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Trials&TRIBULATIONS

Can teachers be banned from wearing campaign buttons?

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On Oct. 17, U.S. District Court Judge Lewis A. Kaplan, in *Weingarten v. Board of Education of the City School District of the City of New York*, 2008 WL 4620573 (S.D.N.Y.) answered in the affirmative.

The court ruled in connection with a preliminary injunction motion that the Board of Education of the New York City School District (BOE) can prohibit the wearing of political campaign buttons in BOE buildings, and doing so does not violate the First Amendment of the U.S. Constitution.

The court also found that posting candidate political materials on bulletin boards designated for union use in BOE buildings, and placing candidate-related political materials in staff mailboxes, is permitted activity and cannot be banned.

It may be difficult to reconcile Judge Kaplan's opinion with Second Circuit decisions from the early 1970's, two of which were litigated in our local federal court before being appealed to the U.S. Court of Appeals for the Second Circuit. It remains uncertain whether Judge Kaplan's decision ever be will reviewed by the Court of Appeals since it was issued in response to a preliminary injunction motion and, according to the plaintiffs' attorney Alan Klinger, it is unclear whether the case will proceed to a final judgment.

Judge Kaplan's decision concludes that prior Second Circuit decisions — *James v. Board of Education Central School District of the Town of Attison*, 461 F. 2d 566 (Second Cir. 1972) and *Russo v. Central School District No. 1 of the Town of Rush*, 469 F.2d 623 (Second Cir. 1972), *cert.* denied 411 U.S. 932 (1973) — are not controlling authority. Instead, the court relied on an intermediate appellate court in California, which found, in essence, that a public school constitutionally can prohibit teachers from wearing campaign buttons in the classroom. That California case relied on the U.S. Supreme Court case of *Hazelwood School District v. Kuhlmeir*, 484 U.S. 260 (1984), which did not deal with campaign buttons or teachers, but instead addressed the extent to which a principal may remove articles he found offensive from a student newspaper.

It appears the Second Circuit decisions in *James* and *Russo* are infinitely closer to the facts in *Weingarten* compared to *Hazelwood*, yet Judge Kaplan concluded the Second Circuit precedent "has been undermined seriously by more than three decades of subsequent decisions" (p. 5). To what extent has the authority they were based on been undermined?

In 1969, Charles James was employed as an 11th grade English teacher at Attison High School near Elmira, N.Y., and he chose to wear a black armband to class as a protest to the country's continued involvement in the Vietnam War.

The principal there ordered James to remove the armband or risk suspension or dismissal, stating it would encourage students to engage in disruptive demonstrations. When James refused, he was suspended and, subsequently, discharged.

After exhausting his administrative remedies through an appeal to the Commissioner of Education, James filed a civil rights action in the Western District of New York; the case was heard by U.S. District Judge Harold Burke. Judge Burke granted the defendant's motion for summary judgment, dismissing the complaint, and the case was appealed to the Second Circuit.

Second Circuit Judge Irving Kaufman reversed Judge Burke's decision, and the case was remanded to the district court for further proceedings.

Judge Kaufman relied primarily on *Tinker v DesMoines Independent Community School District*, 393 U.S. 503 (1969), which dealt with a regulation that prohibited the wearing of black armbands by students while in school facilities. The U.S. Supreme Court found that such a prohibition violated students' First Amendment rights.

In reversing the district court, the Court of Appeals concluded that a board of education may not prohibit a teacher's expression of a political opinion, and that doing so would violate the teacher's First Amendment rights.

In addition to *Tinker*, the court also relied on *Pickering v. Board of Education*, 391 U.S. 563 (1968), which dealt with a teacher's reinstatement after being discharged for sending a letter that criticized the board and district superintendent of schools to the local newspaper.

Both *Tinker* and *Pickering* repeatedly have been relied upon by courts throughout the country, and there does not appear to be any

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evidence that their precedent-setting value has been undermined.

Russo involved an art teacher in the Rush-Henrietta School District who refused to participate in the school's daily flag salute. Although she rose from her seat and faced the flag, she refused to recite the Pledge of Allegiance and salute it. When her conduct finally was brought to the attention of school officials, she was summoned to the principal's office, whereshe explained that her refusal to salute the flag was a matter of "personal conscience." At the end of the school year, she was dismissed. No reasons were provided for her dismissal.

In response to her firing, she filed a civil rights action in U.S. District Court. After a trial, Judge Harold Burke dismissed the complaint and, in a relatively brief decision, concluded that neither the First nor the 14th Amendments were violated by Russo's dismissal.

The case was appealed to the Second Circuit and Judge Irving Kaufman, in an opinion critical of Judge Burke, concluded Russo's dismissal was improper and in violation of her First Amendment rights of freedom of speech: "[T]he right to remain silent in the face of an illegitimate demand for speech is as much a part of the First Amendment protections as the right to speak out in the face of an illegitimate demand for silence," (*Russo* p. 634).

In analyzing the authority upon which the Court of Appeals relied, it is clear that in the 36 years that have elapsed since the decision, the cases remain of precedential value, including the decisions in *Pickering v. Board of Education,* 391 U.S. 563 (1968); *Tinker v. DesMoines Independent Community School District,* 393 U.S. 503 (1969); and *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943) (students' refusal to pledge allegiance to the flag cannot be the basis for expulsion).

In analyzing *James* and *Russo,* it appears the authority for both decisions has not been undermined. In fact, it was relied on, partially, by Judge Kaplan in his decision.

Although it is difficult to reconcile Judge Kaplan's decision in *Weingarten* with Second Circuit precedent, the plaintiffs in both *James* and *Russo* were terminated from teaching positions for exercising their First Amendment rights; whereas *Weingarten* simply was a case where a rule prohibiting the wearing of campaign buttons was challenged (not a teacher's dismissal). In the event a teacher is recalcitrant and refuses to remove a campaign button, one would be faced with determining whether the confrontation is comparable to the situations in *James* and *Russo*, so that the First Amendment would bar their termination.

I believe the decisions in *James* and *Russo* would control and, unlike Judge Kaplan in *Weingarten*, the Court of Appeals would have a difficult time sidestepping those decisions.

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