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Restrictive Dress Code Did Not Violate First Amendment

SUMMARY: A Texas school dress code prohibiting any t-shirt messages, except those promoting school spirit, did not violate the First Amendment. The United States Court of Appeals for the Fifth Circuit decided *Palmer v. Waxahachie Independent School District* on August 13, 2009.

BACKGROUND: In September 2007, Waxahachie High School had a dress code prohibiting t-shirts with any printed messages, unless the message promoted a school club, sports team, university, or school spirit. Polo shirts with messages were permitted.

Paul Palmer, a sophomore, came to school wearing a t-shirt bearing the words "San Diego." The school's assistant principal told Palmer that his shirt violated the district dress code. Palmer called his parents for a replacement t-shirt. The one they brought him said, "John Edwards for President '08." The assistant principal disallowed that shirt, too. Palmer appealed to the principal and the superintendent, who agreed that the shirt was prohibited.

Palmer sued the school in federal district court, arguing that its policy violated his First Amendment right to free speech. He moved for temporary and permanent injunctions barring the school from enforcing the dress code. Before the hearing on his motion, the school modified its dress code. The new code added bans of university messages and polo shirts with messages. The code did not prohibit political pins, buttons, bumper stickers or wrist bands. It also allowed logos that were smaller than two inches by two inches.

The district court found the dress code constitutional and denied Palmer's motion. He appealed to the Fifth Circuit Court of Appeals.

ANALYSIS: The First Amendment states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The portion of the amendment dealing with speech is short and clearly worded: "Congress shall make no law . . . abridging the freedom of speech." The courts have interpreted the amendment as applying not just to Congress, but to government generally. Public schools are considered to be part of, or instrumentalities of, the government. Therefore, public schools are subject to the Constitution. A public school prohibiting a student from wearing a shirt with a message would seem to violate of the Constitution's First Amendment.

While the Constitution says that "NO LAW" shall abridge freedom of speech, such a strict proscription does not work in practice. You can't just exercise an unlimited freedom of speech. You cannot "shout fire in a crowded theatre." You cannot slander or defame someone with untrue statements. You cannot interrupt a public performance with disruptive talk. You cannot incite riots with speeches. There are laws that might be said to abridge freedom of speech.

To prevent the exercise of free speech rights from trammeling other rights, courts have applied "time, place and manner restrictions" to the First Amendment. How strongly the right to speak is protected depends on where the speaker seeks to exercise the right. Palmer wanted to speak through a printed t-shirt in a public school. Because schools are charged with educating the nation's youth, they have extended leeway in controlling speech. In schools, individual rights are sometimes restrained to maintain a safe and effective learning environment.

Courts are frequently called upon to interpret the First Amendment. The Supreme Court has issued several important opinions on this issue. Under current law, schools can regulate school-sponsored speech, such as that appearing in the school paper; schools can prohibit sexually explicit, indecent, or lewd speech; and schools can ban speech that promotes the use of illegal drugs. Palmer argued that because his San Diego and Edwards for President t-shirt messages were outside those prohibitions, they were constitutionally protected.

The Fifth Circuit agreed that Palmer would win, if those were the only permissible restrictions on speech in school. They were not the only ones, however. The Fifth

Circuit ruled in a case called *Canady v. Bossier Parish School Board* that a school could impose content-neutral restrictions for its students' benefit. A content-neutral restriction prohibits all messages of a particular type. The rule is not content-neutral if it singles out and prohibits a particular position with which the school disagrees.

Where a school rule is content-neutral, the Fifth Circuit reviews it under a time, place and manner analysis. Under this approach, the rule is valid if it furthers an important or substantial government interest, the interest is unrelated to the suppression of student expression, and the incidental restrictions on First Amendment activity are no more restrictive than necessary to advance that interest. Palmer argued that the code failed the first and third parts of this test.

The dress code's preamble states that the code was adopted "to maintain an orderly and safe learning environment, increase the focus on instruction, promote safety and life-long learning, and encourage professional and responsible dress for all students." The school studied dress codes and their effects in numerous other schools before adopting their own. The court found that Waxahachie's dress code promoted an important school interest.

Palmer also argued that the code was more restrictive than it needed to be. There was no need to ban messages on shirts, he maintained, if students were free to convey the very same ideas with buttons, pins, wrist-bands, bumper stickers and small logos. The court found this argument illogical. Was Palmer arguing that the dress code was more restrictive than it needed to be because it was not restrictive enough? The school was free to determine that shirt logos, which are readily visible to anyone in the area, are more disruptive than buttons or wrist-bands, which must be studied closely for strangers to read their message.

The court found the dress code a reasonable and constitutional means of advancing its stated objectives and ruled against Palmer.

EXCERPTS FROM THE COURT'S OPINION (By Judge Smith): "We must decide whether the District's dress code is content-neutral. The District does not allow messages on shirts, but it exempts small logos on shirts and campus principal approved shirts that promote school clubs, organizations, athletic teams, or school spirit. Palmer argues that the dress code's exemption for small logos and school-sponsored shirts by definition violates content-neutrality, because it distinguishes based on content. Similar allegedly-content-based dress code exceptions have been examined by three other federal courts and found to be content-neutral.

