

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA**

<p>PAUL GERLICH and ERIN FURLEIGH,</p> <p>Plaintiffs,</p> <p>v.</p> <p>STEVEN LEATH, WARREN MADDEN, THOMAS HILL, and LEESHA ZIMMERMAN,</p> <p>Defendants.</p>	<p>Case No. 4:14-cv-264</p> <p>MEMORANDUM OF AUTHORITIES IN SUPPORT OF DEFENDANTS’ MOTION TO DISMISS</p>
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I. INTRODUCTION 2

II. DEFENDANTS’ MOTION TO DISMISS SHOULD BE GRANTED 2

A. All of Plaintiffs’ claims should be dismissed because Plaintiffs have failed to plead that (1) they lack adequate alternative avenues of communication without the use of ISU’s marks, (2) their t-shirt designs constitute “fair use” of ISU’s marks, or (3) their t-shirt designs do not create confusion as to whether ISU “sponsored, endorsed, or is otherwise affiliated with” the speech 3

1. Plaintiffs have not plead they lack adequate alternative avenues of communication without the use of ISU’s marks.....3

2. Plaintiffs have not plead their t-shirt designs constitute “fair use” of ISU’s marks 4

3. Plaintiffs have not plead their t-shirt designs do not create confusion as to whether ISU “sponsored, endorsed, or is otherwise affiliated with” the speech 4

B. All Plaintiffs’ claims against all Defendants in their individual capacities should be dismissed because Defendants each have qualified immunity..... 6

C. All Plaintiffs’ claims against Defendant Steven Leath in his individual capacity should be dismissed because Plaintiffs did not establish a claim plausible on its face and because Leath has qualified immunity9

D. Plaintiffs’ claims for money damages against Defendants in their official capacities should be dismissed because Defendants have sovereign immunity 10

E. Plaintiffs’ claims against all Defendants for violation of procedural due process should be dismissed because Plaintiffs did not exhaust their administrative remedies and it would not have been futile for them to do so..... 11

VI. CONCLUSION..... 12

I. INTRODUCTION

Defendants are administrators at Iowa State University (ISU). Pl's Compl. at ¶¶ 15-18. Plaintiffs are members of ISU's student chapter of the National Organization for the Reform of Marijuana Laws (NORML). *Id.* at ¶¶ 13-14.

Plaintiffs have sued Defendants under 42 U.S.C. § 1983 alleging Defendants violated their rights to Free Speech under the First Amendment and Due Process under the Fourteenth Amendment by creating Trademark Guidelines that are overbroad and vague and then arbitrarily applying them to reject the use of ISU trademarks on some, but not all, of NORML's t-shirt designs. *Id.* at ¶¶ 7, 41, 47, 48. Plaintiffs have sued all Defendants on all counts, *id.* at ¶¶ 61, 77, 81, 92, in their official and individual capacities, *id.* at ¶¶ 15-18, for money damages, prospective injunctive relief, declaratory judgment, fees, and other remedies, *id.* at ¶¶ A-F.

Plaintiffs' Complaint should be dismissed for failure to state a claim and because: (A) Plaintiffs have failed to plead facts that Defendants violated a constitutional right, (B) Defendants in their individual capacities have qualified immunity, (C) Plaintiff's claim against Defendant Leath is not plausible on its face (D) Defendants in their official capacities have sovereign immunity and (E) Plaintiffs failed to exhaust their administrative remedy.

II. DEFENDANTS' MOTION TO DISMISS SHOULD BE GRANTED

Standard of Review. Defendants' motion is based on Federal Rule of Civil Procedure 12(b)(6) (failure to state a claim on which relief can be granted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "The plausibility standard requires a plaintiff to show at the pleading stage that success on the merits is more than a 'sheer

possibility.’ It is not, however, a ‘probability requirement.’” *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 662). A plaintiff merely alleging facts that are “consistent with” liability is insufficient. *Id.* (citation omitted).

