

# **The End of an Era to Keep Religious Identity out of Public Schools**

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In 1990, the 3<sup>rd</sup> Circuit Court of Appeals upheld enforcement of a law that not only prohibited a teacher from wearing modest dress believed to be religiously obligated, but that also allowed the state to suspend her from teaching in the school and revoked her teaching certificate for at least one year.<sup>1</sup> While the decision was justified on the basis of maintaining an environment of religious neutrality in public schools, its consequences have only cultivated the very sentiments that the First Amendment sought to destroy. In spite of the decision taken by the 3<sup>rd</sup> Circuit, there is hope that these laws, known as Religious Garb Statutes, may no longer be enforceable. Even though challenges to these statutes have been unsuccessful prior to 1990, lower courts are now refusing to follow these precedents and are, instead, recognizing challenges under both Title VII and the Establishment Clause as valid. For these reasons in addition to recognizing that enforcing Religious Garb Statutes only discriminate against religious minorities and defeat efforts to promote diversity in public schools, these laws will no longer be able to withstand constitutional challenge.

### **History of Religious Garb Statutes**

Pennsylvania, Oregon and Nebraska, all have within their School Codes, statutes that restricts teachers from wearing anything that may identify their religious convictions while performing their duties as a teacher in public school.<sup>2</sup> At the end of the 19<sup>th</sup> century, the Nativist movement sought to limit Catholic and other “foreign” influences on many sectors of American society. In reaction to the 1894 Pennsylvania Supreme Court decision in *Hysong v. Gallitzn Borough School District*, where the court held that the

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<sup>1</sup> *United States v. Bd. of Educ. for the Sch. Dist. of Phila.*, 911 F.2d 882 (3rd Cir.1990).

<sup>2</sup> Neb. Rev. Stat. § 79-898; Or. Rev. Stat. § 342.650; Pa. Con. Stat. § 11-1112.

traditional religious habits worn by nuns in public school would not constitute sectarian teaching, the Pennsylvania Legislature passed a law that banned all religious garb and symbols from being worn by teachers in public schools.<sup>3</sup> Several other states followed suit, including New York, New Mexico, North Dakota, Oregon, Indiana, and Nebraska.<sup>4</sup> With the passage of time, however, and as the motive behind these laws waned, so did the need to reinstate these laws, particularly, in light of the potential conflict with the First Amendment.<sup>5</sup> That being said, even though three states continue to have Religious Garb Statutes in place, enforcement of these laws has been sparse, until recently.

### **Unsuccessful Challenge under the Establishment Clause**

The first major case to take the national stage in enforcing such a statute came in Oregon. In *Cooper v. Eugene School District*, Janet Cooper, a special education teacher, was suspended from work and had her teaching certificate revoked because she was violating the Religious Garb Statute which prohibited a teacher in public school from wearing religious dress while performing her duties as a teacher.<sup>6</sup> After becoming Sikh, Cooper began wearing white clothes and a white turban because of her religious beliefs and she refused to stop after being warned by the school administration.<sup>7</sup> Cooper challenged the actions of the school on the basis that the regulation on teachers violated the Establishment Clause of the First Amendment and the Oregon Bill of Rights.<sup>8</sup>

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<sup>3</sup> *Cooper v. Eugene School District*, 301 Or. 358, 308 (1986).

<sup>4</sup> *Cooper*, 301 Or. at 308.

<sup>5</sup> See discussion of legislative history to repeal North Dakota's religious garb statute over concern that it may violate the First Amendment, <http://www.legis.nd.gov/assembly/55-1997interim-info/minutes/es102398.html>. In 1998, North Dakota repealed its religious garb statute.[N.D. Cent. Code § 15-47-29].

<sup>6</sup> *Cooper*, 301 Or. at 360.

<sup>7</sup> *Id.* at 360.

<sup>8</sup> *Id.* at 371.

The Establishment Clause states that: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, ...” It has been the source of much litigation in public schools because of a school’s requirement to maintain a balance between protecting an individual’s right to exercise their religion while not endorsing any particular religion.