"As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based. A dress code 'is content based if . . . it differentiates based on the content of the speech on its face.' The District's code, however, is content-neutral. In its preeminent case on content-neutral regulation, *Ward v. Rock Against Racism*, the [Supreme] Court stated that '[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.' The Court has reiterated this principle. '[A] regulation is generally "content-neutral" if its restrictions on speech are not based on disagreement with the message it conveys.'

"The District was in no way attempting to suppress any student's expression through its dress code—a critical fact based on earlier student speech cases—so the dress code is content-neutral. Its allowance for school logos and school-sponsored shirts does not suppress unpopular viewpoints but provides students with more clothing options than they would have had under a complete ban on messages."



COMMENTS & QUESTIONS

Palmer v. Waxahachie Independent School District

1. What message was Paul Palmer trying to deliver at his school? In what way was he trying to deliver it?
2. Was his message political?
3. What reason did the school give for censoring his speech?

Precedent is an important principle in our legal system. How a given case should be decided turns not only on constitutional provisions and laws passed by legislatures, but also according to courts' own prior rulings. Precedent describes prior cases addressing the same legal question. Where a court has ruled one way under a given set of facts, precedent requires the court to rule consistently with that decision in a later case that raises a similar situation—or to overrule the prior case. Parties and judges do not always agree over what is “precedential,” however. They frequently disagree over the application of a particular case to the present controversy before the court. Those who feel bound by the case regard it as precedent; those who do not will call it “distinguishable,” noting the critical difference they see between the facts of the prior and the present case.

Public school free speech cases are frequently cited in dress code cases even though those cases are unrelated to actual dress or appearance conflicts. The court followed free speech precedent in this case to test the limits of the dress code, but they interpreted the precedents differently than Palmer would have.

Public school dress code cases are plentiful and reach varying results. Generally, however, the courts give leeway to school officials in drafting rules to safeguard the educational environment. Courts have upheld dress codes that prohibit the wearing of gang colors, have prohibited the wearing of religious symbols, have prohibited the wearing of Confederate symbols and prohibited attire found to be vulgar offensive or contrary to the mission of the school.

The case at hand is interesting because it prohibits all forms of speech and all messages on T-shirts worn to school. Is it not a violation of the First Amendment to preclude all speech? Was a school attempting to preclude all forms of speech or were they merely precluding speech on clothing? Do you think the Waxahachie dress code makes sense? Do you agree with the court's decision?

Do you think that dress codes improve the educational environment?

Proponents of dress codes would say that the codes are appropriate because they: 1) eliminate opportunities for ridicule of the less popular or less fortunate students based on attire; 2) decrease theft and violence among students over designer clothing and expensive sneakers; 3) help prevent gang activity resulting from gang colors and insignia at school; 4) instill students with discipline; 5) help parents and students resist peer pressure; 6) help students concentrate on their schoolwork; and 7) help school officials recognize intruders who might come in to the school.

Opponents of dress codes would say that the codes are inappropriate because they: 1) stifle the self-expression of the students, forcing them to find other less appropriate ways to express themselves; 2) force students into one mold, thereby removing the student individuality when they should be embracing and celebrating diversity; 3) undermine socialization of the students and do not prepare students for the real world; 4) increase the cost of clothing for families that buy from secondhand stores or rely on hand-me-down clothing from friends and family; and 5) although in theory uniforms should improve academic, behavioral, and social outcomes, in reality they do not. Opponents would argue there is no valid reason to standardize student dress.

Surveillance Cameras Did Not Violate Employees' Privacy

SUMMARY: A video camera installed in an office shared by two employees did not unlawfully violate their privacy where the equipment was not intended to monitor them, was not turned on during their regular business hours, and was justified by the employer's sheltering of vulnerable child residents who were at potential risk of harm from the unknown person violating company computer policy late at night. The Supreme Court of California decided *Hernandez v. Hillsides, Inc.*, on August 3, 2009.

BACKGROUND: Hillsides Children's Center is a private, nonprofit residential facility for neglected and abused children. Some of these children have been sexually abused and exposed to pornographic materials and behaviors. As a result of these vulnerable residents in its care, the facility has a heightened concern with sexual behavior on its grounds.

The computer system at Hillsides is monitored by the facility's computer staff, including the websites each computer within the facility has visited. In July 2002, computer records indicated that pornographic websites were being accessed by at least two computers on Hillsides grounds in the late night/early morning hours. One was in the computer center. The other was on a desk used by Maria-Jose Lopez in an office she shared with Abigail Hernandez.

Although computer records could specify what was being viewed and where, they could not confirm who was using the computer. Facility Director John M. Hitchcock felt it was his duty to attempt to identify the responsible party to prevent any potential harm this person might pose to their 66 child residents and to avoid the risk of legal liability for failure to act. Moreover, viewing explicit sexual websites was prohibited by Hillsides policy and therefore warranted disciplinary measures or termination.