“Rule 12(b)(6) allows the Court ‘to eliminate actions that are fatally flawed in their legal premises and destined to fail.” *Carlson v. Wiggins*, 760 F. Supp. 2d 811, 817 (S.D. Iowa 2011) *aff’d*, 675 F.3d 1134 (8th Cir. 2012) (citing *Advanced Cardiovascular Sys., Inc. v. SciMed Life Sys., Inc.*, 988 F.2d 1157, 1160 (Fed. Cir.1993)). This includes legal premises the plaintiff does not advance because “a Court is under a duty to examine a complaint to determine if the allegations provide for relief on any possible theory.” *Cunningham v. Associated Benefits Corp.*, 2001 WL 1678747, at *1 (S.D. Iowa Oct. 19, 2001) (quoting *Garland v. St. Louis*, 596 F.2d 784, 787 (8th Cir. 1979)).

- A. All of Plaintiffs’ claims should be dismissed because Plaintiffs have failed to plead that (1) they lack adequate alternative avenues of communication without the use of ISU’s marks, (2) their t-shirt designs constitute “fair use” of ISU’s marks, or (3) their t-shirt designs do not create confusion as to whether ISU “sponsored, endorsed, or is otherwise affiliated with” the speech.**
 - 1. Plaintiffs have not plead they lack adequate alternative avenues of communication without the use of ISU’s marks.**

This case is about Plaintiffs’ desire to use Iowa State University trademarks. *See, e.g.*, Pl.’s Compl. at ¶¶ 24-27, 33, 39-41. Trademarks are property. *Mut. of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 402 (8th Cir.1987), cert. denied, 488 U.S. 933 (1988) (citing *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 259 (1916)). “Trademarks do not yield to free speech rights when adequate alternative avenues of communication exist.” *Id.* (citing *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 567 (1972)); *but see, Rogers v. Grimaldi*, 875 F.2d 994,

998-99 (2d Cir. 1989).¹ Plaintiffs' Complaint does not state that they lack adequate alternative avenues of communication without the use of ISU's trademarks.

2. Plaintiffs have not plead their t-shirt designs constitute "fair use" of ISU's marks.

The purpose of granting trademark holders property rights to their marks is to prevent others from appropriating or copying the marks to take advantage of the holder's goodwill. *See, Coca-Cola Co. v. Purdy (Purdy I)*, 382 F.3d 774, 777 (8th Cir. 2004) (citation omitted). The exception is when trademarks are used (1) other than as a mark, (2) in a descriptive sense, and (3) in good faith. *Int'l Stamp Art, Inc. v. U.S. Postal Serv.*, 456 F.3d 1270, 1274 (11th Cir. 2006). Plaintiffs do not plead that their proposed use of ISU's trademarks is a fair use—i.e., descriptive.

3. Plaintiffs have not plead their t-shirt designs do not create confusion as to whether ISU "sponsored, endorsed, or is otherwise affiliated with" the speech.

A trademark holder may prevent use of its marks that could confuse an observer about the source of political speech on a purchasable t-shirt and whether the trademark holder "sponsored, endorsed, or is otherwise affiliated with" that speech. *See, Novak*, 836 F.2d at 398 (shirt designs were anti-war speech depicting post-apocalyptic life). Similarly, a trademark holder may prevent an activist from using its marks in website domain names to attract visitors to the site and then promote political messages unrelated to the trademark holder, elicit donations, and generate publicity. *See, Purdy I*, 382 F.3d at 779 (marks could not be used in bad faith to elicit donations); *Coca-Cola Co. v. Purdy (Purdy II)*, 2005 WL 212797, at *3 (D. Minn. Jan. 28, 2005) (marks could not be used in bad faith to promote messages, generate publicity, and raise