The Oregon Supreme Court held that while it may appear that such a statute does infringe on a teacher’s First Amendment right, the need to maintain a school that is religiously neutral was paramount to those infringements.<sup>9</sup> Because of the school’s obligation to remain religiously neutral, the “otherwise privileged display of a teacher’s religious commitment by her dress” would be “incompatible with the atmosphere of religious neutrality that ORS 342.650 aims to preserve.”<sup>10</sup> Moreover, the court explained that allowing the teacher to dress in her religious garb would result in an unofficial endorsement of those beliefs, thus it could not be permissible under the principle that “freedom of religion for all implies official sponsorship of none.”<sup>11</sup>

The court also supported its position by emphasizing that a ban on religious dress was not a ban on religious belief.<sup>12</sup> So long as the statute was enforced in cases where religious dress was a regular or frequently repeated practice and not an occasional occurrence while en route to a seasonal ceremony, disqualification of that teacher could be a proper sanction. Therefore, despite the fact that such conditions or limitations were not mentioned in the statute, the court imposed its own limits to ensure that the statute could sustain its constitutionality.<sup>13</sup> “When correctly interpreted and

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<sup>9</sup> *Cooper*, 301 Or. at 372.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 375.

<sup>12</sup> *Id.* at 379.

<sup>13</sup> *Id.* at 381.

applied, ORS 342.650 survives challenge under Oregon's guarantees of religious freedom [and] ... it also does not violate the federal First Amendment.

### Unsuccessful Challenge under Title VII

Only a few years after the decision by the Oregon Supreme Court, another challenge to the Religious Garb Statute came in Pennsylvania, this time as a violation of Title VII.<sup>14</sup> Title VII extends all rights guaranteed by the Constitution to employees, both private and public, in order to protect them from adverse employment actions taken in violation of those rights.<sup>15</sup> It states that an employer will be in violation of the law if he discharges or discriminates against an individual with respect to his compensation, terms, conditions, or privileges of employment because of the individual's religion.<sup>16</sup> An employer can only discriminate or discharge an employee on the basis of his or her religion when the employer can demonstrate that it could not accommodate the religious practice or requirement without suffering undue hardship.<sup>17</sup>

From 1970 until 1984, Alima Delores Reardon had worked in various positions ranging from full-time teacher to substitute teacher in the Philadelphia School District.<sup>18</sup> Beginning in 1982, she began to dress modestly in long dresses and a headscarf to cover her hair, neck and bosom pursuant to her religious belief that a Muslim woman must cover her entire body, except her hands and face, whenever in public.<sup>19</sup> She had proscribed to those beliefs while teaching without incident for two years.<sup>20</sup> Then in 1984,

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<sup>14</sup> *Sch. Dist. of Phila.*, 911 F.2d at 885.

<sup>15</sup> 42 U.S.C. § 2000e-2(a).

<sup>16</sup> 42 U.S.C. § 2000e-2(a).

<sup>17</sup> 42 U.S.C. § 2000e(j).

<sup>18</sup> *Sch. Dist. of Phila.*, 911 F.2d at 884.

<sup>19</sup> *Id.* at 885.

<sup>20</sup> *Id.*

on three separate assignments to substitute teach in three different schools, she was told by the principal of each school that she could not wear her religious clothing while teaching because it violated the Pennsylvania Garb Statute.<sup>21</sup> Similar to the statute in Oregon, the statute prohibits any teacher from wearing any dress that would indicate she was a member or adherent of any religious order or sect, and also prohibits the teacher from wearing any mark, emblem, or insignia that has the same effect.<sup>22</sup> If a teacher violated the rule, the school had authority to suspend her from teaching and could have her teaching certificate revoked to disqualify her from teaching in that school permanently.<sup>23</sup> The statute also held any school or administrator criminally liable for failing to enforce the law.<sup>24</sup>