Hitchcock decided that the most effective way to identify the perpetrator was to secure his or her image on videotape. Initially, he had planned to affix a concealed camera in the computer center. After attempting this plan, he determined that that room was too big, with too many occupants, to set up camera surveillance without swift detection, which would inhibit further prohibited computer use.

Hitchcock neither suspected Hernandez and Lopez of wrongdoing nor intended to videotape them. Instead, he had hoped simply to catch the illicit user in their office late at night.

He installed a camera hidden on a shelf behind some personal effects and a motion detector in another area. Elsewhere, in a locked storage room, Hitchcock installed a monitor and some recording equipment attached to the camera and motion detector. In order for the system to record images of activity in the women's office, the monitor and video recorder needed to be turned on. Hitchcock did not leave this equipment operating during the day. Instead, he turned on the monitor and recorder only a few times over a three-week period. The resulting tapes did not reveal anyone in the office after hours.

After about three weeks in place, the hidden camera was discovered by the women in their office. They immediately went to Hitchcock. He explained that he had installed the system, and the reason for doing so. He told them he had not recorded either of the women and promptly showed them the surveillance tape.

Hernandez and Lopez sued the facility alleging an unlawful breach of their privacy. Hillsides and Hitchcock moved for summary judgment. The district court granted the motion and the women appealed. The appeals court reversed and defendants appealed to the California Supreme Court.

ANALYSIS: The legal concept of privacy describes a person's reasonable expectation of freedom from close scrutiny in certain contexts. Context is critical to this right. Stock exchanges, for example, can be open, loud, spaces crammed with people. The office Hernandez and Lopez shared was much more private. It served only the two of them and included blinds on the windows and a lock on the door. Near the floor, the door also had a pet door, which was missing the flap to close it.

The women testified that they would sometimes close the blinds and lock the door to change into or out of exercise clothing. They found the idea that their hidden actions might be videotaped highly offensive. Hitchcock, though sorry for the means he felt necessary to catch the culprit, argued that the circumstances in this case should not amount to unlawful violation of privacy.

The California Supreme Court summarized the factors essential in proving a privacy violation. First, a person must possess a legally protected privacy interest. Privacy interests include conducting personal activities without observation, intrusion, or interference. Second, the privacy interest must be reasonable. Finally, the plaintiff must show that the intrusion is so serious in nature and scope as to constitute an egregious breach of social norms.

Because Hernandez and Lopez occupied an office with its own door and blinds, the court ruled that they had some reasonable, legally recognizable privacy interest. The next question was whether what Hitchcock had done in his pursuit of illicit computer users was highly offensive such that a reasonable person would find his actions to be an egregious breach of social norms. To determine how intrusive a reasonable person would find Hitchcock's hidden camera, the court examined all of the surrounding circumstances, including the degree and setting of the privacy intrusion, and the intruder's motives and objectives.

Hitchcock did not operate the video monitor and recorder while Hernandez and Lopez were present—whoever was sneaking into their office would not do so while they were at work. He had also placed the monitor and recorder, the only means of viewing activities in the women's office remotely, in a locked storage room to which only a few staff members had access. The recording equipment did not run continuously. Instead, Hitchcock kept it off except during the few evenings he selected for monitoring, at which point the monitor and recorder had to be turned on manually in the storage room. As to the setting of the intrusion, Hitchcock had wanted to monitor the computer lab but could not find a place to hide a camera there. He considered telling Hernandez and Lopez about the camera in their office but was concerned that word of his plan would get out and spoil his effort to find the violator. Because of his care in avoiding the two women, he did not record their activities. He also failed to detect the person misusing their computer.

Although the women had a reasonable expectation of privacy, the circumstances in this case did not rise to the level of highly offensive because of Hitchcock's duty to find the person viewing pornography at a facility housing abused children. Because the women did not meet all of the standards for a privacy violation, the California Supreme Court dismissed their claim. The district court had been correct to grant defendants' motion for summary judgment.

EXCERPTS FROM THE COURT'S OPINION (By Justice Baxter): “A grant of summary judgment is proper where it appears no triable issues of material fact exist, and judgment is warranted as a matter of law. As the moving party, the defendant must show that the plaintiff has not established, and cannot reasonably expect to establish, a prima facie case on one or more elements of the cause of action. The reviewing court independently examines the record and considers all of the evidence set forth in the moving and opposing papers except that as to which objections have been made and sustained.

“[P]rivacy is not a binary, all-or-nothing characteristic. There are degrees and nuances to societal

recognition of our expectations of privacy: the fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law.

“[C]ourts have examined the physical layout of the area intruded upon, its relationship to the workplace as a whole, and the nature of the activities commonly performed in such places. At one end of the spectrum are settings in which work or business is conducted in an open and accessible space, within the sight and hearing not only of coworkers and supervisors, but also of customers, visitors, and the general public. At the other end of the spectrum are areas in the workplace subject to restricted access and limited view, and reserved exclusively for performing bodily functions or other inherently personal acts. The present scenario falls between these extremes.

