

AUGUST 2002 NRPA LAW REVIEW

COUNTY FAIR DRESS CODE FAILS CONSTITUTIONAL TEST

James C. Kozlowski, J.D., Ph.D.

© 2002 James C. Kozlowski

On a windy evening last fall, I attended a high school football game with my 12-year-old daughter. At the time, my daughter had her hair wrapped in a pink paisley bandanna. Upon entering the stadium, my daughter was abruptly stopped by a member of school security and told to remove her scarf because it violated school regulations which prohibited the wearing of “gang apparel” at public school events. I thought it was absurd, but decided not to press the matter and risk making the situation more uncomfortable for my daughter. After removing her bandanna, we were allowed to proceed into the stadium.

Following the incident, I was never able to find any such school regulation. Instead, I was only able to find a very loosely worded reference to a school dress code which provided the school principal with a large measure of discretion to determine what was appropriate to the school setting. I was reminded of this incident when I came across the *Gatto* opinion described herein.

As illustrated by the *Gatto* opinion, such vague and overly broad dress codes are most likely unconstitutional, absent a clear showing by the government that the wearing of distinctive apparel “unique to a discernible group was reasonably likely to provoke violence.”

In reaching its conclusion, the court in *Gatto* cited extensively from an earlier federal district court opinion, *Hodge v. S.T. Lynd*, 88 F.Supp.2d 1234 (D.N.M. 2000), which it found to be “factually similar” and “particularly instructive” on the constitutional issue of dress codes. In *Hodge*, a minor was excluded by deputy sheriffs from a county fair and rodeo for wearing a baseball cap with the brim facing backward.

The fair had been advertised and promoted as a family event and fair officials instructed the sheriff's department "that there should be zero tolerance for gang activity at the fair, and no tolerance for inappropriate behavior." The sheriff's department had received intelligence reports that wearing baseball caps backward "could be a gang symbol", and the deputy sheriff who enforced the county's rules viewed such clothing as similar to that worn by gang members.

While the right to wear a bandanna, baseball cap, or other apparel may seem too trivial to warrant constitutional protection, the *Gatto* court cited the following “historical examples of excessive governmental restrictions on dress and appearance”:

AUGUST 2002 NRPA LAW REVIEW

In China, following the Manchu invasion of 1644, the conquerors required the population to wear a prescribed hair style and prescribed clothing, and killed those who did not obey; in Russia, also in the 17th century, Peter the Great imposed a heavy tax on beards that had religious significance for Russian Orthodox men, in an attempt to force a more Western lifestyle on his country. Recent efforts of the Taliban government of Afghanistan to require men to wear beards and women to wear concealing burkas demonstrate that the authoritarian impulse of some governments to control dress is still alive in the world.

FREEDOM OF DRESS?

In the case of *Gatto v. County of Sonoma*, No. A094976 (Cal.App. Dist.1 05/23/2002), Stephen Gatto was ejected from the Sonoma County Fair (Fair) for refusing to remove a vest he was wearing that bore insignia of the Hell's Angels Motorcycle Club. The facts of the case were as follows:

On August 1, 1998, after Gatto purchased a ticket and entered the Fair, City of Santa Rosa Police Officers Badger and Brazis told Gatto the vest he was wearing, which carried the insignia of the Hell's Angels Motorcycle Club, violated the Fair's dress code and instructed him to either remove the vest or leave the fair. When Gatto refused to take off the vest, the officers ordered him to leave and he complied.

The dress code commenced with the statement that "[t]he Sonoma County Fair is intended for the enjoyment of the general public, particularly families, and to insure the quality of our family atmosphere. . . ." All fairgoers were asked to adhere to three policies, the second of which is the sentence just quoted. The first and third policies, not implicated in this litigation, state "[n]o apparel will display profanity" and "[n]o nudity."

The "Policies and Procedures" promulgated by the Fair set forth rules required to be posted at all admission gates. The posted rules stated that "THE FAIR RESERVES THE RIGHT TO DENY ADMISSION TO ANYONE AT ANYTIME. . . . NO `COLORS' ALLOWED (E.G. BANDANAS, HANDKERCHIEFS HANGING FROM POCKETS) TO BE WORN IN A PROVOCATIVE MANNER. ALL PERSONS SUBJECT TO DRESS CODE & SEARCH." The dress code referred to in the rules stated in material part that "[n]o apparel or accessories intended to provoke, offend or intimidate others will be tolerated, including offensive slogans, insignia or `gang colors.'"