¹ For example, "[f]ree speech rights do not extend to labelling or advertising products in a manner that conflicts with the trademark rights of others. In these circumstances, the exclusive right guaranteed by the trademark law is generally superior to the general free speech rights of others. *See Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir.1989)." *Yankee Pub. Inc. v. News Am. Pub. Inc.*, 809 F. Supp. 267, 276 (S.D.N.Y. 1992).

money for a cause). Plaintiffs do not plead that their proposed uses of ISU's trademarks do not create confusion as to whether the trademark holder "sponsored, endorsed, or is otherwise affiliated with" the speech at issue. Instead, their Complaint pleads that the proposed t-shirt designs did *in fact* create such confusion. Pl.'s Compl. at ¶¶ 31-35.

In a § 1983 suit alleging violation of free speech and due process rights, the court in *Gibson v. Bordelon (Gibson I)*, 2011 WL 7763787, at *5 (N.D. Tex. Oct. 31, 2011) aff'd in part, rev'd in part sub nom. *Gibson v. Texas Dep't of Ins.--Div. of Workers' Comp.*, 700 F.3d 227 (5th Cir. 2012) stated in dicta that "[p]laintiff cannot claim a fundamental right to the usage of another's. . . trademark." The 5th Circuit agreed, in dicta, that a use of a trademark which "misidentif[ies] the source of a product" is "outside the reach of the First Amendment." *Gibson v. Texas Dep't of Ins.--Div. of Workers' Comp. (Gibson II)*, 700 F.3d 227, 240 (5th Cir. 2012). Though the situation differs if a state statute restricts speech using words that are otherwise in the public domain, *see, id.*, courts find trademarks to be property rights that do not yield to free speech (unless it qualifies for a fair use exception) if the use might confuse an audience about the speech's source and has adequate alternative avenues of reaching its audience.

In sum, Plaintiffs' pled facts fail to demonstrate a fundamental right to use ISU's trademark, *contra Gibson I*, 2011 WL 7763787, at *5, that they lack adequate alternative avenues of speech without use of ISU's marks, that their proposed use of ISU's marks was fair (i.e., descriptive) use, that their proposed use of ISU's marks was not confusing, or how Defendants violated Plaintiffs' rights by rejecting a design that potentially confuses observers about both the meaning of Plaintiffs' speech and whether ISU endorses it.

All Plaintiffs' claims should therefore be dismissed for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

B. All Plaintiffs' claims against all Defendants in their individual capacities should be dismissed because Defendants each have qualified immunity.

Even if Plaintiffs pled facts sufficient to establish a First Amendment right to use ISU's marks as they wish, Defendants are entitled to qualified immunity from Plaintiffs' claims.

Qualified immunity protects public officials acting within the scope of their discretionary authority except those who are "plainly incompetent" or "knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Luckert v. Dodge County*, 684 F.3d 808, 817 (8th Cir.2012) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) ("[o]fficials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines"). Courts decide whether an official qualifies for immunity by an objective reasonableness standard. *Harlow*, 457 U.S. at 818.

To overcome an official's qualified immunity, a plaintiff has the burden of alleging facts sufficient to demonstrate that the official violated her constitutional rights. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). A plaintiff also has the burden of demonstrating that her rights were "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). A defendant in a § 1983 suit for damages is "entitled to 'fair warning' that his conduct deprived his victim of a constitutional right." *Hope v. Pelzer*, 536 U.S. 730, 739-40 (2002). Assessing whether a plaintiff's right was established clearly enough to give a defendant fair warning, "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201 (receded from on other grounds by *Pearson*, 555 U.S. at 236-37). Citing cases that are on point provides the strongest support for finding a plaintiff's right is clearly established in the specific context while "fundamentally similar" cases provide strong support and "materially similar" cases provide some support. *See, Hope*, 536 U.S. at 741.

