his shirt to convey a message is confirmed by the report of a School Resource officer and the student's statement to the effect 'I have been waiting all day for someone to notice.'
> . . .
> Moreover, the statement by the student indicating he was intending to be noticed corroborates the fact that he was attempting to convey a message of racial stereotyping. Given the climate and background it was entirely appropriate for the Administration to take the action which it took.
> . . .
> [I]n the future any conduct which is violative of either the Dress Code or the Racial Discrimination Code is not welcome at any of the Warren Hills Regional Schools and because of the history of racial intimidation, this behavior will not be tolerated. In a simpler time and age the use of the term redneck would not necessarily be offensive when utilized in a school setting. But where, as here, there is a history and background of racial intimidation and problems this conduct will not be permitted.

(Id.) The press release did not reveal T.S.'s identity.

A more detailed discussion of the facts is set forth in the following sections of this memorandum opinion. (See also 9-4-01 Mem. Op. for a discussion of the facts pertinent to this action.)

II. **Procedural History**

This action was commenced when plaintiffs filed a complaint on June 25, 2001. The complaint named the following defendants: (1) the School Board; (2) Merluzzi; (3) Beth Godett, Principal of the High School; (4) Griffith and Philip Chalupa, Vice Principals of the High School, and (5) nine members of the School Board.[2] (See, e.g., Compl. ¶¶ 8-12.) The complaint asserted a facial and as-applied challenge to the constitutionality of the School Board's harassment policy and the High School's dress code as well as tort claims of defamation and false light.

Plaintiffs, on June 25, 2001, moved for a preliminary injunction seeking to prevent defendants from enforcing the challenged policies and taking disciplinary action against plaintiffs for wearing the Foxworthy T-shirt. This Court held that the Dress Code was unconstitutional and should not be enforced but declined to enjoin enforcement of the Harassment Policy or to prohibit application of the Policy to the wearing of the Foxworthy T-shirt. (9-4-01 Mem. Op. at 75.) Plaintiffs appealed.

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[2] The administrators are named in both their individual and official capacities while the members of the School Board are sued in their official capacities only. (Compl. ¶¶ 8-12.)

The Third Circuit Court of Appeals reversed the Court and found that defendants should be enjoined from applying the Harassment Policy to the Foxworthy T-shirt and from enforcing a provision of the Policy prohibiting the possession of materials causing "ill-will" (the "'ill-will' provision"). Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 269 (3d Cir. 2002). The Third Circuit specifically held that: (1) plaintiffs were likely to succeed on the merits of a claim that defendants' enforcement of the Harassment Policy prohibiting students from wearing the Foxworthy T-shirt violated the First Amendment; (2) the Harassment Policy was not overbroad, except to the extent that it contained the "ill-will" provision; (3) it was not unconstitutionally vague; and (4) it did not constitute impermissible content discrimination. Id.

Plaintiffs now move for partial summary judgment, pursuant to Rule 56(c), seeking, inter alia, to make permanent the preliminary injunction entered on November 25, 2002 on the basis of the ruling by the Third Circuit enjoining defendants from:

> (i) enforcing the Dress Code to the extent that it prohibits clothing portraying racial, ethnic, or religious stereotyping without requiring evidence that the particular clothing being prohibited causes disruption in the school and/or interferes with the rights of others[;]
> (ii) enforcing the Harassment Policy, to the extent that it prohibits the wearing or possession of any written material . . . that . . . creates ill will[;] and
> (iii) preventing or attempting to prevent the wearing of the Foxworthy T-shirt to Defendants' schools and from taking any disciplinary action against the wearing of the Foxworthy T-shirt.

(Pl. Br. in Supp. Mot. ("Pl. Supp. Br.") at 1.) Plaintiffs' motion also seeks partial summary judgment

> [1.] On Count V, finding that defendants issued false and defamatory written statements concerning plaintiff [T.S.], which defendants published to third persons, without any privilege, and were at least negligent in doing so; and
> [2.] On Count VI, finding that defendants issued publicity concerning [T.S.], placing him before the public in a false light, which was highly offensive to a reasonable person, and defendants did so with the knowledge of or acted with reckless disregard as to the falsity of the statements and the false light in which [T.S.] was placed.

(Id.)

The moving defendants cross-move for summary judgment, on the grounds of qualified immunity, as to the claims asserted against them in their individual capacities. See supra footnote 2.

The Court heard oral argument on January 12, 2005. As discussed during oral argument, and as stated in a subsequent letter to the Court dated January 14, 2005, plaintiffs agreed that instead of requesting a permanent injunction against defendants' barring the Foxworthy T-shirt, they would instead seek relief in the form of a declaration that T.S.'s "wearing of the T-shirt on March 22, 2001 was protected conduct and that the defendants' action in sanctioning him for wearing it violated [his] First Amendment rights." (1-14-05 Walpin Letter.)

DISCUSSION

I. Standard for Summary Judgment

Rule 56(c) provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The party moving for summary judgment bears the initial burden of showing that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the summary judgment movant has met this prima facie burden, the nonmovant "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). A nonmovant must present actual evidence that raises a genuine issue of material fact and may not rely on mere allegations. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

The Court must view the evidence in the light most favorable to the nonmovant when deciding a summary judgment motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). At the summary judgment stage, the Court's role is "not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249. Under this standard the "mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient [to defeat a Rule 56(c) motion]; there must be evidence on which the jury could

reasonably find for the [nonmovant]." Id. at 252. "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Id. at 247-48 (emphasis in original). A fact is material only if it might affect the action's outcome under governing law. Id. at 248. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id. at 249-50 (citations omitted).