“Employees who retreat into a shared or solo office, and who perform work and personal activities in relative seclusion there, would not reasonably expect to be the subject of televised spying and secret filming by their employer. Courts have acknowledged the intrusive effect for tort purposes of hidden cameras and video recorders in settings that otherwise seem private. It has been said that the unblinking lens can be more penetrating than the naked eye with respect to duration, proximity, focus, and vantage point. Such monitoring and recording denies the actor a key feature of privacy—the right to control the dissemination of his image and actions. We have made clear that the ‘mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone.’

“Some statutes criminalize the use of camcorders, motion picture cameras, or photographic cameras to violate reasonable expectations of privacy in specified areas in which persons commonly undress or perform other intimate acts. Liability exists, under certain circumstances, where the lens allows the intruder to look into or view the protected area. Of course, the intruder also cannot secretly videotape, film, photograph, or record anyone in that private place where various conditions exist.

“Hitchcock hid the video equipment in plaintiffs' office from view in an apparent attempt to prevent anyone from discovering, avoiding, or dismantling it. He used a camera and motion detector small enough to tuck inside and around decorative items perched on different bookshelves, both high and low. Plaintiffs presumably would have been caught in the camera's sights if they had returned to work after hours, or if Hitchcock had been mistaken about them having left the office when he activated the system. Additionally, except for the one day in which Hitchcock removed the camera from plaintiffs'

office, the means to activate the monitoring and recording functions were available around the clock, for three weeks, to anyone who had access to the storage room. Assuming the storage room was locked, as many as eight to 11 employees had keys under plaintiffs' version of the facts (depending upon the total number of program directors at Hillsides).

"Hitchcock connected the wireless devices and allowed the system to remotely monitor and record events inside plaintiffs' office only after their shifts ended, and after they normally left Hillsides' property. He never activated the system during regular business hours when plaintiffs were scheduled to work. The evidence shows they were not secretly viewed or taped while engaged in personal or clerical activities.

"[W]e agree with defendants that their successful

effort to avoid capturing plaintiffs on camera is inconsistent with an egregious breach of social norms. This case does not involve surveillance measures conducted for socially repugnant or unprotected reasons. Nor, contrary to what plaintiffs imply, does the record reveal the absence of any reasonable justification or beneficial motivation. The undisputed evidence is that defendants installed video surveillance equipment in plaintiffs' office, and activated it three times after they left work, in order to confirm a strong suspicion—triggered by publicized network tracking measures—that an unknown staff person was engaged in unauthorized and inappropriate computer use at night. Given the apparent risks under existing law of doing nothing to avert the problem, and the limited range of available solutions, defendants' conduct was not highly offensive for purposes of establishing a tortious intrusion into private matters."



COMMENTS & QUESTIONS

Hernandez v. Hillsides, Inc.

1. Where did Maria-Jose Lopez and Abigail Hernandez work? What service did that organization provide?
2. How did their office become the focus of Director Hitchcock's attention?
3. Was it the only area at the facility he was concerned about?

Ordinarily a private employer has broad control over its employees. An employer can create certain rights for employees, beyond those enforced by statute, with a written policy setting forth conduct the employer will not tolerate and the repercussions that follow from violating the policy. The facility here had an established computer-use policy, distributed to all employees, that prohibited accessing sexually explicit websites from the employer's computers. The fact that such websites had been accessed created grounds for discipline. The policy did not, however, give notice that the employer might begin secret videotaping of employees when the policy was violated. Had it done so, a court would consider that fact in evaluating employees' claimed expectation of privacy.

Where an employer owns a building, desks, chairs and offices, and pays employees for their time there, why do employees feel they have a right to engage in private activities outside the employer's view?

Do employers have a right to monitor their employees on property the employer owns? Why would an employer want to do this? Can an employer hire someone to spy on other employees? Could this internal investigator eavesdrop on employee conversations or watch them across the room without their knowledge? Could this internal spy watch employees through binoculars or a telescope? Could she record them with hidden cameras or microphones? Would it matter whether the recording device was attached to the "spy" or hidden in an employee office?

If employers are allowed to monitor employees, can they do this anywhere? Can they monitor everything their employees do? Should employers be required to provide notice to their employees that their activities might be monitored? Is being videotaped less offensive when people have notice of it? What if they have notice that it could happen, but don't know where or when?

What if Hitchcock discovered that someone was sneaking in at night and downloading copyrighted music illegally and recording it on company CDs? Would setting up a covert camera to capture footage of this person be justified?

If the cameras had captured the person misusing the computers, would that justify Hitchcock's methods and eliminate any privacy claim by Lopez and Hernandez?

Do you think that employees should have any "expectation of privacy" while they are on their employers premises?

Do you think that this ruling will encourage employers to use employee surveillance systems in their businesses? Do you think this is good public policy?

Punitive Damages Awarded for Employment Discrimination

SUMMARY: Where Wal-Mart refused to pay a female pharmacist comparably to its male pharmacists and terminated her when she complained about it on asserted bases for which they had not punished males, a jury could permissibly find that punitive damages were warranted under Massachusetts law. The Massachusetts Supreme Court decided *Haddad v. Wal-Mart Stores, Inc.*, on October 5, 2009.

