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Employment Law Note

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Ninth Circuit Revives Teacher's First Amendment Lawsuit and Rules MAGA Hat Was Protected Speech

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Plaintiff Eric Dodge was a long-time teacher in the Evergreen School District ("the District") in Vancouver, Washington. In August 2019, Dodge attended two teacher training days and brought a Make America Great Again ("MAGA") hat. The first day of training involved cultural sensitivity and racial bias training presented by a professor from Washington State University. Dodge wore his MAGA hat up to the front doors of the school and then took it off when he entered the building. During the training, Dodge sat near the back of the room and placed his hat either on the table in front of him or on top of his backpack but did not wear his hat during the training.

The professor leading the training saw Dodge's hat and complained to Principal Caroline Garrett after the training that she felt intimidated and traumatized. Garrett also learned that Dodge's hat upset a few teachers who attended the training. One teacher had cried, and another found the hat "threatening." There was no allegation that Dodge did anything with his hat during the training other than place it near him with his other things, nor was there any allegation that he did anything to interfere with or disrupt the training.

Garrett consulted with the District's HR Officer, and they agreed that Garrett would speak with Dodge and explain the reaction the hat had elicited. When Garrett talked to Dodge, Dodge stated that he wore the hat to protect sunspots on his head and because he liked the message behind the hat. Garrett told him that "some people take [the hat] as a symbol of hate and bigotry," and he needed to use "better judgment" in the future.

The next day, Dodge attended another teacher training. He again wore his MAGA hat before entering the building and then took it off while he was inside. A teacher who was present at the first day's training saw the hat and texted Garrett. After consulting with the HR Officer, Garrett spoke with Dodge again. According to Dodge, during their conversation Garrett called him a racist, a bigot, a homophobe, and a liar, and swore at him for having his MAGA hat with him again. Dodge also claims that Garrett suggested that disciplinary action could occur if she saw Dodge with his hat again by stating to Dodge: "The next time I see you with that hat, you need to have your union rep."

Dodge filed a harassment, intimidation, and bullying complaint against Garrett. The HR Officer contracted a third party to investigate and determine whether Garrett violated District policies in her treatment of Dodge. The investigator concluded that Garrett had not technically violated any school policy because the District's antidiscrimination policy did not ban discrimination based on political beliefs, and the encounters between Dodge and Garrett did not rise to the level of harassment, intimidation, or bullying. The HR Officer relied on the investigation report in determining that no policy violation had occurred. Dodge appealed the denial of his complaint to the school board, and the school board affirmed.

Dodge sued Garrett and the HR Officer under 42 U.S.C. § 1983, claiming that they retaliated against him for having his MAGA hat in violation of his First Amendment right to free speech. He also sued the District, claiming that the school board ratified the unconstitutional actions of Garrett and the HR Officer by affirming the denial of his complaint.

The district court held that Garrett and the HR Officer were entitled to qualified immunity because it was not clearly established that their actions violated the Constitution. The district court also concluded that Dodge failed to present evidence that the school board ratified any unconstitutional actions by Garrett or the HR Officer and, even if it had, there was not a sufficient causal connection between the school board's decision to affirm the denial of Dodge's complaint and Dodge's injury. Dodge appealed. The Ninth Circuit Court of Appeals affirmed the district court's grant of summary judgment for the HR Officer and the District, but it reversed and remanded as to Garrett.

MAGA Hat Was Protected Speech

The Ninth Circuit held that Dodge was engaged in speech protected by the First Amendment. The Court concluded that Dodge's speech was his display of Donald Trump's presidential campaign slogan on a red hat, and "[t]he content of this speech is quintessentially a matter of public concern." The Court noted that Garrett and others "viewed Dodge's hat as a comment on issues such as immigration, racism, and bigotry, which are all matters of public concern," and that "regardless of Dodge's intent, the MAGA hat has an obvious political nature." Further, because Dodge had no official duty to wear the MAGA hat and he did not wear the hat in school with students, the Court concluded that Dodge was engaging in expression as a private citizen, not a public employee.

Principal's Threat of Discipline May Be Adverse Action

The Court held that a jury must decide whether Garrett's conduct constituted an adverse employment action. To determine if an adverse employment action occurred for purposes of First Amendment retaliation, the Court applied the "reasonably likely to deter" test. The Court stated that Garrett's criticism of Dodge for bringing his MAGA hat to teacher training did not constitute an adverse employment action in this case; however, her suggestion that disciplinary action could occur if she saw Dodge with his hat again could have been reasonably interpreted by Dodge as a threat against his employment. The Court said the claim against the HR Officer could not proceed because she did not take any adverse action against Dodge.

Speech that Upset Co-Workers Was Not a Disruption

The Court concluded that Garrett's asserted administrative interest in preventing disruption among staff did not outweigh Dodge's right to free speech. Promoting workplace efficiency and avoiding workplace disruption is a valid government interest that can justify speech restrictions. The Court, however, concluded that while some training attendees may have been outraged or offended by Dodge's political expression, there was no evidence of actual or tangible disruption to school operations.

Perceived Unpopularity of a Political View is Not Justification to Prohibit Protected Speech

Finally, the Court concluded that Dodge's constitutional right to express political views, even as a public-school teacher, was clearly established at the time of the violation. Although a government employer can categorically prohibit political speech as a valid administrative interest, the District had no general prohibition on political speech when Garrett told Dodge he could not bring his MAGA hat to school. Garrett openly admitted her allowance of other political symbols and speech at her school, including a Black Lives Matter poster hanging in the school library and a Bernie Sanders bumper sticker displayed on her own car. The Court concluded that a reasonable school administrator at the time of the events in this case would have known that the disparate treatment was improper, and the perceived unpopularity of a political view is not itself justification to prohibit protected expression.

Different Rules for Private Employers

Although First Amendment protections are enjoyed by public-sector employees, such as Dodge, there are different rules for private-sector employees. The First Amendment does not limit private employers. The Bill of Rights—and the First Amendment—limit only government actors, not private actors. This means that private employers can restrict employee speech in the workplace without running afoul of the First Amendment. Public employers, on the other hand, are government actors and are subject to the limitations of the Bill of Rights, including the First Amendment. Still, private employers operating within the City of Seattle should be careful of violating employee free-speech rights by attempting to regulate political speech. The Seattle Municipal Code states that political ideology is considered a "protected class," which means that employers cannot discriminate against employees on the basis of their political ideology.

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