II. Analysis of Plaintiffs' Motion for Partial Summary Judgment

The Court will grant plaintiffs' motion to the extent that it seeks a permanent injunction requiring: (1) facial correction of the Dress Code, and (2) elimination of the "ill-will" provision of the Harassment Policy. The Court, however, will deny plaintiffs' motion to the extent that it seeks: (1) a declaration that T.S.'s wearing of the Foxworthy T-shirt at school on March 22, 2001 was protected conduct and that defendants violated T.S.'s First Amendment rights in sanctioning him for wearing the T-shirt; and (2) partial summary judgment on the defamation and false light claims.

A student has the constitutional right to freedom of speech or expression. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). Schools may, however, restrict a student's

First Amendment right to free speech in order "to provide and facilitate education and to maintain order." Sypniewski, 307 F.3d at 252-53. In order for a school to restrict a student's First Amendment freedoms it must have a specific, significant, and well-founded fear or expectation that a student's speech or conduct may cause substantial disruption to school operations or interfere with the rights of others (the "Tinker substantial disruption standard"). Id. at 253 (citing Tinker, 393 U.S. at 507).

The Dress Code, as formulated, may not pass constitutional muster because it fails to limit its application to speech that causes, or is reasonably feared to cause, substantial disruption or interference with the work of school or the rights of other students. We recognize that the Dress Code contains language that may be interpreted to require that proscribed speech cause disruption. See Sypniewski, 307 F.3d at 263 n.23. The facial correction to the Dress Code proposed by plaintiffs, and unopposed by defendants, however, makes the Dress Code's requirements clearer and brings it squarely within the requirements of Tinker. We will, accordingly, grant plaintiffs' motion to the extent that it requires a facial correction of the Dress Code, adding language limiting its application to speech that meets the Tinker substantial disruption standard. We will direct the parties to confer with the Court as to the precise language of the permanent injunction, prior to the Court's issuance of an injunction.

We will also grant plaintiffs' motion to the extent that it seeks a facial correction of the Harassment Policy. The Third Circuit found "[t]hat the part of the Policy directed at material that 'creates ill will' is unconstitutionally" overbroad. Sypniewski, 307 F.3d at 265. Plaintiffs seek, and defendants do not oppose, enforcement of the Third Circuit's holding and a permanent injunction ordering that the "ill-will" provision be stricken from the Harassment Policy. We, accordingly, will grant plaintiffs' motion for a permanent injunction to the extent that it relates to the facial challenge of the Harassment Policy.

The claims still in issue in this action include: (1) plaintiffs' as-applied First Amendment challenge[3] and (2) plaintiffs' state tort law claims of defamation and false light.

The issues now before the Court are:

(1) Was there a violation of T.S.'s First Amendment rights when defendants prevented him from wearing the Foxworthy T-shirt?;

(2) Are defendants liable to T.S. for defamation?; and

(3) Are defendants liable to T.S. for portraying him in a false light?

We find that there are material issues of genuine fact as to each of these issues. The Court, therefore, will deny plaintiffs' motion for partial summary judgment to the extent that it seeks:

[3] Count IV of the complaint, asserting challenges to the New Jersey Constitution, is incorporated into the Court's analysis of plaintiffs' constitutional claims.

(1) a declaration finding that defendants violated T.S.'s constitutional rights by preventing him from wearing the Foxworthy T-shirt and (2) judgment on plaintiffs' defamation and false light claims.

A. Declaration of a Constitutional Violation

The Tinker substantial disruption standard holds, as discussed supra, that in order for a school to restrict a student's First Amendment rights, it must have a specific, significant, and well-founded fear or expectation that a student's speech or conduct may cause substantial disruption to school operations or interfere with the rights of others. Sypniewski, 307 F.3d at 253 (citing Tinker, 393 U.S. at 507). Plaintiffs urge the Court to issue a declaration that defendants violated T.S.'s rights by preventing him from wearing the Foxworthy T-shirt because defendants "had no basis to believe that the T-shirt would cause any disruption." (Pl. Supp. Br. at 1.) Plaintiffs particularly allege that, when read as a whole, the record demonstrates that no genuine issues of material fact exist as to whether: (1) defendants had a fear that the word "redneck" would cause a disruption in the High School; (2) the "Hicks" were also known as the "Rednecks"; and (3) T.S. was an identified member of the "Hicks." (Pl. Supp. Br. at 20-21; Walpin Supp'l Submission 1-12-05 Oral Arg. ("Walpin Supp'l Sub.").)

Defendants, however, argue that given the atmosphere of racial tension and racial disturbances in the school, school

officials did have a well-founded fear that T.S.'s wearing of the Foxworthy T-shirt would cause disruption to school activities. (Def. Op. Br. at 15, 16-17.) Defendants, therefore, argue that the suspension of T.S. for refusing to take off the T-shirt was not a violation of T.S.'s constitutional rights. (Id.)