Because qualified immunity is immunity from suit, it is effectively lost if a case is erroneously allowed to go to trial. *Pearson*, 555 U.S. at 231. Accordingly, immunity questions should be resolved at the earliest possible stage of litigation. *Id.* at 232; *see also*, *Davenport v. Bd. of Trustees of the Univ. of Arkansas at Pine Bluff*, 2011 WL 900095 (E.D. Ark. Mar. 14, 2011) (granting motion to dismiss plaintiff's claims under § 1983 for damages against a University official in his official capacity); *Cowboys for Life v. Sampson*, 983 F. Supp. 2d 1362, 1364-65 (W.D. Okla. 2013) (granting motion to dismiss claims against University President in his individual capacity for allowing other officials to use policies President approved to allegedly deny student group's free speech).

Here, Plaintiffs do not dispute that each Defendant was a public official acting within the scope of his or her discretionary authority when Plaintiffs' rights were allegedly violated. *See* Pl's. Compl. ¶¶15-18 and ¶ 83 (stating that the issue is the "discretion of public officials at ISU").

As discussed in the preceding section, Plaintiffs' pled facts fail to establish *any* constitutional right to the use of ISU's marks, let alone that a clearly established right. Plaintiffs' Complaint fails to identify a case where university officials violated the free speech rights of student organization members by denying them a particular use of the university's trademark. *Hope*, 536 U.S. at 741 (explaining that substantially and materially similar cases help establish that a plaintiff's right was sufficiently clear to a defendant). Thus, in the context of this case, Plaintiffs have failed to plead facts that Defendants had fair warning that they were knowingly violating Plaintiffs' rights when they acted to protect the use of ISU's marks. *See, Anderson*, 483 U.S. at 640; *see also, Hope*, 536 U.S. at 739-40 (defendants are "entitled to 'fair warning' that his conduct deprived his victim of a constitutional right").

Plaintiffs' Complaint also fails to allege whether speech on a student organization t-shirt speech even occurs in a designated public forum, a limited public forum, or a non-public forum. *See, e.g., Hosty v. Carter*, 412 F.3d 731, 737-39 (7th Cir. 2005) (en banc) (holding a school official had qualified immunity from limiting university-funded newspaper's stories because newspaper's forum was not clear). Instead, Plaintiffs merely make the conclusory allegations that Defendants violated Plaintiffs' clearly established rights, *id.* at ¶ 69, that Defendants did so willfully, *id.* at ¶ 30, that pictures can be protected speech, *see, id.* at ¶ 63 (citations omitted), and that a university's power to punish its students' speech is not unlimited, *see, id.* at ¶ 72 (citations omitted). But these allegations miss the legal mark. Whether Plaintiffs' speech rights are clearly established in other circumstances or "as a broad general proposition" is not at issue; what matters is whether Plaintiffs pled facts showing that their rights are clearly established "in the specific context of [this] case." *See, Saucier*, 533 U.S. at 201.

In the context of *this* case, school administrators of reasonable competence could disagree over (1) whether Plaintiffs had a free speech right to use ISU's marks as Plaintiffs' wished, (2) whether it is overbroad or vague to regulate the use of ISU's trademarks based on whether they "suggest promotion" of "dangerous, illegal or unhealthy products actions or behaviors" in 6(e) of the Trademark Guidelines and (3) whether the NORML t-shirt designs that were rejected promoted dangerous conduct and illegal drugs.

Thus, Plaintiffs does not allege sufficient facts that Defendants were "plainly incompetent" and did not "knowingly violate the law" when they created the Trademark Guidelines and applied them to reject some of Plaintiffs' shirt designs. *Briggs*, 475 U.S. at 341.

Accordingly, Defendants ask that the Court dismiss Plaintiffs' claims against each Defendant in his or her individual capacities for failure to state a claim under Federal Rule of

Civil Procedure 12(b)(6). Each Defendant was acting within the scope of his or her discretionary authority at all relevant times and Plaintiffs have failed to demonstrate that the rights Defendants allegedly violated were clearly established.

