

## YOU AND THE LAW

# When Fandom Ends and Harassment Begins

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Donnelly v. University of North Carolina  
Court of Appeals of North Carolina 236 N.C. App. 32  
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University of North Carolina (UNC) graduate John Donnelly (Petitioner) filed a petition in North Carolina's Superior Court to review UNC's Notice of Trespass banning him from entering university athletic facilities indefinitely after UNC (Respondent) determined Donnelly had exhibited a history of harassment. Petitioner unsuccessfully appealed the case through UNC's appeals process, which resulted in a Final University Decision to uphold the Notice of Trespass. Following his appeal to the UNC Department of Public Safety, Donnelly filed in North Carolina's Superior Court a legal complaint arguing his First Amendment rights had been violated. After the superior court upheld UNC's indefinite ban, Donnelly appealed to the North Carolina Court of Appeals. Under consideration was the type of speech protected by the First Amendment and whether UNC acted appropriately in issuing the indefinite ban to Donnelly.

## Facts of the Case

During a 6-year period, Donnelly was engaged in a series of incidents involving inappropriate behavior directed toward UNC athletes and their families, and UNC staff. The inappropriate

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behavior included sexually suggestive comments; appearing at the soccer team's hotel while attending an away match; and harassing players, fans, and players' family members during games. Donnelly also harassed UNC staff by calling the athletics offices up to 13 times a day. This conduct began while petitioner acted as a volunteer usher for UNC during the 2006 football season and continued while a patron of UNC athletics.

The incident that led to the indefinite ban occurred at the Women's Soccer College Cup, held in San Diego from November 9 to December 2, 2012. After previously attempting to contact multiple soccer players on Facebook and in person, Donnelly discovered where the team would be staying while in San Diego. Donnelly claimed that he uncovered this information because "he won an autographed soccer ball and could not locate the head coach's signature on the ball" and wished to contact him to obtain that signature (*Donnelly v. University of North Carolina*, 2014). Donnelly's presence became uncomfortable for players and parents alike due to his attempts to contact various team members. At this point, Donnelly was asked to leave the hotel and did so without incident.

On December 3, 2012, UNC issued to Donnelly a Notice of Trespass related to the incidents occurring against players, fans, family, and UNC staff. The Notice of Trespass informed petitioner of his indefinite prohibition from entering UNC athletic facilities. George Hare, deputy chief of the UNC Department of Public Safety, called petitioner 1 week later to inform him of the Notice of Trespass, explain the details, and notify Donnelly of his right to appeal.

### Case History

Donnelly appealed the Notice of Trespass with the UNC Department of Public Safety. On March 7, 2013, Hare issued a Final University Decision upholding the Notice of Trespass, ending Donnelly's process of appeal with UNC. On April 4, 2013, Donnelly filed a Petition for Review asking the Superior Court of Iredell County to review the Final University Decision barring him from UNC athletic facilities. The superior court judge found that "no substantial rights of the petitioner have been prejudiced and that the final decision of the University should be affirmed" (*Donnelly v. University of North Carolina*, 2014). Subsequently, Donnelly filed an appeal in the North Carolina Court of Appeals.

## Case Analysis

In his appeal, Donnelly presented three arguments against UNC's ruling: (1) violation of his First Amendment right to free speech; (2) violation of N.C. Gen. Stat. § 150B-51, alleging UNC's decision was arbitrary, capricious, and unsupported by substantial evidence; and (3) retaliation by UNC officials through the indefinite ban.

In his first argument, Donnelly contended that banning him from future athletic contests infringed on his First Amendment right to free speech. When confronted with a First Amendment claim, the court must first determine "whether the plaintiff has engaged in 'protected speech'" (*Goulart v. Meadows*, 2002). Citing *Thorne v. Bailey* (1988), the court noted that "harassment is not protected speech." Donnelly's acts were determined to constitute harassment toward athletes, family members, and UNC staff, and were not a particularized message; therefore, the behavior was not protected by the First Amendment.

The petitioner's second argument asserted UNC's ban was arbitrary, capricious, and unsupported by substantial evidence (N.C. Gen. Stat. § 150B-51, 2011). The court defined substantial evidence as "relevant evidence a reasonable mind might accept as adequate to support a conclusion" (*Donnelly v. University of North Carolina*, 2014). UNC argued their decision was not based on a single incident, but on a track record of 6 years of progressive incidents, with prior reprimands served. In the Final University Decision, UNC outlined all events that led to the petitioner's permanent ban. The court found no evidence of unreasonable action.