There appears to be no dispute that Warren Hills High School, at the time of T.S.'s suspension, was experiencing significant problems of racial tension and racially motivated incidents. The Third Circuit, as noted supra, found that "the record clearly supports . . . the finding that the Warren Hills public schools–particularly the high school-were afflicted with pervasive racial disturbances throughout the 2000-2001 school year." Sypniewski, 307 F.3d at 248. Timothy Downs and Griffith both testified to a pattern of racial disturbances and racial tension in the High School. Downs, a teacher in the High School and the Coordinator for Peer Mediation during the 2000-2001 school year, testified that a racial problem existed in the High School to such a degree that students were discussing racial incidents, in particular the Confederate flag incident, during class. (Walpin Aff., Ex. 7, at 17:24-19:8, 24:14-22.) Griffith testified to a "series of incidents within the school that was creating [an] atmosphere that wasn't conducive to the education process." (Id., Ex. 6, at 15:7-9.) These incidents, according to Griffith, involved students (a) reading racially offensive jokes in class; (b) parading around the halls while waving confederate flags; (c) coming to school with a black face and

noose on and playing vulgar music; (d) celebrating "White Power Wednesdays" where students "would bring things to school to show solidarity"; and (e) writing racially offensive graffiti in the school bathrooms. (Id. at 15:23-24, 16: 3-11, 23:2-4, 33:15-19, 47:5-6; Griffith Cert., at ¶¶ 8-9.)

There also appears to be no dispute that the group known as the "Hicks" was responsible for, or at the very least associated with, these problems. Merluzzi, Griffith and Downs testified that the "Hicks," or members of the group, were: (a) responsible for these racial incidents and "at the center" of the school's racial problems and (b) associated with racial harassment and intolerance of minority students. (Merluzzi Cert., at ¶¶ 13, 47; Griffith Cert., at ¶¶ 8-11; Walpin Aff., Ex. 6, at 33:6-19 (Griffith's testimony); Id., Ex. 7, at 21:4-10 (Downs's testimony).)

There, however, is significant dispute as to whether, at the time of T.S.'s suspension, school officials knew whether the "Hicks" were alternatively known as the "Rednecks." T.S.'s friend was suspended for wearing a T-shirt with both a Confederate flag and the word "redneck" on it the day before T.S. wore the Foxworthy T-shirt. (Walpin Aff., Ex. 2, 35:10-40:17 (T.S.'s testimony).) This evidence illustrates a possible correlation between the word "Redneck" and the Confederate flag, a symbol of the "Hicks." (See Merluzzi Cert., at ¶ 13 (stating that the Confederate flag was a symbol of the "Hicks").) Both Griffith and Downs testified that, at the time of T.S.'s

suspension, the "Hicks" were alternatively known to students as the "Rednecks." (Walpin Aff., Ex. 6, at 33:19-20 (Griffith's testimony); Id., Ex. 7, at 29:10-12 (Downs's testimony).)

Plaintiffs, however, argue that there is no evidence that the "Hicks" were also known as the "Rednecks." (Walpin Supp'l Sub. at 5.) Plaintiffs, in support of this argument, rely on Griffith's deposition testimony in which he stated: "Yeah, I guess they [the group to which particular students were part of] referred to themselves as 'Hicks' or as, 'Rednecks' or whatever. I don't know." (Id. (citing Walpin Aff., Ex. 6, at 34:15-23).) Plaintiffs also argue that defendants did not learn that the terms the "Hicks" and "Rednecks" were synonymous until after T.S. was suspended. (Id.; 1-12-05 Oral Arg. of Gerald Walpin.) Plaintiffs, in support of this argument, cite Downs's deposition testimony:

> A: There was a click [sic] of students who identified themselves as, 'the Hicks'; and we later learned that they interchangeably referred to themselves as, 'the Rednecks.'
> Q: The report that you have written only refers to the group as, 'the Hicks'; is that correct?
> A: That is correct.
> Q: Is that because students only said that this group was known as, 'the Hicks' at this time?
> A: At that time, yes.

(Walpin Supp'l Sub. at 5 (citing Walpin Aff., Ex. 7, at 21:7-18).) This testimony follows dialogue about Downs's role in questioning students, and subsequently preparing a written report, about the Confederate flag incident. The testimony does not relate to T.S.'s later suspension for wearing the Foxworthy

T-shirt. There, hence, exists an issue of material fact as to whether Downs learned of the relationship between the terms "Hicks" and "Rednecks" after the Confederate flag incident but before T.S.'s suspension, or only after the suspension. This material issue of fact, along with other material issues of fact that pertain to the actual or perceived relationship between the terms "Hicks" and "Rednecks," must be considered by the trier of fact.[4]

There also exist genuine issues of material fact as to whether T.S. was a member of the "Hicks." Griffith and Downs both testified that T.S. was among a group students who confronted school officials after the Confederate flag incident

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[4] T.S. appeared in a Star Ledger newspaper article, published October 4, 2000, wearing a T-shirt, with the Confederate flag illustrated on the word redneck, that read "Not only am I perfect I'm a redneck too." (Zaiter Aff., Ex. D; Susan Todd, District Waits to Ban Shirts with Rebel Flag, Star Ledger, Oct. 4, 2000, at 31.) The article states that T.S. said that "the boys who wear the shirts are known among other students as rednecks, hicks and farmers." (Id.)

In an article in the High School newspaper T.S. was quoted as saying that he supports the wearing of the Confederate flag because it is "associated with the words 'redneck' and hick.'" (Zaiter Aff., Ex. H.)