C. All Plaintiffs' claims against Defendant Steven Leath in his individual capacity should be dismissed because Plaintiffs did not establish a claim plausible on its face and because Leath has qualified immunity.

“Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*.” *Iqbal*, 556 U.S. at 675-76. Thus, a supervisor's knowledge of his subordinate's discriminatory purpose is not enough to find the supervisor liable under § 1983. *Id.* at 677. The supervisor will only be held responsible for his own misconduct. *Id.*; *see also, Baasi v. Fabian*, 2010 WL 924384 at *9 (D. Minn. Mar. 11, 2010) *aff'd*, 391 F. App'x 571 (8th Cir. 2010) (dismissing claims against warden who was not personally involved with alleged violation of prisoner's constitutional rights). Absent a plausible allegation that the supervisor acted purposely to deprive plaintiffs of their rights, the supervisor has qualified immunity from § 1983 suits. *Iqbal*, 556 U.S. at 677.

Acquiescence and support is insufficient to find a University president liable for the actions of his subordinates. *See, Iqbal*, 556 U.S. at 677 (rejecting that a supervisor's acquiescence is sufficient to find the supervisor liable for a subordinate's actions); *see also, Cowboys*, 983 F. Supp. 2d at 1364-65 (W.D. Okla. 2013) (dismissing claims against University President in his individual capacity for allowing other officials to use policies President approved to deny a student group's free speech).

Plaintiffs allege that Defendant Hill said that Leath said that he was not pleased that NORML sent an e-mail to the Director of the Iowa Office of Drug Policy. *See*, Pl's Compl. ¶ 45. Plaintiffs do not allege that Leath's alleged displeasure with NORML led him to purposely direct

his subordinates to unconstitutionally apply the Trademark Guidelines to reject future NORML t-shirt designs that would have otherwise been approved.

Plaintiffs also allege that Leath directed Hill to “address the situation involving [NORML’s] t-shirt designs” after a NORML t-shirt design was approved under the Trademark Guidelines. *Id.* at 44. Plaintiffs do not allege that Leath directed Hill to direct Madden to direct Zimmerman to unconstitutionally apply the Trademark Guidelines to reject future NORML t-shirt designs that would otherwise have been approved.

Finally, Plaintiffs allege that Leath did not abrogate the Trademark Guidelines or change how they were applied to NORML after an organization mailed Leath its opinion that the Trademark Guidelines were unconstitutional as applied to NORML. *See*, Pl’s Compl. ¶ 57. Assuming Plaintiffs could state a plausible claim against Leath because he failed to implement policy suggestions from an outside group, Leath clearly qualifies for immunity in his individual capacity, pursuant to the analysis in the preceding section, because Leath acted like an objectively reasonable university president by delegating legal critiques of university policy to counsel and following counsel’s advice not to modify the Trademark Guidelines. *See, Id.* at ¶ 58.

Accordingly, the Court should dismiss Plaintiffs’ claims against Defendant Leath in his individual capacity for failing to state a claim plausible on its face under Federal Rule of Civil Procedure 12(b)(6). *See, Iqbal*, 556 U.S. at 663.

D. Plaintiffs’ claims for money damages against Defendants in their official capacities should be dismissed because Defendants have sovereign immunity.

This Court has acknowledged time and again that U.S. Const. amend. XI entails that claims under § 1983 against a state employee in their official capacity must be limited to requests for prospective injunctive relief. *Casey v. Riedel*, 195 F. Supp. 2d 1122, 1129, 1135-36 (S.D.

Iowa 2002); *Van Pilsum v. Iowa State Univ. of Sci. & Tech.*, 863 F. Supp. 935, 940 (S.D. Iowa 1994) (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70 (1989)). This includes employees of Iowa State University. *Van Pilsum*, 863 F. Supp. at 936, 940 (limiting suit against ISU officials to prospective injunctive relief).

Each defendant is a state employee sued in his or her official capacity for money damages. *See*, Pl's Compl. ¶ 69.

