No Cap!: Ninth Circuit Holds MAGA Hat is Free Speech

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On December 29, 2022, the United States Court of Appeals for the Ninth Circuit held that a Washington principal violated a middle school teacher's free speech rights by threatening discipline, if the teacher continued wearing a "Make America Great Again" ("MAGA") hat to staff training sessions. The Court found no evidence that the teacher caused any actual disruption by repeatedly bringing or wearing the hat to teacher-only trainings. The decision can be found here.

Background
A teacher repeatedly brought a MAGA hat to staff training sessions conducted by his school district. The first training at issue was a cultural sensitivity and racial bias training. The teacher wore his MAGA hat up to the school's front doors, then took it off when he entered the building. During this training, the teacher sat near the back of the room and did not wear his hat. The presenter and several participants saw the hat and complained to the principal alleging the hat was threatening and intimidating.

After the first training, the principal asked the teacher why he wore the hat. The teacher stated he wore the hat to protect sunspots on his head, and because he liked the hat's message. The principal told the teacher to use better judgment.

The following day, the teacher attended a second teacher-only training. The teacher again wore his MAGA hat before entering the building and took it off when he was inside. When the training was over, the principal warned the teacher he would need a union representative if he wore the MAGA hat to work again.

The teacher filed a harassment, intimidation, and bullying complaint against the principal and requested a transfer to a different school. The District's Human Resources Officer hired a third-party investigator to determine whether the principal violated the District's policies. The investigation concluded the teacher was singled out and subjected to negative treatment because he wore the MAGA hat. Although the principal allowed other types of political messaging (*e.g.*, Black Lives Matter posters) around the school, the principal did not violate District policy because the District's antidiscrimination policy did not prohibit discrimination based on political beliefs. The Human Resources Officer adopted the investigation findings and informed the teacher no further action would be taken on his complaint.

The teacher appealed the District's investigatory findings to the Board of Education. The Board upheld the District's initial findings, but ordered further investigation into whether the principal acted professionally in her interactions with the teacher. After reviewing the second investigation's findings, the Board indicated it had a "strong belief" that the principal's conversations with the teacher were unprofessional and undermined her credibility. The Board gave the principal a choice to resign or face discipline. The principal resigned. The teacher sued claiming the principal violated his First Amendment rights by threatening discipline, if he continued wearing his MAGA hat to teacher-only training sessions.

The Court's Review of the Teacher's First Amendment Retaliation Claim
To establish a First Amendment retaliation claim, the teacher had to prove: (1) he engaged in protected speech; (2) the principal took an adverse employment action against him; and (3) his speech was a substantial or motivating factor for the adverse employment action. The Court noted, to the extent adverse employment action occurred, it was clear the MAGA hat was the motivating factor. As a result, the Court focused its analysis on the first and second factor.

With regard to the first factor—whether the teacher was engaged in protected speech—the Court quickly concluded the teacher spoke on a matter of public concern given the MAGA hat displayed a candidate's political message, falling squarely in the community's interests. The Court also concluded the teacher was speaking as a private citizen, rather than as an employee, because the message was displayed on a personal item during a teacher-only training and not in the course of his job teaching students.

This left the Court to address the final protected speech element—balancing the private citizen's interest in speaking on matters of public concern versus the employer's interest in maintaining an effective and efficient operation. The District could prevail under this balancing test by demonstrating either actual or forecasted substantial disruption resulting from the teacher's speech, but the Court concluded the District could prove neither. For example, although the District cited to staff who became scared and angry upon seeing the MAGA hat, the Court noted fewer than five staff members complained about the hat. Both trainings also concluded without issue. The Court also pointed to the District's unequal enforcement of political speech as undermining its disruption argument, given the uneven approach suggested this most recent incident had less to do with disruption and more to do with political disagreement. As a result, the Court concluded the balance tipped in favor of the teacher who engaged in protected speech in wearing the MAGA hat and bringing the MAGA hat into trainings.

The final hurdle to be addressed was whether the principal's conduct constituted an adverse employment action. Although the criticism and bad-mouthing of the teacher by staff members was unlikely to deter the teacher from engaging in constitutionally-protected free speech, the principal's reference to disciplinary action and the need for a union representative likely deterred the teacher from further speech. Because the teacher satisfied the required elements, the Court upheld his First Amendment retaliation claim against the principal.

The District's Liability for the Principal's Conduct
The teacher also sought to hold the District liable for First Amendment retaliation, arguing the Board concluding that District policy had not been violated by the principal was akin to the ratification of unconstitutional conduct. The Court disagreed and held the Board's determination that the principal complied with District policy was not the same as adopting or approving such conduct. The Court was also persuaded by the lack of Board action impacting the teacher, as it was the principal, not the Board, that threatened disciplinary action in response to protected speech. Therefore, the court concluded the District lacked liability in this matter.

Conclusion
The *Dodge* decision provides public school districts with the following reminders and takeaways:

- **Review Policies.** This case serves as a helpful reminder to review and update all Board policies and District guidelines that impact employee speech, including employee conduct policies, social media policies, off-duty conduct policies, dress codes, and antidiscrimination policies. Any one of these policies can serve as the breeding ground for a First Amendment lawsuit.
- **Train and Implement.** Having the appropriate policies and guidelines in place is only the first step. Implementing significant and meaningful training of District Administration, Board members, and front-line supervisors on all policies impacting employee speech and how those policies are to be interpreted and enforced is essential so good choices within the constraints of the policies are made.
- **Enforce Policies with a Viewpoint Neutral Approach.** If a public employer permits speech of a particular viewpoint, it is required to permit speech of opposite viewpoints. This concept applies equally to political speech. Failure to approach policy development and enforcement from a viewpoint neutral approach can undermine a public school district's decision to discipline an employee in a number of ways, as demonstrated by this case.
- **Consider Approaching These Issues Practically.** Discipline does not have to be, and should not be, the default response to an employee speech issue. Often times, a softer approach involving education as to how their speech might be portrayed is more effective and less fraught with legal liability. This type of approach also garners more respect in the workplace by allowing for open dialogues with regard to differing viewpoints, rather than an adversarial environment where certain employees feel singled out (regardless of whether those perceptions are accurate). Finally, consider addressing the issue with those who are concerned.
- **Identify and Document the Basis for Disruption.** Discuss with relevant District officials and staff what actual and tangible disruption looks like and what it does not look like. Be clear with staff that merely finding speech offensive, especially political speech, is not enough to find the kind of disruption that would outweigh the speaker's First Amendment rights. Further, while courts permit public school districts to act upon forecasted disruption, the ability do so is even more limited than when a school district believes actual disruption has occurred. When disruption or concern for disruption exists, timely and thorough documentation of the facts of what was observed and transpired is essential.

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