T.S. asserts that he was misquoted in both articles. (Walpin Aff., Ex. 2, at 47:10-48:13, 52:13-53:11.) A dispute, therefore, exists as to the factual accuracy of these articles. Defendants, however, were aware of the existence of these articles and that these articles demonstrated a relationship between the terms "Hicks" and "Rednecks." (Merluzzi Cert., at ¶ 43; Walpin Aff., Ex. 4, at 122:17-22 (Merluzzi's testimony).) These articles, while inadmissible to prove that T.S. actually said the quoted statements, unless the writer of the articles testifies, are relevant to defendants' belief and knowledge as to the public perception of a relationship between the two terms at the time of T.S.'s suspension.

and demanded, speaking as a group, that the group be told what clothing students had a right to wear. (Griffith Cert., at ¶ 12; Walpin Aff., Ex. 6, at 37:6-38:17 (Griffith's testimony); Id., Ex. 7, at 25:7-27:7 (Downs's testimony).) T.S., according to both Griffith and Downs, identified himself as the spokesperson for that group. (Id., at Ex. 6, at 37: 5-12 (Griffith's testimony); Id., Ex. 7, at 25:7-17 (Downs's testimony).) This group, however, did not actually identify itself as the "Hicks" during this confrontation. (Id. at 27:16-28:6.)

Griffith, Downs, and Merluzzi state that school officials determined, after investigating the Confederate flag incident, that the incident "was started by what the kids had called 'White Wednesdays'" and that the "Hicks," who were responsible for "White Wednesdays," used a Confederate flag to represent the group. (Walpin Aff., Ex. 6, at 33:6-20 (Griffith's testimony); Id., Ex. 7, at 21:4-18 (Downs's testimony); Merluzzi Cert., at ¶ 13.) Downs also testified that two students interviewed about the Confederate flag incident named T.S. as being a member of the "Hicks."[5] (Walpin Aff., Ex. 7, at 33:14-37:23.)

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[5] In the High School newspaper article, referenced supra, T.S. is attributed as saying that "he and his friends refer to themselves" as "hicks" and "rednecks." (Zaiter Aff., Ex. H.) T.S. also appeared in an article published by the Express Times on March 22, 2001, the morning of his suspension and a day after his friend was suspended for wearing a T-shirt with the words "Ultimate Redneck" and a Confederate flag on it. (Id., Ex. A.) T.S., in that article, is purported to have said that "he was one of the students who defended the right to wear the Confederate flag by staging a protest in September [the Confederate flag incident]" and that he considers himself a "redneck." (Id.)

Merluzzi, however, testified that he could not identify specific individuals who had mentioned that T.S. was part of the "Hicks" or cite documents or written statements from students in which T.S. was purported to be a member of the group. (Walpin Aff., Ex. 5, at 136:25-137-1, 139:6-20, 140:11-17, 141:1-5.) Merluzzi also testified that he was "never able to verify" that T.S. was involved in specific racial incidents. (Id. at 151:3-152:16.)

The Court finds that given this conflicting evidence in the record, there are genuine issues of material fact as to whether defendants had justifiable reason to believe that T.S. was a member of the "Hicks." This issue, therefore, must be weighed by a trier of fact.

The most significant factual dispute in this matter concerns whether defendants had a well-founded fear that the word "redneck" would cause disruption in the school. The Third Circuit recognized in Sypniewski "that an expectation of disruption will most likely be 'well-founded' where there have been 'past incidents arising out of similar speech.'" Sypniewski, 307 F.3d at 254-55. The Sypniewski court held that the Court had failed to make a finding that the "Hicks" were also

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T.S. claims that the articles misquoted him and are inaccurate. (Walpin Aff., Ex. 2, at 33:18-38:3, 47:13-48:13.) These articles, while not admissible for the truth of the matter unless a reporter is called as a witness, are pertinent to defendants' belief that T.S. was a member of the "Hicks" at the time of his suspension. See supra footnote 4.

known as the "Rednecks" or that the term "Redneck" was used to harass or intimidate students. Id. at 256. The Third Circuit, in so holding, noted that "[a] word might well become offensive if it also served as an identifier of the Hicks (or a similar group), or as a promoter of the Hicks' disruptive behavior." Id. at 257. Hence, "[t]he most plausible kind of similarity that would permit such an inference [of disruption] would be that the word 'redneck' was akin to a gang symbol identifying the Hicks, or clearly promoting their activities." Id. The evidence discussed supra demonstrates significant genuine issues of material fact as to whether, at the time of T.S.'s suspension, the term "Redneck" was a symbol or identifier of the "Hicks."

Defendants Griffith, Downs, and Merluzzi all testified as to a fear that the Foxworthy T-shirt could potentially disrupt school activities. Griffith testified:

> On March 22, 2001 when [T.S.] was summoned into my office for wearing a [T]-shirt with the word 'redneck' imprinted in large letters on it, I immediately recognized the shirt as a symbol which had the potential to incite violence in our school because of the racial tension present at this time. As soon as I saw the shirt I immediately became alarmed because of my involvement with the students at Warren Hills High School and observations of the current school climate. Furthermore, as I learned from the students' statements the term 'redneck' was being used in an offensive manner in our school and, given the current situation, that it was being used as a symbol to harass our minority students. The term 'redneck' in the backdrop of the racial situation at Warren Hills school not only was offensive but also was being used by that group as a means of identifying themselves and their conduct. Hence, Hick or Redneck became synonymous with racial harassment at Warren Hills.
>
> . . .

> It is difficult to describe the extent of the racial problems present at our school without actually observing the day to day events. The situation has reached the boiling point and my fears for the minority students and general population at our school as well as the overall disruption the racism has caused has resulted in the need for a heightened vigilance for materials and/or behaviors that may incite further incidents of violence.

(Griffith Cert., at ¶¶ 14, 19.)

