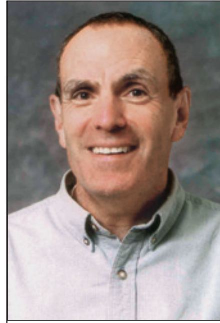
Employees Wearing Religious Attire



While adherents to many religions can be identified by distinctive clothing or accessories, the wearing of such garb by teachers is not necessarily related to evangelism in the classroom.[1] The following case and the accompanying question-and-answer discussion illustrate the problem of the principal caught between the rock of First Amendment establishment clause concerns, often in the form of laws prohibiting school employees from wearing religion-related apparel or jewelry, and the hard place of countervailing individual freedoms, including free exercise of religion, freedom of speech, and the Title VII protection against religious discrimination.

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The Case

During the 2002–03 school year, Brenda Nichol was a paraprofessional in a special education class at Penns Manor Area Elementary School in western Pennsylvania. For the previous five years, she had performed similar duties at the middle school in the same district.[2] Sometime before the end of the 1998–1999 school year, she and all district personnel had received a notice explaining that the Pennsylvania Public School Code did not allow wearing religious jewelry such as "crosses or Stars of David." Yet Nichol continued to wear a cross to school approximately three days per week without tucking it inside her blouse and without any reaction from her co-workers or students.

However, in March of 2003 another staff member informed her special education supervisor that Nichol was wearing a cross at work. The next day, the supervisor reminded Nichol and other staff members of the state law and asked them either not to wear crosses or to keep them concealed by tucking them in. Nichol was not wearing her cross that day, but early the next month she wore it openly again and the special education teacher in her classroom reminded her of the supervisor's request.

When the supervisor followed up a week or so later with another reminder, she explained that his request was like asking her to remove or hide her wedding ring, and that complying would be to shame her "Lord and Savior Jesus." The next day, he gave her a copy of the employee handbook, pointing to the district policy that "employees shall not display any religious emblems, dress, or insignia … includ[ing] jewelry such as crosses or Stars of David" and which lists a one-year suspension as the consequence for the first violation and a permanent suspension for the second. He warned her that if she wore the cross visibly the next day he would have to follow the policy and issue the suspension. She did so, and the district issued the suspension.

Nichol filed suit in federal court, claiming that the suspension violated her First Amendment rights of free exercise of religion and freedom of speech. The district's defenses were that the state statute (which applies to all professional certificated personnel) required, on penalty of criminal prosecution, enforcement against any known violations; and that the district policy (which applies to all employees) is based on not only the statute but also the First Amendment's establishment clause for religious neutrality.

Questions and Answers

Who do you think prevailed in this litigation?

The federal district court issued a preliminary injunction in favor of the plaintiff-paraprofessional.[3] First, the court ruled that the state statute did not apply to Nichol because she was a paraprofessional, not a teacher or other certificated professional. Second, although the district policy applied to Nichol, the court concluded that she was likely to succeed on her First Amendment claims.

The court ruled that by drawing a line between jewelry and other apparel that convey a religious message and those that convey a secular message, the policy constituted viewpoint discrimination contrary to the First Amendment's freedom of religion and expression. The court suggested that "permitting small crosses or similar jewelry with religious content or viewpoint at school, especially in the context that jewelry with secular message content is worn and permitted" would not violate the First Amendment's establishment clause. In response to the district's argument that elementary school students are particularly impressionable, the court pointed to the Supreme Court's 2001 religious-access decision[4] that treated this concern as exaggerated and one-sided.

Would the court's decision have been different if Nichol had been a teacher in Pennsylvania or another state with a strong statute, had worn conspicuous religious attire, such as that associated with devout Sikhs or Muslims, and relied solely on First Amendment freedom of religion? Would the outcome be

the same if she had relied on Title VII of the Civil Rights Act?

Yes, with limitations in relation to both questions.

In a 1986 decision in Oregon, which has a teacher garb statute that carries the ultimate penalty of certification revocation, the state's highest court rejected the freedom of religion claims of a middle school teacher who wore the distinctive dress of her Sikh faith while teaching.[5] Skirting an analysis of the First Amendment's establishment clause, the court viewed the maintenance of religious neutrality in the public schools as a compelling interest that overrode the teacher's constitutional freedom of religion.

