

The T-shirt Wars: Courts struggle to find balance between free speech and harassment

By Dana Rudolph on April 14, 2011

April 15 marks the 15th annual Day of Silence, a national event organized by the Gay, Lesbian, and Straight Education Network (GLSEN) to bring attention to anti-LGBT name-calling, bullying, and harassment in schools. But a recent federal court decision—in a case stemming from a conservative response to the Day of Silence—has upheld the right of students to express certain anti-gay sentiments.

A leading expert on LGBT youth and the law says the case and others like it show the courts are struggling to define just where the expression of hostile views becomes harassment. And so far, even when they have allowed anti-gay speech, the courts have shown some sympathy to the needs of gay students to be protected against harassment.

In a decision March 1 in *Nuxoll v. Indian Prairie School District*, a three-judge panel of the 7th U.S. Circuit Court of Appeals upheld a lower court ruling that students have a First Amendment right to wear shirts stating “Be Happy, Not Gay.” The school, the court said, had not demonstrated that wearing the shirts would cause “substantial disruption”—a metric the U.S. Supreme Court has used to evaluate permissible speech in schools.

Unlike more overtly confrontational slogans, such as “Homosexuals go to Hell,” wrote Judge Richard Posner for the panel, “Be Happy, Not Gay” is “only tepidly negative.”

“A school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality,” Posner said. “People in our society do not have a legal right to prevent criticism of their beliefs or even their way of life.”

The *Nuxoll* case began in 2006, when Heidi Zamecnik, a student at a public high school in Illinois, wore a t-shirt with “Be Happy, Not Gay” on the “Day of Truth,” an event developed by the Alliance Defense Fund (ADF), a conservative Christian legal organization. ADF sees a “Day of Truth” as a conservative response to GLSEN’s “Day of Silence,” and promotes the event on the school day following the “Day of Silence.”

School officials told Zamecnik that her t-shirt violated school policy forbidding “derogatory comments” referring to sexual orientation, among other characteristics. The following year, Zamecnik, now joined by fellow student Alexander Nuxoll, again wanted to wear the shirt on the Day of Truth. This time, school officials suggested alternatives, including the slogan, “Be Happy, Be Straight” and an ADF-produced “Day of Truth” shirt saying “The Truth Cannot Be Silenced.” Zamecnik and Nuxoll refused those options and, with the help of the ADF, filed a lawsuit challenging school officials’ actions.

A U.S. district court in April 2007 found in favor of the school, but the plaintiffs appealed.

The 7th Circuit overturned the first ruling, in 2008, saying the school had not shown that the t-shirt message “Be Happy, Not Gay” would cause “substantial disruption.” But the appeals panel denied ADF’s request that it declare the school’s “derogatory comments” policy unconstitutional.

The 7th Circuit then sent the case back to the lower court with instructions to enter a preliminary injunction allowing the wearing of the t-shirts. It noted that “the district judge will be required to strike a careful balance between the limited constitutional right of a high-school student to campaign inside the school against the sexual orientation of other students and the school’s interest in maintaining an atmosphere in which students are not distracted from their studies by wrenching debates over issues of personal identity.”

On remand, the district judge granted the preliminary injunction allowing the two students to wear their t-shirts, then granted a summary judgment in their favor, awarding them each \$25 in damages, and issuing a permanent injunction allowing any student to display the slogan on clothing or “personal items.”

This time, the school appealed, claiming in its brief that the district court improperly issued a summary judgment because the school had presented evidence—“numerous examples of emotional, violent and/or threatening reactions of students to the phrase ‘Be Happy, Not Gay’”—that should have warranted a trial.

The 7th Circuit issued its second opinion on the case on March 1, 2011, and said the school had not presented enough evidence that it had “a reasonable belief” the t-shirt would cause “substantial disruption.” It therefore ruled the summary judgment was valid.

Jack Canna, principal attorney of Canna and Canna, which represented the school, said in an interview that he thought “the court should have provided us with a trial into the problems the schools face.”

“A summary judgment presumes no issues of material fact,” he explained. “We felt there were issues related to the impact these messages have on kids,” but the court “just wasn’t impressed with the severity or derogatory nature of this piece of expression.”

Stuart Biegel, a member of the faculty at the UCLA School of Law and UCLA Graduate School of Education and Information Studies, analyzed the early stages of the Nuxoll case in his 2010 book, *The Right to Be Out: Sexual Orientation and Gender Identity in America’s Schools*. He said in an interview that Posner did show some “sensitivity to what LGBT youth were going through,” as he did in the earlier ruling, while he also “set forth some guidelines that try to respect everybody’s free speech rights.”

The Nuxoll case is only latest of several cases in which courts have been charting the boundary between harassment and free speech with regard to anti-gay sentiments expressed at school.

In the 2001 case *Chambers v. Babbitt*, a Minnesota high school told a student he could not wear a t-shirt saying, "Straight Pride." The U.S. District Court for the District of Minnesota found that the t-shirt was unlikely to be disruptive, and therefore, the student had the right to wear it.

Biegel noted in his book that the court in *Chambers* still "went out of its way" to indicate the opinion was not anti-gay—and parts of Judge Donovan Frank's opinion may be "among the most supportive of LGBT students" in a federal court decision. Frank noted, for instance, the challenges faced by LGBT youth and praised the school for its efforts to be inclusive.

And in a 2004 case, *Harper v. Poway Unified School District*, Tyler Chase Harper, a student at a San Diego area high school, wore a t-shirt to school on the Day of Silence saying, "Homosexuality Is Shameful" and that the school "had accepted what God has condemned."

The school tried to ban the shirt, and Harper sued. In this case, however, the U.S. District Court for the Southern District of California and (on appeal) a panel of the 9th U.S. Circuit Court of Appeals ruled that the t-shirt went too far. Judge Stephen Reinhardt of the 9th Circuit wrote that the slogan interfered with the right of other students to be free from "verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation."

Harper appealed to the U.S. Supreme Court, which vacated the 9th Circuit's ruling and remanded the case to the 9th Circuit with instructions to dismiss the appeal to the 9th Circuit as moot, since the district court had, by then, entered a final judgment, stating that because Harper had graduated, his claims were now moot. The Harper case, however, spurred the ADF to create the Day of Truth as a counterpoint to the Day of Silence, Biegel noted.

The Day of Truth is now sponsored by the conservative Christian group Focus on the Family and has been renamed the "Day of Dialogue." ADF is continuing to provide free legal assistance to participating students.

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