Downs stated:

> A: It was the – it was – the word, "redneck" was problematic because it was associated with this group that referred to themselves as, 'the Hicks' or, 'the rednecks,' . . . and this group expressed feelings of prejudice towards others. . . .
> Q: Was there any student who said - made a complaint about the use of the word, 'redneck' that you were aware of?
> A: The complaints really focused on the symbols that – not the symbols but the shirts that were worn or whatever that were used by this group to demonstrate solidarity. And so what I was telling you before was when, 'redneck' was used in school, it was understood within that community that it was a reference to that particular group.
> . . .
> A: In that sense it was problematic.
> . . .
> A: [T]he school year was disrupted on many occasions because of people wearing shirts that were-that some perceived as being expressive of feelings of divisiveness or racial prejudice. And that I clearly remember because that affected my ability to instruct in the classroom. And there were – you know, it was in the hallways, it was in the classrooms; it was all over.

(Walpin Aff., Ex. 7, at 42:12-43:23, 39:20-40:3.)

Merluzzi stated:

> The [T]-shirt in question which the plaintiff, [T.S.] was wearing on March 22, was not only offensive in the context of our school at the time but also served as a

> symbol of racial intolerance that had been present at the school. Many of the students at the high school who are familiar with the group that calls themselves the 'hicks' are also of the opinion that this . . . racially intolerant group also calls themselves the 'rednecks.' Thus the [T]-shirt aside from it being offensive in the context of our school also serves as a symbol of the association of the group and the harassment.

(Merluzzi Cert., at ¶ 49.)

Plaintiffs argue that there are no genuine issues of material fact as to whether defendants had a basis to conclude that the word "Redneck" would cause disruption. Plaintiffs particularly rely on the fact that T.S. allegedly wore the Foxworthy T-shirt "on many occasions in school prior to March 21, 2000, as well as for the first seven periods on March 22, 2000" without complaints from students or faculty. (Pl. Supp. Br. at 7.) Plaintiffs also rely on Merluzzi's testimony that T.S.'s wearing of the T-shirt was not a disruptive event. (Id.)

The Court disagrees with plaintiffs. We find that there exist genuine issues of material fact, given the evidence now available, and even the evidence available at the preliminary injunction stage, as to the relationship between the terms "Hicks" and "Rednecks" and the association between the term "Rednecks" and incidents of racial harassment and intimidation. We, accordingly, as a matter of law, after considering the evidence in the light most favorable to the non-moving party, cannot conclude that defendants did not have a well-founded fear that T.S.'s wearing of the Foxworthy T-shirt at that time would

disrupt school activities. We, therefore, will not issue a declaration that T.S.'s constitutional rights to wear the Foxworthy T-shirt were violated when defendants suspended him. We, rather, find that only a trier of fact can make such a determination.

B. Defamation & False Light Claims

To prevail on a claim of defamation, under New Jersey law, a plaintiff must prove: (1) that the defendant made a defamatory statement of fact; (2) concerning the plaintiff; (3) which was false; (4) which was communicated to persons other than the plaintiff; and (5) fault. Taj Mahal Travel, Inc. v. Delta Airlines, Inc., 164 F.3d 186, 189 (3d Cir. 1998). A plaintiff must prove an additional element of actual malice when the plaintiff is a public figure. Verna v. Links at Valleybrook Neighborhood Ass'n, Inc., 282 A.2d 202, 213 (N.J. App. Div. 2004). The actual malice standard applies to a person who "voluntarily and knowingly engag[es] in conduct that one in his position should reasonably know would implicate a legitimate public interest, engendering the real possibility of public attention and scrutiny." Id. Plaintiffs must demonstrate each of these elements by clear and convincing evidence. Rocci v. Ecole Secondaire MacDonald-Cartier, 755 A.2d 583, 588 (N.J. 2000).

The Court, as a matter of law, ordinarily determines whether a statement is defamatory. Taj Mahal, 164 F.3d at 189. A trier of fact makes such a determination, however, when the Court

determines that "the statement is reasonably susceptible to both a defamatory and a non-defamatory meaning." Sedore v. Recorder Publ'g Co., 716 A.2d 1196, 1200 (N.J. App. Div. 1998). "A defamatory statement is one that is false and injurious to the reputation of another or exposes another person to hatred, contempt or ridicule or subjects another person to a loss of the good will and confidence of others." Taj Mahal, 164 F.3d at 189 (quotations omitted).

The elements of a false light claim are: (1) that a defendant gives publicity to a matter that places the plaintiff before the public in a false light (2) which is highly offensive to a reasonable person and (3) the defendant "had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the [plaintiff] would be placed." Romaine v. Kallinger, 537 A.2d 284, 290 (N.J. 1988). "As with the requirement in defamation actions that the matter publicized be untrue, a fundamental requirement of the false light tort is that the disputed publicity be in fact false, or else at least have the capacity to give rise to a false public impression as to the plaintiff." Id. (quotations omitted). The Court determines whether the criticized matter is capable of portraying plaintiff in a false light and whether that portrayal is highly offensive to a reasonable person. Id. A claim against a public figure, similar to a defamation claim, also requires proof of actual malice on the part of the defendant. DeAngelis v. Hill, 847 A.2d 1261, 1271 (N.J. 2004).

Defendants published a press release on April 20, 2001, reporting the School Board's upholding of T.S.'s suspension for wearing a T-shirt imprinted with the term "Redneck." (Walpin Aff., Ex. 12.) The press release, in support of the suspension, cited "an unfortunate series of incidents" in which a minority of white students had "engaged in a course of conduct of harassment and verbal abuse of" African-American students. (Id.) The press release also said that T.S.'s statement that he was "waiting all day for someone to notice" him, "corroborat[ed] the fact that he was attempting to portray a message of racial stereotyping." (Id.) The School Board stated that such violations of the Dress Code or the Harassment Policy would not be tolerated given the "history and background of racial intimidation and problems" afflicting the High School. (Id.)