AUGUST 2002 NRPA LAW REVIEW

Gattoo sued the county and others involved in running the Fair, alleging enforcement of the Fair's dress code policy "interfered with and abridged" his "right to free speech guaranteed by Article I, Section 2 of the California Constitution. " Article 1, section 2(a) of the state constitution provided that: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." While not identical, this provision in the state constitution is similar to rights protected by the United States Constitution.

The trial court agreed that the dress code was unconstitutional. The county appealed. As characterized by the appeals court, the issue was whether the Fair's dress code was unconstitutional because it was "void for vagueness and facially overbroad." Further, the appeals court considered whether enforcement of the dress code against Gatto "deprived him of a liberty interest in his personal dress and appearance."

"LIBERTY INTEREST" IN PERSONAL APPEARANCE

On appeal, Gatto argued that "the dress code is void for vagueness and impermissibly overbroad." In the opinion of the appeals court, however, the evidence in the record did not necessarily establish that "Gatto's use of an insignia of the Hell's Angel Motorcycle Club constituted protected speech."

The insignia itself was not received in evidence. Nor does the record show whether Gatto is a member of the Hell's Angels, whether the Hell's Angels espouse a political view or other ideas entitled to constitutional protection, or whether Gatto wore its insignia with the intent to convey a particularized message and there was a great likelihood the message would be understood by those observing it, not merely as a fashion statement...

[T]he wearing of a particular type or style of clothing usually is not seen as expressive conduct... [I]t has not been shown here, that the insignia and apparel at issue served to express a constitutionally protected political viewpoint...

A report on the Hell's Angels prepared by the California Department of Justice in 1965 describes numerous "Hoodlum Activities" attributed to club members by law enforcement agencies, and their "Crime Characteristics," but the report does not attribute any socio- political beliefs to members of the organization.

On the other hand, the court acknowledged that "the constitutional rights that may be affected by a dress code are not limited to those arising under the free speech clause of the First Amendment."

AUGUST 2002 NRPA LAW REVIEW

Specifically, the court noted that “a plaintiff challenging a dress code may have a liberty interest protected under the due process clause of the Fourteenth Amendment.”

[A]n individual's choice of personal dress or appearance is a liberty interest protected under the due process clause... [D]eciding what clothes to wear and what appearance to present to the rest of the world are personal decisions, constitutionally protected from arbitrary government interference... [T]here is a liberty interest in one's choice of clothing, grooming, and other aspects of personal appearance, under the Due Process Clause of the United States Constitution.

However, because it is less significant than other, more fundamental rights, such as speech, religion and marital privacy, alleged infringement of the judicially recognized liberty interest in personal dress or appearance is subjected to the rational basis test rather than more stringent scrutiny.

In sum, even if a person's choice of dress and manner of appearance does not constitute the sort of expressive conduct protected by the First Amendment, it is nevertheless a form of individual expression that is constitutionally entitled to some protection against arbitrary governmental suppression.

For a government regulation to be constitutional under the rational basis test, the government must demonstrate a reasonable connection between a significant governmental interest and the regulatory means chosen to achieve that interest. In so doing, however, the chosen regulatory framework must not be too vague or overbroad in defining what conduct is prohibited.

Accordingly, the court would examine “the legitimacy of the county's interest in imposing dress restrictions on fair patrons.” As noted by the court, “judicial treatment of government imposed dress codes has usually depended on the nature of the arena in which the restriction was imposed.” In this particular instance, the court found the county fair involved “an event that is open to the public, but is put on for a particular purpose,”

[A] governmental entity sponsoring an event such as the Fair has a legitimate interest in fostering a non-violent, family atmosphere, because this atmosphere is consistent with the event being sponsored. In connection with that interest, the Fair has the authority to impose rules of conduct designed to advance this goal.

Since a county fair is not an event in which a particular mode of dress is part of the purpose, such as a black-tie affair, the government sponsor could not legitimately

AUGUST 2002 NRPA LAW REVIEW

enforce a dress code requiring a particular style of clothing; but it did have a legitimate interest in imposing a dress code banning clothing that other patrons would find threatening, or that could potentially trigger angry or even violent responses from those other patrons. Such clothing would be inimical to the family-oriented, safe atmosphere that was part of the purpose for the Fair.

Despite “the legitimacy of the fair's interest,” the court found the dress code in this particular instance “did not pass constitutional muster because it was both vague and overbroad.”

A regulation is constitutionally void on its face when, as matter of due process, it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. The void for vagueness doctrine is designed to prevent arbitrary and discriminatory enforcement. The problem with a vague regulation is that it impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis...