After receiving each warning, Reardon refused to change her clothes arguing that it would violate her religious obligations and each time she was subsequently sent home and prohibited from teaching.<sup>25</sup> After exhausting all administrative remedies available to her to no avail, she filed a charge of discrimination with the Equal Employment Opportunity Commission (“EEOC”).<sup>26</sup> In concluding the EEOC’s investigation, the Department of Justice filed a complaint in federal court naming both the School Board and the Commonwealth as defendants alleging that they violated Reardon’s rights under Title VII.<sup>27</sup> The district court ruled in favor of Reardon and ordered that the school district be barred from enforcing the Garb Statute on Reardon. The School Board responded by appealing the decision to the 3<sup>rd</sup> Circuit.<sup>28</sup>

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<sup>21</sup> *Sch. Dist. of Phila.*, 911 F.2d at 885.

<sup>22</sup> 24 Pa.St. Ann. §11-1112.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Sch. Dist. of Phila.*, 911 F.2d at 885-86.

<sup>26</sup> *Id.* at 885.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 886.

Relying heavily on the decision in *Cooper*, the court reversed the lower court's decision explaining that accommodating Reardon by allowing her to teach would be an undue hardship on the school, in light of its compelling interest to maintain religious neutrality within its public schools. For those reasons, as the court explained, the actions of the school would not be a violation of Title VII because it could not reasonably accommodate allowing Reardon to teach in her religious clothing.<sup>29</sup>

The court dismissed the action taken by the state as violating Title VII for several reasons. First, because the state has a similar interest, as in *Cooper*, to maintain religious neutrality, the statute is narrowly tailored to fulfill that interest.<sup>30</sup> Second, because of the potential criminal liability that the school could endure, the accommodation to allow Reardon to teach was an undue hardship on the school, despite the fact that enforcement of the criminal sanction was negligible and unrealistic.<sup>31</sup> Finally, the court explained that while the initial passing of the law originated from particular animus towards Catholics, those anti-Catholic sentiments would be irrelevant in barring enforcement because the statute was now being enforced in a non-discriminatory way against all religious clothing and not only against Catholics.<sup>32</sup>

It is important to note that in the concurring opinion by Justice Ackerman, he criticized the majority's heavy reliance on the U.S. Supreme Court's dismissal of *Cooper* for want of a substantial federal question as being authoritative. He argued that using the Court's dismissal as authoritative to establish that the Oregon statute did not violate

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<sup>29</sup> *Sch. Dist. of Phila.*, 911 F.2d at 894.

<sup>30</sup> *Id.* at 893.

<sup>31</sup> *Id.* at 891.

<sup>32</sup> *Id.* at 894.

Title VII would be a misapplication of precedent by the majority.<sup>33</sup> After all, to grant the Supreme Court that kind of precedential power would give them a voice on laws that they have, themselves, refused to take.

### Successful Challenge under Title VII

Only one year after the decision in *School District of Philadelphia*, the district court in Pennsylvania was confronted again with a Title VII violation case resulting from enforcement of the Religious Garb Statute.<sup>34</sup> The case arose after a 3<sup>rd</sup> grade counselor, Cynthia Moore, interviewed for a position with an agency, Remedial Educational and Diagnostic Services (“READS”), that contracted with both private and public schools to provide them with auxiliary services.<sup>35</sup> Moore, wore a head scarf tied to the side of her head during the interview and was asked about its significance by her interviewer.<sup>36</sup> She replied that she wore it because she was Muslim.<sup>37</sup> The interviewer then told her that the only way she could work as a counselor was if she removed her head covering.<sup>38</sup> Moore refused, but offered to change how she wore it.<sup>39</sup> The interviewer still refused stating that because it was identifiable as Muslim religious attire, it could not be accommodated because it violated a regulation that incorporated the Religious Garb Statute to apply on all providers of auxiliary services.<sup>40</sup>

While acknowledging the precedent set by the 3<sup>rd</sup> Circuit one year earlier, the court refused to enforce the statute and, instead, narrowed the application of the Religious

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<sup>33</sup> *Sch. Dist. of Phila.*, 911 F.2d at 895 (Ackerman,H., concurring). See also 480 U.S. 942 (1987) (dismissing case for want of substantial federal question).