Plaintiffs allege that the press release was defamatory and portrayed T.S. in a false light because it falsely: (1) charged him with portraying a message of racial stereotyping; (2) associated him with, or attributed to him, a course of conduct of harassment and racial intimidation; and (3) implied that his wearing of the Foxworthy T-shirt was a continuation of that course of conduct. (Pl. Supp. Br. 25-29.) Plaintiffs cite the testimony of Merluzzi, Griffith, and Downs in support of these contentions.[6] (Id. at 27-28; Walpin Supp'l Sub. at 3-4.)

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[6] Griffith testified:

Q: Do you believe that [T.S.] was a racist?
A: I honestly don't know. Don't have a clue.

Plaintiffs particularly rely on Merluzzi's statements that he: (1) did not believe that the T-shirt portrayed a message of racial stereotyping; (2) did not believe that T.S. was a racist; and (3) knew of no evidence that associated T.S. with the racial incidents cited in the press release.[7] (Pl. Supp. Br. at 14-16.)

(Walpin Aff., Ex. 6, at 81: 17-20.)

Downs testified:

> Q: Do you remember whether [T.S.] was involved in any racial incidents at the school during 2000-2001 school year?
> A: No.

(Walpin Aff., Ex. 7, at 38:12-15.)

[7] Merluzzi testified:

> Q: Are you aware of any evidence that supports the assertion that [T.S.] was a racist?
> A: Nobody ever claimed [T.S.] was a racist.

(Walpin Aff., Ex. 5, at 40:23-25.)

> Q: So if somebody called [T.S] a racist you wouldn't have any basis for believing that was true or false?
> A: Correct.

(Walpin Aff., Ex. 4, at 83:3-6.)

> Q: Do you believe [T.S.] was engaging in racist conduct by wearing the T-shirt that we have been discussing?
> . . .
> A: Nobody ever said he was engaging in racist conduct.

(Walpin Aff., Ex. 5, at 43:11-19.)

> Q: [D]o you believe that the shirt portrayed a message of racial stereotyping?
> . . .
> A: The answer is no.

(Id. at 45:17-23.)

> Q: [Y]ou went through a series of racial incidents and described them that had occurred at the school prior to

Defendants, however, deny that the press release was defamatory and instead maintain that the message projected in the press release, that T.S was engaging in racial and ethnic stereotyping, was true. (1-12-05 Oral Arg. of John M. Zaiter.) Defendants specifically argue that the evidentiary record establishes that the defendants reasonably believed that T.S. was a member of the "Hicks," a group responsible for prior incidents of racial stereotyping and harassment of minority students, and that T.S.'s Foxworthy T-shirt portrayed an image of racial stereotyping. (Def. Opp. Br. at 20.)

Griffith and Downs both testified that T.S. was a member of the "Hicks" and that T.S. identified himself as the group's spokesperson. (Walpin Aff., Ex. 6, at 37:5-8 (Griffith's testimony); Id., Ex. 7, at 25:11-17 (Downs's testimony).) Both school officials also testified that the "Hicks" were responsible for racial disturbances in the High School. (Griffith Cert., at

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> [T.S.] having this incident . . . [T.S.] was not found to have been somebody who committed any of those violations; is that correct?
> A: [H]e was not involved in any other [incident] than the one that's here.
>
> (Walpin Aff., Ex. 4, at 158:4-16.)
>
> Q: Why would [a chronology of racial incidents] been attached to a press relase about [T.S] . . . ?
> A: I don't know why they would have wanted that attached in retrospect.
>
> (Walpin Aff., Ex. 5, at 46:16-25.)

¶¶ 8-9; Walpin Aff., Ex. 6, at 33:6-25 (Griffith's testimony); Id., Ex. 7, at 21:4-10 (Downs's testimony).) Griffith, in fact, stated that the Hicks's "racially fueled and intimidating behavior" was at the center of the racial problems in the High School. (Griffith Cert., at ¶¶ 9, 11.) Griffith and Downs also testified that the term "Redneck" was being used in an "offensive manner" because it was associated with the "Hicks'" harassment of minority students and expression of "prejudicial feelings towards others." (Id. at ¶ 14; Walpin Aff., Ex. 7, at 42:1-4, 43:1-4 (Downs's testimony).)

The Court, in considering whether the elements of defamation and false light are met, finds that genuine issues of material fact exist as to the falsity of the press release. There is conflicting evidence in the record, as noted supra, as to T.S.'s association with the "Hicks," connection with past racial incidents, and whether T.S.'s wearing of the Foxworthy T-shirt portrayed an image of racial stereotyping. While plaintiffs heavily rely upon Merluzzi's testimony, there exists contrary testimony of both Griffith and Downs, two school officials who worked within the High School and dealt with the day to day issues of the student body on a routine basis. The Court, upon viewing all the evidence and resolving all inferences in a light most favorable to defendants, cannot conclude that defendants' statements in the press release were false as a matter of law. Such a determination must, rather, be decided by a trier of fact because there exist genuine issues of material fact. We,

therefore, deny summary judgment on plaintiffs' defamation and false lights claims.[8]

III. Analysis of Defendants' Cross Motion for Summary Judgment

The qualified immunity doctrine protects government officials performing discretionary functions from damages claims when their conduct "does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). See Donahue v. Gavin, 280 F.3d 371, 377 (3d Cir. 2002). Its purpose is to shield officials from the burdens of litigation and not merely from liability itself. Saucier v. Katz, 533 U.S. 194, 200-01 (2001); Curley v. Klem, 298 F.3d 271, 277 (3d Cir. 2002).