One of the significant factors in the court's decision was its perception of the children with whom the teacher had regular contact, depending on their "age, background, and sophistication." *In dicta*, the court distinguished as permissible the wearing of common symbols of religious heritage, such as a "small cross or Star of David"; wearing garments that unintentionally imply membership in a religious group; or dressing in distinctively religious garb to assume a role in a classroom historical exercise or theatrical performance.

As for Title VII, the Third Circuit Court of Appeals in a 1990 decision agreed with the district's statutory defense that it would be an undue hardship to require a school board to violate "an apparently valid criminal statute, thereby exposing its administrators to criminal prosecution and the possible consequences thereof."[6] The court cited the Oregon case as factually indistinguishable and pointed to the Supreme Court's dismissal of the appeal, which included a Title VII issue, as supporting its position. However, the Third Circuit artfully ducked establishment clause analysis, and there was no First Amendment free exercise or expression claim in the case.

If a district in a state with a strong statute refused to hire a teacher based on her ambiguous head covering and her explanation that she did so as an attempted accommodation, without strict observance, of her Muslim faith, would her Title VII outcome have been different?

Again, the answer is a qualified yes. In a 1991 decision, a federal district court in Pennsylvania upheld the Title VII claim of a teacher applicant, concluding that her ambiguous head covering was not reasonably perceived as religious garb and that the district had not explored reasonable accommodations, such as having her agree not to tell children that she covered her head for religious reasons.[7] This decision is limited to its relatively narrow factual and Title VII confines.

If the state did not have a law regarding teachers' religious attire and a school employee wore an ambiguous head covering, such as a red beret, in violation of a dress code not specifically targeted to religious garb, would the Title VII claim likely have a successful judicial outcome?

No, not if the administrators did not have reason to know that the head covering was religious. In a Mississippi case, the federal district court rejected a teacher aide's Title VII claim because, based on her inconsistent actions and vague statements, the administrators were not aware that the practice was part of her religious beliefs before they discharged her for insubordination.[8]

Conclusion

Employee wearing of religious clothing or jewelry is a perplexing issue that merits careful consideration in collaboration with legal counsel rather than either knee-jerk or ostrich-like administrative reaction. First, determine whether your state has a pertinent statute and, if so, its strength and scope. Second, take a preventive approach to potential problems by developing or revising pertinent school policy, making sure that it is reasonably clear and not overly broad; that it provides for progressive and proportional discipline, with appropriate procedural safeguards; and that it extends to secular forms of employee garb based on such justifiable concerns as safety and effective instruction.

In applying such prohibitions, keep in mind:

- Whether the garb is conspicuous or ambiguous in terms of religion in the eyes of the reasonable observer;
- The extent of contact that the employee has with children and, to a lesser extent, their age and his or her level of authority;
- Whether the problem is resolvable via less restrictive alternatives or reasonable accommodations; and
- Whether the policy is administered with reasonable consistency.

Finally, in such a fluid area of law, the principal's careful consultation, via central office, with district legal counsel is especially advisable. ■

Notes

1. *See, e.g.,* Perry Zirkel, "Evangelism in the Classroom," *Principal*, November 1998, 62–63. For a more recent case, see *Marchi v. Bd. of Coop. Educ. Serv.,* 173 F.3d 469 (2d Cir. 1999) (upheld constitutionality of directive that special education teacher refrain from using religious references in his instruction).
2. Although her employer was an intermediate unit, we identify the school district as her employer for the sake of simplicity and coherence, because the terminology for and scope of intermediate units vary from state to state.
3. *Nichol v. Arin Intermediate Unit 28,* 268 F. Supp. 2d 536 (W.D. Pa. 2003).
4. *Good News Club v. Milford Cent. Sch.,* 533 U.S. 98 (2001) (district's denial of facilities access to otherwise eligible organization based on its religious viewpoint violates First Amendment expression).
5. *Cooper v. Eugene Sch. Dist. No. 4J,* 723 P.2d 298 (Or. 1986), *appeal dismissed,* 480 U.S. 942 (1987).
6. *United States v. Bd. of Educ. for the Sch. Dist. of Philadelphia,* 911 F.2d 881 (3d Cir. 1990).
7. *EEOC v. Reads, Inc.,* 759 F. Supp. 1150 (E.D. Pa. 1991).
8. *McGlothin v. Jackson Mun. Separate Sch. Dist.,* 829 F. Supp. 853 (S.D. Miss. 1992).

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