<sup>34</sup> *EEOC v. READS*, 759 F.Supp. 1150, 1153 (E.D.Pen. 1991).

<sup>35</sup> *READS*, 759 F.Supp. at 1152.

<sup>36</sup> *Id.* at 1153.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

Garb Statute. The court explained that when clothing is worn for religious reasons, but those reasons would not be apparent to the observer, such clothing would not fall under the prohibition of the statute.<sup>41</sup> Unless the dress was either facially religious defined by a specific religious group and worn for religious reasons or easily perceived by many as worn for religious reasons and thus identifiable to a particular religion, it would not fall under the definition of “religious garb.”<sup>42</sup> Therefore, because Moore’s attire was worn for religious reasons but not perceivable as such, it would not be prohibited by the Religious Garb Statute, and READS failure to accommodate her without showing undue hardship would be a violation of Title VII.<sup>43</sup>

### **Successful Challenge under the Establishment Clause**

In the most recent case challenging the Religious Garb Statute in Pennsylvania, a special education instructional assistant, Brenda Nichols, brought suit in 2003 after she was suspended for wearing a cross pendant around her neck while working with students and refused to hide it after being warned several times.<sup>44</sup> Nichols had been working in an elementary school providing assistance to students receiving special education services in mainstream classrooms.<sup>45</sup> During the course of her work with students, Nichols wore the cross for more than six years without any incidents or complaints by students or parents.<sup>46</sup> In fact, the only complaints made to her supervisor were from other teachers she worked with who were aware of the school district policy

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<sup>41</sup> *READS*, 759 F.Supp. at 1153.

<sup>42</sup> *Id.* at 1158.

<sup>43</sup> *Id.* at 1160.

<sup>44</sup> *Nichols v. Arin Intermediate Unit 28*, 268 F.Supp.2d 536 (W.D.Pen. 2003).

<sup>45</sup> *Nichols*, 268 F.Supp.2d at 543.

<sup>46</sup> *Id.* at 545.

that prohibited teachers from wearing religious symbols.<sup>47</sup> Following her suspension, Nichols filed for injunctive relief and declaratory action to reinstate her position and to challenge the policy and Religious Garb Statute as violating the Establishment Clause.<sup>48</sup>

The court began its analysis by discussing how Nichols would not be liable under the statute because she was not a teacher as defined by the School Code.<sup>49</sup>

Interestingly, however, the court did not stop its analysis there and it continued to analyze whether the policy and Garb Statute would be violating the Establishment Clause.<sup>50</sup> In doing so, the court focused on applying the modified *Lemon* test to determine whether the statute violates the Establishment Clause.<sup>51</sup>

In 1971, the Supreme Court established what came to be known as the *Lemon* test in order to resolve disputes centered on the Establishment Clause.<sup>52</sup> It originated as a three prong test to determine whether a government statute violated the Establishment Clause.<sup>53</sup> In order for a statute to be enforceable under the First Amendment, the court would need to find that the statute had a secular purpose, that it had a secular effect which neither advanced nor inhibited religion, and that it did not foster excessive entanglement between religion and the state.<sup>54</sup>

Eventually the test evolved into a 2 prong test now known as the modified *Lemon* test.<sup>55</sup> It requires that the state law serve a secular purpose and that its effect neither advance nor inhibit religion, with three criteria determining if a government action

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<sup>47</sup> *Nichols*, 268 F.Supp.2d at 544.

<sup>48</sup> *Id.* at 548.

<sup>49</sup> *Id.* at 547.

<sup>50</sup> *Id.* at 548.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 549.