BACKGROUND: Cynthia Haddad worked as a pharmacist at Wal-Mart for ten years. Massachusetts law requires every pharmacy to have a “manager of record,” who is a registered pharmacist responsible for complying with state and federal drug reporting requirements and supervising the pharmacy staff. In addition to their hourly pharmacist wages, Wal-Mart pharmacy managers received an additional hourly stipend and an annual bonus.

For most of her years with Wal-Mart, Haddad worked as a staff pharmacist. She received consistently excellent evaluations. In March 2003, she accepted a pharmacy manager job on a temporary basis. Her pay was considerably lower than that of any male pharmacy manager in her region. Wal-Mart told her that she would receive the additional hourly pay the company gave to all pharmacy managers, but she did not receive it. After numerous complaints, in April 2004 she finally received a check for the pharmacy manager’s bonus. She never received the additional hourly pay that it was company policy to provide.

Five days after the company gave her the pharmacy manager’s bonus, the district manager and two other Wal-Mart managers met with Haddad. They questioned her about two fraudulent prescriptions written and filled by a pharmacy technician named Kristin Baran. One was written in October 2002 while Haddad was on duty, and one was written on March 20, 2004, while a male pharmacist, Richard Blackbird, was on duty. Haddad said she knew nothing of the fraudulent prescriptions, but that the October 2002 prescription could have been written when she left the pharmacy to purchase a soda at a nearby counter, while she was in the restroom, when she was in the front of the pharmacy talking to customers, or when she was in the back eating lunch or counting narcotics to ensure against theft. She was fired the day the company managers met with her. They told her she was being fired for “failing to secure the pharmacy” when she briefly left the area unattended. Baran was also fired. The prescription from March 2004 was initialed by Richard Blackbird. He was not fired for that incident, nor was he reprimanded or questioned.

Haddad sued Wal-Mart for sex discrimination. The jury awarded her \$972,774 dollars in compensatory damages (for pay she would otherwise have earned) and \$1 million in punitive damages. The trial judge granted Wal-Mart’s motion to set aside the punitive damages award and both parties appealed to the state supreme court for direct review, which the court granted.

ANALYSIS: In Massachusetts, punitive damages may be awarded for conduct that is outrageous because of the defendant’s evil motive or his reckless indifference to the rights of others. An award of punitive damages requires a determination of the defendant’s intent or state of mind. These determinations are properly left to the jury, whose verdict should be sustained if it could ‘reasonably have been arrived at from any evidence presented.’

Wal-Mart argued that it was wrong to award punitive damages against the company because there was a valid basis for terminating Haddad—failing to secure the pharmacy, an oversight that allowed Baran to write a fraudulent prescription while Haddad was away. Yet Wal-Mart could not produce proof that its policy was to prohibit leaving the pharmacy area. Other pharmacy employees testified that they also left it for various reasons during the day without discussion or reprimand. The court also noted that Haddad was not pharmacy manager at the time of that incident. She was only a staff pharmacist, the same job level Richard Blackbird held when he initialed a fraudulent prescription a month before Haddad was fired and for which Blackbird was not punished.

During trial testimony, various Wal-Mart managers provided statements that conflicted with those of other employees and also contradicted things the managers had said in their interrogatory answers in pre-trial discovery.

Looking at the unreliable and controversial reasons Wal-Mart offered for firing Haddad, along with their inequitable treatment of her in pay and discipline compared to male pharmacists, the court determined that a jury could reasonably find that Wal-Mart had an evil motive toward Haddad or was recklessly indifferent as to how their unequal treatment would affect her.

Because the lower court judge had not stated Massachusetts’ punitive damage policy with adequate clarity, the state supreme court took the opportunity to clarify the standard that must be shown to prove punitive damages in the future. Punitive damages may be awarded in Massachusetts only where the defendant’s conduct is outrageous or egregious—where the conduct is so offensive that it justifies punishment and not merely compensation. In awarding punitive damages, the fact finder should determine that the award is needed to deter such behavior toward the class of which plaintiff is a member, or that the defendant’s behavior is so egregious that it warrants public condemnation and punishment.

EXCERPTS FROM THE COURT’S OPINION (By Justice Cowin): “There was evidence of other incidents in which male pharmacists were not disciplined for far more serious infractions of Wal-Mart policies, or even for actions that violated State and Federal law. For instance, a videotape from a surveillance camera showed Baran

placing drugs in her purse while the male pharmacist on duty, Hershel Patel, was standing near her; Wal-Mart policy prohibited bringing purses into the pharmacy area. Patel, who remained employed by Wal-Mart at the time of trial, testified that he was not questioned or disciplined about the incident. In August, 2003, Wal-Mart discovered that another male pharmacist, Jerry Campagna, had been writing prescriptions for himself for a level 'C-II' narcotic; this practice violated State and Federal law as well as Wal-Mart policy. A district manager instructed Campagna to have a prescription written by his physician, and no disciplinary action was taken against Campagna for these prescriptions. Campagna was also later observed taking drugs from the pharmacy area; his employment was not terminated for this conduct.