The issue of whether an official is entitled to qualified immunity is a matter of law to be decided by the Court. Sharrar v. Felsing, 128 F.3d 810, 827-28 (3d Cir. 1997). The Court analyzes a qualified immunity defense by first asking whether the facts alleged, viewed in the light most favorable to the plaintiff, establish the violation of a federal constitutional or statutory right. Curley, 298 F.3d at 277. If the plaintiff fails to allege a such a violation, the Court need not engage in further inquiry and the defendant is entitled to immunity from

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[8] We acknowledge defendants' argument that T.S. was a public figure and therefore must prove actual malice. (Def. Opp. Br. at 19-20.) We, however, decline to consider T.S.'s status as a public figure at this time because, assuming arguendo that T.S. was acting as a public figure, genuine issues of material fact would still exist as to the truth of the press release.

suit. Id. But if the plaintiff alleges a federal constitutional or statutory violation, the Court next considers "whether the right was clearly established." Id. If the Court finds that the plaintiff has alleged the violation of a clearly established right the Court next considers whether the official's mistaken belief that his conduct was constitutional was objectively reasonable. Sharrar, 128 F.3d at 826.

The inquiry of whether a right is clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." Saucier, 533 U.S. at 201. Whether a right is clearly established, however, does not hinge on the "precise factual correspondence between the case at issue and a previous case." Assaf v. Fields, 178 F.3d 170, 177 (3d Cir. 1999). The issue, rather, "turns on the objective legal reasonableness" of the official's actions. Anderson v. Creighton, 483 U.S. 635, 639 (1987). A constitutional right allegedly violated, therefore,

> Must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. at 640 (citations omitted). See also Doe v. Delie, 257 F.3d 309, 318 (3d Cir. 2001) (the issue in deciding whether a right is "clearly established" is "whether, given the

established law and the information available to" the defendant, a reasonable person in defendant's position "could have believed that their conduct was lawful.").

"A defendant has the burden to establish that he is entitled to qualified immunity." Kopec v. Tate, 361 F.2d 772, 776 (3d Cir. 2004). Plaintiffs, however, bear the burden of presenting evidence that defendants violated their federal constitutional or statutory rights. See Kopec, 361 F.3d at 776 ("If the plaintiff fails to make out a constitutional violation, the qualified immunity inquiry is at an end; the officer is entitled to qualified immunity."); Sherwood v. Mulvihill, 113 F.3d 396, 399 (3d Cir. 1997) ("Where a defendant asserts a qualified immunity defense in a motion for summary judgment, the plaintiff bears the initial burden of showing that the defendant's conduct violated some clearly established statutory or constitutional right.").

Defendants contend that at the time of T.S.'s suspension, the law regarding T.S.'s First Amendment rights to wear the Foxworthy T-shirt at the High School was "not sufficiently clear that a reasonable official would understand what he is doing violates the law." (Def. Br. in Supp. Cross-Mot. ("Def. Supp. Br.") at 10.) Defendants specifically allege that "the non-existence of a clearly established right is apparent" from the conflicting decisions of the district court and the Third Circuit's majority and dissenting opinions. (Id. at 9.) Plaintiffs argue that T.S.'s right to wear the Foxworthy T-shirt was a clearly established right violated by defendants. (Pl. Br.

in Opp. Cross Mot. ("Pl. Opp. Br.") at 2-4.) Plaintiffs, in support of this argument, cite the broad principle articulated in controlling law existing at the time of T.S.'s suspension – that a student's speech may only be regulated if it causes substantial disruption to school activities. (Id. at 3.)

The Court agrees with defendants and finds that defendants are entitled to qualified immunity because T.S.'s constitutional right to wear the Foxworthy T-shirt in that context was not clearly established at the time of his suspension. Griffith testified, in his deposition, that he suspended T.S. under the Dress Code only after conferring with Merluzzi and per Merluzzi's instructions. (Walpin Aff., Ex. 6, at 63:15-66:17.) Merluzzi testified that he ordered Griffith to suspend T.S. under the Dress Code after he considered suspending him under the Harassment Policy but decided against it so as "to air [sic] in favor of" T.S. (Id., Ex. 4, at 201:13-22, 202:2-19, 206:12-20.) The testimony of both Griffith and Merluzzi demonstrates that the officials were in a quandary as to how to address T.S.'s wearing of the Foxworthy T-shirt and that both officials carefully and deliberately considered T.S.'s suspension. We find that a reasonable person in defendants' position would not have understood that T.S.'s suspension under the Dress Code was unconstitutional.

The legal precedent, existing at the time of T.S.'s suspension, most analogous to this case is Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

While Tinker articulates the broad principles applicable here, it does not speak to the specific context of this case. See Saucier, 533 U.S. at 201. There are, rather, relevant factual and contextual differences between this matter and Tinker. In Tinker, unlike here, the Court found an absence of any facts which might have led school officials to predict substantial disruption or actual disturbances or disruption on school property caused by the wearing of the armbands. Tinker, 393 U.S. at 514. Here, as discussed supra, there is a history of racial incidents in the High school and genuine issues of material fact as to whether at the time of the suspension the term "Redneck" was associated with these racial incidents.

