

STATE OF MICHIGAN
COURT OF APPEALS

MELISSA GREENE,

UNPUBLISHED

Plaintiff-Appellant,

v

No. 186157

Wayne Circuit Court

PLYMOUTH-CANTON COMMUNITY
SCHOOLS,

LC No. 94-413292

Defendant-Appellee.

Before: MacKenzie, P.J., and Wahls and Markey, JJ.

WAHLS, J. (Dissenting).

I respectfully dissent. I agree with the majority that, in order to have standing to bring a claim before the court, a plaintiff must show that she has a legally protected interest that is in jeopardy of being adversely affected. *Wortelboer v Benzie Co*, 212 Mich App 208, 214; 537 NW2d 603. In the typical case, such a personal interest is shown by demonstrating injury. See *id.* However, because I believe that the allegations in this case were sufficient to endow plaintiff with standing notwithstanding the absence of actual injury, I would adjudicate this case on its merits.

First Amendment freedoms need breathing space to survive. *Federal Election Comm v Hall-Tyner Election Campaign Comm*, 678 F2d 416, 423 (CA 2, 1982). Accordingly, “[w]hen fear of injury that is neither imaginary nor speculative discourages the exercise of valued and revered First Amendment rights, courts must intercede.” In *Babbitt v United Farm Workers Nat’l Union*, 442 US 289; 99 S Ct 2301, 2308-2309; 60 L Ed 2d 895 (1979), the United States Supreme Court fleshed out this holding as it relates to the requirement of actual injury:

A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute’s operation or enforcement. But “[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.”

When contesting the constitutionality of a criminal statute, “it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.” When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he “should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.” [Citations omitted.]

Where a federal constitutional right is asserted in a state court, the most restrictive rule of standing to be applied by such court is the federal one. *Shaskan v Waltham Indus Corp*, 168 Conn 43; 357 A2d 472, 475 (1975).

Michigan law accords with this position. In *Michigan State AFL-CIO v Civil Service Comm*, 191 Mich App 535, 544; 478 NW2d 722 (1991), this Court discussed the interplay between the concept of standing and the requirement of actual controversy. This Court concluded that a court is not necessarily precluded from deciding a dispute before an actual injury has occurred. Rather, the question is whether the plaintiff has an interest in the outcome of litigation sufficient to invoke the controversy-resolving powers of the judiciary:

Under Michigan law, standing is required to insure that only those who have a substantial interest in a dispute will be allowed to come into court to complain. The standing doctrine recognizes that litigation should be conducted only by a party having “an interest that will assure sincere and vigorous advocacy.” A litigant attempting to enforce or vindicate a right extended by statute must also show that he will be detrimentally affected in a manner different than the citizenry at large.

The existence of an “actual controversy” is a condition precedent to invocation of declaratory relief. In general, an actual controversy exists where a declaratory judgment or decree is necessary to guide a plaintiff’s future conduct in order to preserve his legal rights. This requirement of actual controversy prevents a court from deciding hypothetical issues. However, a court is not precluded from reaching issues before actual injuries or losses have occurred. Also, before affirmative declaratory relief can be granted, it is essential that a plaintiff, at a minimum, plead[] facts entitling him to the judgment he seeks and prove[] each fact alleged, i.e. a plaintiff must allege and prove an actual justiciable controversy. Therefore, what is essential is that plaintiffs plead and prove facts that indicate an adverse interest necessitating the sharpening of the issues raised.

The threshold question, then, is whether the individual plaintiffs and the labor unions have an interest in the outcome of this litigation sufficient to invoke the controversy-resolving powers of the judiciary. [*Id.*, pp 544-546 (citations omitted).]

Here, plaintiff has alleged a sufficient personal interest to provide standing. In her complaint, she alleged that, while she was a student at Plymouth Canton Educational Park (PCEP), she participated in a walkout to protest the activities of avowed fascists among the student body. When she became dissatisfied with the administration's actions, plaintiff distributed several copies of a leaflet criticizing the administration. As a result of this, defendant, relying on a prior rule, suspended plaintiff from school for five days. Plaintiff's attorney then faxed defendant a letter challenging the constitutionality of the prior rule. In response, defendant adopted the policy at issue in this case.

Taking these allegations as true, plaintiff has shown that she has "an interest that will assure sincere and vigorous advocacy." *Id.*, p 545. According to plaintiff, defendant's prior approval policy was adopted specifically to address plaintiff's actions. As was the case with the plaintiff in *Babbitt*, *supra*, pp 2308-2309, plaintiff here should not have to await the consummation of threatened injury to obtain preventive relief. Because I believe that plaintiff has standing, I would adjudicate this case on its merits.

/s/ Myron H. Wahls