"Our cases have held that if a defendant knows that it has acted unlawfully by interfering with the legally protected rights of the plaintiff, such 'reckless indifference' to the rights of others constituted conduct warranting 'condemnation and deterrence,' and could be sufficient to support an award of punitive damages. That the defendant acted with the knowledge that it was interfering with the plaintiff's right to be free of unlawful discrimination, however, has been only one circumstance warranting an award of punitive damages. If the defendant's act was otherwise outrageous, egregious, evil in motive, or undertaken with reckless indifference to the rights of others, an award of punitive damages has been allowed.

"Although the judge concluded that there was no evidence that Wal-Mart knowingly or intentionally violated [Massachusetts discrimination law], there was evidence that Wal-Mart had policies prohibiting harassment from which a jury could infer that Wal-Mart was aware that gender discrimination was not legally permitted. In addition, contrary to the judge's conclusion, there was sufficient evidence of reprehensible or recklessly indifferent conduct to support an award of punitive damages. We have discussed previously evidence of Wal-Mart's refusing to pay the plaintiff the hourly pay differential it paid male pharmacy managers, and firing a ten-year employee for a single infraction, after what the judge said the jury could have found was a 'sham' investigation, when male pharmacists were not investigated or disciplined for similar or far more serious infractions.

"The additional level of egregiousness necessary to support an award of punitive damages could be found also in evidence of Wal-Mart's unequal treatment of the plaintiff and a male pharmacist concerning investigations for narcotics losses. Wal-Mart hired a male pharmacist as a pharmacy manager who was under criminal investigation for narcotics losses at another pharmacy and therefore was unable to obtain a pharmacy manager's license. Wal-Mart appointed the plaintiff to perform the legally-mandated functions as pharmacy 'manager of record' because the male pharmacist did not have the required license. Nevertheless, the male pharmacist was paid substantially more per hour than the plaintiff. The plaintiff was told that the male pharmacist would perform pharmacy

'business' functions. The jury could have refused to credit this explanation.

"When the plaintiff observed discrepancies in controlled substance counts, she reported these to Wal-Mart management. When Wal-Mart failed to file the State-mandated reporting forms, and the plaintiff filed the forms as required to maintain her license, she was reprimanded for doing so. The male pharmacist was later discovered stealing narcotics from Wal-Mart, and his employment was neither suspended nor terminated. After the plaintiff's termination, Wal-Mart filed the same State-mandated loss forms concerning the plaintiff; she was eventually cleared of any wrongdoing after a year-long State investigation.

"Wal-Mart contends further that the award of \$1 million in punitive damages was excessive. In considering whether an award of punitive damages is excessive in a gender discrimination case, we analyze three factors: the degree of reprehensibility of the defendant's conduct, the ratio of the punitive damage award to the actual harm inflicted on the plaintiff, [and] a comparison of the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct. The jury were warranted in concluding that Wal-Mart's pattern of unequal treatment of male and female pharmacists was outrageous and reprehensible. The close to one to one ratio here between compensatory damages and punitive damages comports with due process requirements and the goals of deterrence.

"In determining whether the defendant's conduct was so outrageous or egregious that punitive damages under [Massachusetts discrimination law] are warranted, the fact finder should consider all of the factors surrounding the wrongful conduct. Such factors may include:

1. whether there was a conscious or purposeful effort to demean or diminish the class of which the plaintiff is a part (or the plaintiff because he or she is a member of the class);
2. whether the defendant was aware that the discriminatory conduct would likely cause serious harm, or recklessly disregarded the likelihood that serious harm would arise;
3. the actual harm to the plaintiff;
4. the defendant's conduct after learning that the initial conduct would likely cause harm;
5. the duration of the wrongful conduct and any concealment of that conduct by the defendant.

Judges can look to these factors for guidance, and should tailor jury instructions in a particular case by selecting from among the suggested factors as warranted by the evidence."



COMMENTS & QUESTIONS**Haddad v. Wal-Mart Stores, Inc.**

1. What does Cynthia Haddad do for a living?
2. In what capacities had she performed this work for Wal-Mart?
3. Did that company appreciate her hard work? What had it said about her in her employee reviews?

The jury awarded Haddad over \$970,000 in compensatory damages and \$1 million in punitive damages. Compensatory damages are defined as the real, substantial and just damages, or the amount awarded to a complainant in compensation for his or her actual or real loss or injury. Compensatory damages are such as will compensate the injured party for the injuries sustained and nothing more, such as will simply make good or replace the loss caused by the wrong or injury. Punitive damages are defined as damages on in the increased scale, awarded to the complainant over and above what will barely compensate him or her for their loss, where the wrong done was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant. They are intended to solace the plaintiff for mental anguish, laceration of feelings, shame, degradation, or other aggravations of the original wrong, or else punish the defendant for his evil behavior or make an example of him.

The award of punitive damages is a controversial issue in the law.