<sup>53</sup> *Id.*

<sup>54</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>55</sup> *Agostini v. Felton*, 521 U.S. 203 (1997) (“Entanglement must be ‘excessive’ before it runs afoul of the Establishment clause”).

creates an impermissible effect. They include whether there is an excessive entanglement between the state and religion, whether the action in question results in religious indoctrination attributable to the state, and whether the beneficiaries of the aid program are defined on the basis of religion.<sup>56</sup>

After the court's analysis of the purpose behind the statute and its effect on religious rights, the court held that the policy in place, had no important or compelling state interest and, instead, incited hostility towards only those symbols that are religious.<sup>57</sup> Because the statute banned all dress, marks, symbols, emblems or insignia indicative of religion, and did not ban any such items that were indicative of other secular messages, it only served to discriminate against religion and teachers choosing to adhere to a religious belief.<sup>58</sup>

The court also challenged the notion that allowing teachers to wear such symbols or pendants would be seen as an "endorsement" of that particular religion because there was no proof that such an interpretation could be made. In contrast, the court replied that following such a rationale would suggest that schools were, in reality, endorsing all the secular pins or messages displayed by its staff. "Merely employing an individual ... who unobstructively displays her religious adherence is not tantamount to government endorsement of that religion, absent any evidence of endorsement or coercion."<sup>59</sup>

The court also distinguished the case from *School District of Philadelphia*, in finding that the changing analysis of Establishment clause violations would probably change how *School District of Philadelphia* would now be decided and that the Religious Garb Statute would no longer withstand the heightened scrutiny that now accompanies

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<sup>56</sup> 1 EDULAW §1:3, 7.

<sup>57</sup> *Nichols*, 268 F.Supp.2d at 552.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 554.

these types of challenges.<sup>60</sup> Therefore, while the policy does serve the purpose of promoting religious neutrality, it does so at the expense of violating a teacher's right to freely exercise his or her religion in the most inconspicuous way.<sup>61</sup> Thus, the statute would not survive strict or heightened scrutiny and would be a violation of the Establishment Clause.<sup>62</sup>

### Future of Religious Garb Statutes

In light of these recent cases, while higher courts have held these statutes to be legal, the lower courts are reluctant to follow suit. At the same time, its historical origin cannot be erased because instead of operating to keep one religious group out of public school, it has only manifested in keeping new religious groups out of public schools. The only state interest in keeping these laws was to promote religious neutrality, but in the current landscape of diversity amidst our public schools, one can no longer argue that employing teachers from different parts of the world or who attest to different religious beliefs would be an "endorsement" of those beliefs. These same teachers will still observe their religious beliefs in other ways that will be evident to their students, whether it is by taking certain days off for holidays, fasting during certain times of the year, or sharing those differences as a learning tool in different classroom situation. Hence, permitting religious identity could no longer be a threat. After all, none of these cases were brought by students who felt "coerced" by their teacher's dress, and students were the ones that the law intended to "protect".

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<sup>60</sup> *Nichols*, 268 F.Supp.2d at 555.

<sup>61</sup> *Id.* at 554.

<sup>62</sup> *Id.* at 555.

Encouraging diversity, which remains a compelling interest, can only occur by embracing those differences and not pretending that they do not exist. Recent figures released by the federal government still show that there is a great discrepancy in diversity between students and their respective teachers. In 2001, while 60% of public school students were white, 17% were black and 17% were Hispanic; teachers in those same public schools were 90% white, 6% black and 5% other races.<sup>63</sup> Diversity does not only encompass race, but also culture and ethnicity and most studies show that employing a more diverse faculty can actually higher achievement rates for diverse students.<sup>64</sup> Laws like Religious Garb Statutes only create obstacles to achieve those goals. In light of these recent decisions and changing opinions regarding diversity and religious freedom, these statutes will lose their legitimacy because they, ultimately, only serve illegitimate purposes.

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<sup>63</sup> Statistics compiled by the National Center for Education Statistics (NCES, 2003); See <http://www.cec.sped.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=6240>.

<sup>64</sup> See Report by the NCES: *Assessment of Diversity in America's Teaching Force* <http://www.cec.sped.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=6240>.