As a part of his second argument, petitioner also argued that proper procedure for the General Order was not adhered to as multiple lines of the Notice of Trespass were left blank. The court noted that the goals of the UNC Department of Public Safety's General Order on trespass warnings (informing the trespasser of the restrictions and his right to appeal) were both met even with nominal missing information. UNC was forced to make minor adjustments to their normal notification procedure as the offending incident took place off campus. The court dismissed Donnelly's second argument, finding UNC's procedural error harmless and immaterial.

Finally, the petitioner claimed misuse of power by UNC officials in their retaliation against him by enforcing the indefinite ban.

Petitioner cited *Trulock v. Freeh* (2001), which states public officials are “prohibited from retaliating against individuals who criticize them.” The court determined the current case does not involve criticism of government officials, and therefore, a correlation between the two cases cannot be made. For the aforementioned reasons, the court of appeals affirmed the judgment of the lower court.

## Discussion

The court of appeals held that (1) Donnelly’s speech was not protected by the First Amendment; (2) the university’s decision to ban Donnelly indefinitely was not arbitrary, capricious, or unsupported by substantial evidence; and (3) any procedural error committed by the university in the Notice of Trespass was harmless and immaterial. In his concurring opinion, one judge wrote that the majority missed an opportunity to fully apply the *O’Brien* test (*United States v. O’Brien*, 1968). The four-pronged *O’Brien* test determines whether the regulation of a state actor, limiting a course of conduct involving speech, infringes upon the constitutional rights of those involved. The four prongs include

(1) a government regulation is sufficiently justified if it is within the constitutional power of the government, (2) if it furthers an important or substantial governmental interest, (3) if the governmental interest is unrelated to the suppression of free expression, and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. (*United States v. O’Brien*, 1968)

The judge noted that UNC administrators’ powers clearly fell under the first two prongs, as they have the power to ban an attendee and their “substantial interest” is in providing a safe atmosphere for students. UNC met the third prong, as their interest is the protection of students, not the elimination of Donnelly’s free speech. As previous attempts of curtailing Donnelly’s actions proved unsuccessful, the fourth prong was met when “the restrictions placed on Donnelly” were not greater than UNC’s interests of public safety. In the end, it was determined that UNC was within their bounds to take action against a fan whose behaviors had been deemed unacceptable for a substantial period of time.

## Implications

Player and fan safety should be paramount to those managing sporting events and facilities at all levels, from youth and recreational leagues up through professional sport. Facilities and event managers are tasked with providing a safe atmosphere for players and fans alike. “Fan” is short for “fanatic” for a reason; sporting events present an avenue for patrons to express their fandom in extraordinary ways. A fan may be loud, boisterous, and even aggressive. Heckling and offensive language is often protected by the Supreme Court, limiting sport practitioners to “request civility from fans rather than demand censorship” (Calvert & Richards, 2004, p. 6). Facilities and event managers could look to mitigate potentially dangerous situations in the following ways:

- Instituting a Fan Code of Conduct (e.g., National Collegiate Athletic Association, 2016). Having a code of conduct outlined for fans provides all attendees a clear understanding of permitted behavior and penalties for failing to adhere to that behavior.
- Having reminders of expected behaviors and consequences of failing to meet those expectations. Reminders should be posted in multiple places, such as disclaimers on tickets, facilities websites, in-game announcements, posters throughout the facility, and direct contact with facility personnel. Protocol for removing patrons from the premises should be followed.
- Limiting alcohol sales through strategies such as checking identification of patrons, only allowing an individual to purchase a limited amount of alcohol, halting the sale of alcohol at a predetermined time, and cutting off intoxicated patrons (Lenk et al., 2010).
- Effectively communicating issued citations. Sport practitioners should adhere to due process procedures when issuing citations, such as providing an opportunity for patrons to ask questions regarding the citation and to appeal if necessary.

Harassment, along with inciting fear or engaging in illegal behavior, warrants no constitutional protection due to the substantial governmental interest of public safety. However, it is critical for

facility personnel to recognize that cheering for the opposition and offensive language receive protection under the First Amendment. Guidelines such as these can help create an environment where fans are welcome to cheer for whomever they like, while providing officials an avenue for curtailing unacceptable behavior.

## References

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