Proponents of punitive damages believe that this type of award serves a number of important societal functions. They believe that punitive damages provide retribution to the victim of a defendant's reckless or wanton conduct. When a person is injured by a wanton misconduct of another, they have a right to seek retribution and punish the intentional wrongdoer in much the same way as the criminal justice system might punish him. Punitive damages also serve to prevent similar misconduct in the future. Punitive damages help deter future misconduct by publicizing the punishment of those persons found guilty of egregious misconduct. Punitive damages also tell businesses that financial penalties will follow if companies act in inappropriate manners. Advocates of punitive damages would also contend that these extra damages help to make eight plaintiff whole when compensatory damages do not do so. Finally, it is argued that without the prospect of a large punitive damage awards, many people would not be willing to file lawsuits.

Critics of punitive damages believe that of large monetary awards are unfair, unreasonable, and not productive for society. Large awards result in increased costs of products and services and even discourage companies from producing products or providing services out of fear of litigation. One of the central criticisms of punitive damages is that they amount to quiet say criminal punishments, imposed without the usual safeguards of a criminal proceeding. Opponents would argue that the standards for determining a defendant's liability for punitive damages are vague and that juries make decisions based on passion, bias, and prejudice rather than on the law. They argue that punitive damages provide a plaintiff with an undeserved financial windfall and that the public gains no benefit when an individual receives a multimillion dollar punitive damage verdict. In addition, when a government employee is found liable for misconduct and punitive damages are awarded, the taxpayers must pay for the award. Also, in mass disaster cases, a defendant may have to pay multiple punitive damage awards. Awarding punitive damages to early plaintiffs may bankrupt defendants, thereby depriving it later plaintiffs of even compensatory damages.

The controversy over punitive damages involves fundamental issues of justice fairness and the public good. How do you feel about punitive damages?

Do you think it was appropriate for Haddad to receive a punitive damages award?

“Jews Only” Estate Plan OK’d

SUMMARY: A testamentary gift of \$250,000 to grandchildren who were married within the Jewish faith at the time of their grandmother’s death did not violate public policy, even though the restriction disqualified four out of five grandchildren. The Illinois Supreme Court decided *In re Estate of Max Feinberg* on September 24, 2009. .

BACKGROUND: Max Feinberg created a will and a trust before his death. The will provided that at his death, all of his assets were to go into a pair of trusts, Trust A and Trust B. Assuming his wife Erla survived (outlived) him, she to was receive income from Trust A with a limited right to withdraw principal. If Trust A became depleted during her lifetime, she would then receive income from Trust B with a limited right to withdraw principal.

Upon Erla’s death, Trust B, along with any assets remaining in Trust A, were to be distributed to Max’s descendants. Half of these assets were to be held in trust by Max and Erla’s children, Michael and Leila, for the benefit of Michael and Leila’s children. The trust also provided, however, that any of these grandchildren who married outside the Jewish faith or whose spouse did not convert to Judaism within one year of the marriage, would be “deemed deceased” as of the date of the marriage. That grandchild’s share of the trust would then revert to Michael or Leila, whichever was the parent. (The opinion does not mention the other 50% of the estate; presumably these went directly to Michael and Leila.) Finally, the trust provided Erla with a power of appointment over the distribution of trust assets, limited to Max’s descendants.

Max died in 1986 and the assets in Trust A were depleted during Erla’s lifetime. In 1997, she exercised her power of appointment, directing that upon her death each of her two children and any of her grandchildren not deemed deceased under Max’s original plan, were to receive \$250,000.

When Erla passed away in 2003, all of Leila and Michael’s children were married. Only one, Leila’s son Jon, had married within the Jewish faith. Therefore, Max’s other four grandchildren were “deemed deceased” under the trust as modified by Erla and received nothing.

Michael’s daughter, Michele, sued the estate. She argued that the restrictive provision violated public policy by creating financial pressure to question an existing marriage, or to favor one religion over another in exercising their fundamental right to marry. The district court struck down the restriction and the Appellate Court agreed. Michael, as co-executor of the estate, appealed to the Illinois Supreme Court.

ANALYSIS: Max was concerned about the disappearance of the Jewish people through intermarriage with non-Jews. His will pitted basic principles favoring a property owner’s right to transfer assets at death against public policy principles that disfavor restrictions on marriage and incentives to divorce. Under Max’s will, any grandchild who wished to share in the estate faced a choice if he or she wished to marry. Choosing a Jewish spouse kept the grandchild a lifetime beneficiary of the trust, receiving trust benefits. Marrying outside the Jewish faith, however, cut off the grandchild’s trust benefits if his or her spouse did not convert to Judaism.

The court was troubled by Max’s restrictive provision. Upon Erla’s death a grandchild who was planning to marry a non-Jew or had married outside the faith within the last year would have a financial incentive either to break that relationship or to pressure someone of different beliefs to convert. This was Michele’s argument.

But the court focused on the change Erla had made through her power of appointment. Max’s will had made his grandchildren lifetime beneficiaries of a share of the assets remaining in the trusts at Erla’s death. They had a right to share in those assets throughout their lives as long as they didn’t marry a non-Jew, or marry a non-Jew who failed to convert within a year. Erla’s gift did not take that form. Her gift of \$250,000 was not paid over the grandchildren’s lifetime, nor, after given, could it be taken away based on marriage. Instead, her gift either was given or not given based on the instantaneous status of the grandchildren at the moment of her death. Jon, who was married to a Jewish woman, received the money. The other four grandchildren were married to non-Jews who had not converted. They never had a right to the money and therefore Erla’s gift did not violate public policy.