Accordingly, Defendants ask that the Court dismiss Plaintiffs' claims for money damages against each Defendant in his or her official capacities for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) because each Defendant has sovereign immunity.

E. Plaintiffs' claims against all Defendants for violation of procedural due process should be dismissed because Plaintiffs did not exhaust their administrative remedies and it would not have been futile for them to do so.

Plaintiffs do not specify whether they allege Defendants violated their substantive due process rights, procedural due process rights, or both. *See*, Pl's Compl. ¶ 81.

What is clear is that Plaintiffs did *not* appeal the rejection of their proposed use of ISU's marks and therefore did *not* exhaust their administrative remedy to have the decision reviewed. *Id.* at ¶ 53. A student plaintiff's failure to exhaust administrative remedies is fatal to the student's claim that procedural due process was violated. *Stephenson v. Davenport Cmty Sch. Dist.*, 110 F.3d 1303, 1312-13 (8th Cir. 1997); *Christiansen v. W. Branch Cmty. Sch. Dist.*, 674 F.3d 927 (8th Cir. 2012). Thus, Plaintiffs' due process rights were not violated unless it was reasonable for Plaintiffs to think it was futile to appeal the rejection of their t-shirt designs.

Plaintiffs contend it would have been futile to contest rejection of the June, 2013 design because Defendant Madden allegedly wrote the Trademark Guidelines under which the June design was rejected and wrote those Guidelines in response to a different proposed design

NORML submitted in January, 2013. It was not reasonable to think appealing the June design would be futile because a different January design was rejected and had allegedly motivated the creation of new Trademark Guidelines. *See, Baker v. Krieger*, 287 F. Supp. 2d 207, 209 (W.D.N.Y. 2003) (belief that an appeal would be futile because of past negative outcomes did not excuse failure to exhaust administrative appeal). More to the point, Plaintiffs admit the ISU Trademark Office approved multiple NORML t-shirt designs using ISU trademarks during the time in question. *See*, Pl's Compl. ¶ 47. Thus, Plaintiffs have failed to plead facts that it would have been futile for them to appeal the challenged decisions.

Accordingly, the Court should dismiss prejudice Plaintiffs' claims for a violation of procedural due process because Plaintiffs have failed to state a claim for which relief can be granted.

III. CONCLUSION

Plaintiffs' claims should be dismissed for failing to allege sufficient facts to establish any constitutional right in the use of ISU's marks, that they lacked adequate alternative avenues for communicating their message without ISU's marks, that their proposed uses of the marks were fair uses, or that their proposed uses did not cause confusion.

Alternatively, Plaintiffs' claims against each Defendant in his or her individual capacity should be dismissed because each Defendant has qualified immunity. Alternatively, Plaintiffs' claims against Defendant Leath in his individual capacity should be dismissed because Leath can only be held liable for his own misconduct and the alleged facts do not suggest such misconduct. Further, Plaintiffs' claims for damages against each Defendant in his or her official capacity should be dismissed because Defendants have sovereign immunity. Finally, Plaintiffs' claims for

violation of substantive due process should be dismissed because Plaintiffs did not exhaust their administrative remedies.

WHEREFORE, Defendants request that each count of Plaintiffs' Complaint be dismissed and for such other relief as the Court deems proper.

Respectfully submitted,

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Original filed electronically.

Copy electronically served on all parties of record.

PROOF OF SERVICE	
The undersigned certifies that the foregoing instrument was served upon each of the persons identified as receiving a copy by delivery in the following manner on September 4, 2014:	
<input type="checkbox"/> U.S. Mail	<input type="checkbox"/> FAX
<input type="checkbox"/> Hand Delivery	<input type="checkbox"/> Overnight Courier
<input type="checkbox"/> Federal Express	<input type="checkbox"/> Other
<input checked="" type="checkbox"/> ECF System Participant (Electronic Service)	
Signature: <u>/s/Wendi Danitz-Hart</u>	