Applying these principles to the facts of the case, the court had difficulty with “the imprecision” of the phrase “gang colors” in the County’s dress code. As noted by the court, the County’s dress code states: "No apparel or accessories intended to provoke, offend or intimidate others will be tolerated, including offensive slogans, insignia or “gang colors." As characterized by the court, the term "gang colors," (as well as "offensive slogans and insignia") simply provides a “non-exclusive example of "apparel or accessories intended to provoke, offend or intimidate others." In the opinion of the court, “[t]hese operative criteria are so highly subjective as to provide enforcement authorities almost unfettered license to decide what the dress code permits and prohibits.”

The subject matter of the law's prohibitions is not merely broad, but open-ended and potentially limitless. The ordinance does not define, list, or explain what constitutes a “gang symbol” or “gang colors”; it does not even define “gang”...

“[G]ang colors” and “gang symbols” include a wide and undefined range of clothing and jewelry and that, in most cases, these colors or symbols are not necessarily gang related. Moreover, numerous colors may be associated with or used by one gang... [A]ll of the colors under the rainbow can indicate a gang in the right combination... [T]he list of gang symbols or jewelry also includes designs or emblems that are not necessarily gang related...

[A]lmost any color combination may become gang colors and almost any symbol may be a gang symbol; the list is endless. What is innocent today may become a gang

AUGUST 2002 NRPA LAW REVIEW

symbol tomorrow according to the whim of the gangs themselves. Were a gang (however defined) to adopt red, white, and blue as its colors or the crucifix as a symbol, every church and school would be “flashing gang symbols.”

Accordingly, the court found that “[t]he vagueness of the dress code is largely the reason it is also impermissibly overbroad.”

[T]he dress code before us provides no “ascertainable standard for inclusion or exclusion.” Because it is vague not just as applied to Gatto or a limited group of individuals, but in all possible applications, it is proper to call it “perfectly vague”... [Since the County has] neither imposed nor offered any narrowing construction of the code, it is impossible to objectively determine whether the wearing of particular apparel or accessories is or would be thought by a law enforcement official to be within the ambit of its prohibitions.

As described by the court, “[a] statute or regulation is overbroad if does not aim specifically at evils within the allowable area of governmental control, but sweeps within its ambit other activities that constitute an exercise of protected expression and conduct.” In the opinion of the court, “[t]he County’s dress code fits this description” of an overbroad and, thus, unconstitutional regulation.

A great deal of the apparel and accessories celebrated in contemporary fashion magazines can fairly be described as provocative and/or intimidating; and conventional dress bearing forms of political speech and religious expression protected under the First Amendment are clearly offensive to many people, and sometimes even likely to provoke violence.

INSIGNIA PROVOKES VIOLENCE?

In reaching this conclusion, the court found it was “understandable” that “the operators of a county fair or other enterprise providing family entertainment to the public” would want “to prohibit patrons from wearing clothing widely believed to be offensive.” While understandable, the court, however, cautioned that “a clear and narrowly drawn restriction of many forms of behavior offensive to most people may be hard to reconcile with the values enshrined in the First Amendment.”

The First Amendment forbids the government to silence speech based on the reaction of a hostile audience, unless there is a clear and present danger of grave and imminent harm. Otherwise, a vocal minority (or even majority) could prevent the expression of disfavored viewpoints—a result contrary to the central purpose of the First Amendment’s

AUGUST 2002 NRPA LAW REVIEW

guarantee of free expression.

These constitutional principles mandate that government may not disadvantage a person on the basis of his status or his views solely for fear that others may be offended or angered by them. . . . The Constitution does not allow government to subordinate a class of persons simply because others do not like them.

As a result, under the circumstances of this particular case, the court held that “the operators of a county fair or like public event cannot proscribe the wearing of clothing thought likely to be offensive to others.”

In so doing, however, the court was careful to note the County could employ dress codes to prohibit indecent exposure proscribed by law. Moreover, the court noted that the County could prohibit “the wearing of clearly specified types of clothing or accessories they reasonably believe might lead to substantial disruption of or material interference with the event.”

[If the County] knew, and could show, that the wearing of distinctive insignia unique to a discernible group was reasonably likely to provoke violence at the Fair, persons wearing that insignia could be excluded; the County would not have to wait for the expected violence to materialize. But that is not what happened in this case. The County did not prohibit the wearing of Hell's Angels insignia (or the insignia or symbols of any other specific group), and there is no showing that the wearing of such an insignia was likely to lead to violence.

As a result, the appeals court affirmed “the trial court's conclusion that the County's dress code was unconstitutional.”