There are, therefore, factual issues as to whether defendants had a well-founded fear of disruption upon which reasonable minds can differ. This is demonstrated by the disagreement among the Court, the Third Circuit majority, and the dissent as to whether there was a well-founded fear of disruption such that defendants did not violate T.S.'s constitutional rights as articulated under the Tinker substantial disruption standard.

In the Court's September 4, 2001 memorandum opinion we held:

> Given the past history at the High School and the similarity between the word "redneck" and past incidents, the Court concludes that Plaintiffs have not demonstrated a sufficient probability of success as to the prohibition of the Foxworthy T-shirt under the Tinker substantial disruption standard.

(9-4-01 Mem. Op. at 70.)

The Third Circuit, however, held that:

> [P]laintiffs have established a likelihood of success on the merits of their First Amendment claim with respect to the Foxworthy T-shirt. The District Court erred in employing too broad a notion of 'similarity' – a conception that does not provide a sufficient basis for permitting a 'well-founded' inference of disruption.

Sypniewski, 307 F.3d at 257-58.

Circuit Judge Rosenn, concurring and dissenting in Sypniewski, stated:

> [T]he decision whether the wearing of the shirt 'materially and substantially interfered' with the school's work and the rights of other students was best determined by the school authorities. . . . [O]n this record, there is substantial evidence in the affidavits from which to determine that the "Rednecks" T-shirt materially and substantially interfered with the school's work and the rights of other students.

Id. at 273 (Rosenn, J., concurring and dissenting).

The law cannot be clearly established when reasonable jurists objectively disagree on whether existing precedent compels a result in a particular case. See Beard v. Banks, 124 S.Ct. 2504, 2511-12 (2004) (the Court, in considering whether a rule is new for purposes of constitutional analysis, must "assay the legal landscape . . . and ask whether the rule later announced . . . was dictated by then-existing precedent – whether, that is, the unlawfulness of [respondent's] conviction was apparent to all reasonable jurists.") (internal quotations and emphasis in original omitted). "It would be inappropriate to

hold government officials to a higher level of knowledge and understanding of the legal landscape than the knowledge and understanding displayed by judges whose everyday business it is to decipher the meaning of judicial opinions." Denno v. Sch. Bd. of Volusia County, 218 F.3d 1267, 1274 (11th Cir. 2000). That reasonable jurists disagreed, even from the outset of this case, on whether T.S. had a constitutional right to wear the Foxworthy T-shirt without facing suspension indicates that a reasonable school official may have reasonably concluded that T.S.'s suspension was not unconstitutional. See id. It would be unfair to expect defendants to ascertain that T.S.'s right to wear the Foxworthy T-shirt was clearly established when reasonable jurists have objectively disagreed to date on the contours of T.S.'s right and when the evidence reveals factual issues for trial. We, therefore, find that defendants are entitled to qualified immunity.

The cross motion also seeks the dismissal of defendants Godett and Chalupa from the action "as a matter of law in both their individual and official capacities" because "the record is absolutely devoid of any inference or suggestion of any involvement as to" either official. (Def. Supp. Br. at 14-15.) We agree that Chalupa should be dismissed from this action. Plaintiffs have the burden to show that Chalupa was involved in T.S.'s suspension and have failed to meet that burden. See

Stewart v. Wackenhut Corrections Corp., No. 01-0731, 2003 WL 21973320, at *2 (E.D. Pa. June 12, 2003) ("In order to hold a defendant liable in a civil rights action, the plaintiff must establish that the defendant had personal involvement in the alleged constitutional violation. Each named defendant must have played an active role in the violation of the plaintiff's constitutional rights.").

We, however, disagree that Godett should be dismissed from the action. Godett, as the High School principal, acting in an official capacity may have afforded either express or delegated suspension authority to Griffith, who is accused of violating plaintiffs' constitutional rights. Godett, therefore, is a properly named defendant to the extent that liability is premised upon her involvement in the suspension process in her official capacity. Plaintiffs have not alleged Godett's personal involvement in T.S.'s suspension. Assuming arguendo, however, that Godett was personally involved, she would be entitled to qualified immunity for the same reasons Griffith and Merluzzi are protected.

We, accordingly, find that all of the moving defendants, in their individual capacities, are entitled to qualified immunity from liability for plaintiffs' as-applied constitutional challenge. While moving defendants are immune from individual liability for alleged constitutional violations, this ruling does

not address their possible liability for counts V and VI of the amended complaint alleging defamation and false light, because these counts assert state law tort claims.

CONCLUSION

The Court, for the reasons stated supra, will: (1) grant plaintiffs' motion to the extent that it seeks a permanent injunction facially correcting the Dress Code and the Harassment Policy. We, however, will deny plaintiffs' motion to the extent that it seeks (a) a declaration that T.S.'s wearing of the Foxworthy T-shirt on March 22, 2001 was protected and defendants violated T.S.'s First Amendment rights in suspending him for wearing the T-shirt and (b) partial summary judgment on claims of defamation and false light, because there exist genuine issues of material fact as to all three of those claims that must be decided by a trier of fact. We, furthermore, will grant the moving defendants' cross motion for summary judgment because those defendants are entitled to qualified immunity from liability in their individual capacities for plaintiffs' as-applied constitutional challenge. The claims against defendant Chalupa will be dismissed in their entirety based on the lack of evidence of any personal or official involvement by him. An appropriate order and judgment will be issued.

s/ Mary L. Cooper
MARY L. COOPER
UNITED STATES DISTRICT JUDGE