The differences between Max’s and Erla’s gift was that Max’s gave the benefit and then took it away if the child married against Max’s wishes. Erla’s modification did not work this way. It either gave the gift, or did not. During life, Max or Erla had the right to give property to whomever they chose and for whatever reason. Erla’s modification to the trust simply did this at the time of her death. Unlike Max’s, it did not use the law of wills and trusts to take away a promised gift on a basis at odds with public policy.

EXCERPTS FROM THE COURT’S OPINION (By Judge Garman): “[T]his court distinguished between a ‘condition subsequent’ (for example, if the will devised property to the beneficiary in trust for life, subject to divestment if he married), and a ‘condition precedent,’ which directs that upon the fulfillment of the condition,

ownership of the property is to vest in the beneficiary. The condition subsequent, such as one that would prohibit marriage generally, would be void and the donee would retain the property, unaffected by the violation of the condition. A condition precedent would be given effect, because until the condition was met, the beneficiary's interest was a mere expectancy.

"The beneficiary restriction clause as given effect by Erla's distribution scheme does not implicate the principle that trust provisions that encourage divorce violate public policy. That is, the present case does not involve a testamentary or trust provision that is 'capable of exerting *** a disruptive influence upon an otherwise normally harmonious marriage' by causing the beneficiary to choose between his or her spouse and the distribution. The challenged provision in the present case involves the decision to marry, not an incentive to divorce.

"[T]he grandchildren did not receive a vested interest in the trust upon Max's death. By creating a power of appointment in Erla, Max created a situation in which the interests of the grandchildren were contingent on whether and in what manner she would exercise her lifetime and testamentary powers of appointment. Thus, the grandchildren had a mere expectancy that they might receive some portion of the remainder at the conclusion of Erla's life estate. No one had a vested interest in the remainder of the trust assets until Erla's death resolved all contingencies. [T]he grandchildren in the present case were not Max's or Erla's heirs at law. Finally, while the record is unclear whether any or all of the grandchildren

were aware of the existence of the beneficiary restriction clause, because they had no vested interest to protect, they were not entitled to notice of the condition.

"We conclude . . . that no interest vested in the Feinberg's grandchildren at the time of Max's death because the terms of his testamentary trust were subject to change until Erla's death. Because they had no vested interest that could be divested by their noncompliance with the condition precedent, they were not entitled to notice of the existence of the beneficiary restriction clause. Further, because they were not the Feinbergs' heirs at law, the grandchildren had, at most, a mere expectancy that failed to materialize for four of them when, at the time of Erla's death, they did not meet the condition established by Max."



COMMENTS & QUESTIONS

In re Estate of Feinberg

1. What did Max Feinberg create that caused controversy? What about it was controversial?
2. Who is Erla Feinberg? How did her actions change what Max created?
3. Name two principles of law that came into conflict in this case.

While this case involves several technical issues related to Max Feinberg's will, the heart of the matter is whether the "Jewish clause" in his will is enforceable. The Jewish clause stated: "A decedent of my other than the child of mine who marries outside the Jewish faith (unless the spouse of such decedent has converted or converts within one year of the marriage to the Jewish faith) and his or her decedents shall be deemed to be deceased for all purposes of this instrument as of the date of such marriage."

When someone is making out their will, how far can they go in putting conditions on inheritances? Most estate planning lawyers come across clients who want to attach some sort of condition on the gifts they make to decedents and other beneficiaries. How far can they go?

Conditions creating restraints against marriage, religion and family relationships are often void as against public policy. That is how the trial court and appellate court ruled in this case. The provision was found invalid because its intent was to influence the marriage decisions of Feinberg's grandchildren based on a religious standard and thereby discourage them from marrying outside the Jewish faith. As such, the clause seriously interfered with and limited the rights of individuals to marry a person of their own choosing.

Ever, the Supreme Court disagreed with the lower courts' decisions. The Court distinguished between a condition subsequent and a condition precedent in order to find that the clause did not violate public policy. Do you agree with this decision?

This case is interesting because it involves compelling interests on both sides. There are those who believe that each of us ought to have the right to determine the disposition of our own property. Then there are those who believe that provisions such as the Jewish clause ought to be prohibited as discriminatory? What do you think?

In this case, the court upheld a provision that, more or less, required someone to marry within the Jewish religion. How would you rule if the provision precluded someone from marrying someone who was Jewish? How would you rule if the provision precluded someone for marrying someone of a different race? Do you think the courts should be required to enforce provisions that stipulate that heirs would lose their inheritance if they married Jews or blacks, for instance?

Individuals can dispose of their property in any way they choose while they are alive. Why should they not be allowed to put any kind of restriction (no matter how distasteful) on the disposition of their property when they die? Why should public policy have anything to do with it?



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