

COMMUNITY CENTER "DIRTY DANCING"

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The First Amendment protects speech, but not mere conduct. Conduct, however, which contains a communicative element which is reasonably understood by the observer, is symbolic speech subject to First Amendment protection. In regulating First Amendment activity, the government is limited to reasonable time, place, and manner restrictions which are content neutral (i.e., not based on the nature of the message) and narrowly tailored (i.e., regulating no more speech than is necessary) to achieve a significant governmental interest. In contrast, governmental regulation of mere conduct is not subject to such strict judicial scrutiny. On the contrary, courts will uphold governmental regulation of mere conduct under the much less demanding rational basis test which simply requires some rational relationship or connection between the governmental regulation and a legitimate state interest.

In the case of *Willis v. Town of Marshall*, 426 F.3d 251 (4th Cir. 2005), plaintiff Rebecca Willis enjoyed dancing to the music provided by the local bands on Friday evenings at the Town of Marshall's community center, the Marshall Depot. Willis's unorthodox dancing style generated a number of complaints to the committee in charge of the Depot events. As a result of these complaints, the Town banned Willis from the Depot. Willis filed suit in federal district court claiming her dancing was expressive conduct entitled to constitutional protection under the First Amendment.

FACTS OF THE CASE

In the center of the Town of Marshall is the Marshall Depot, a former railroad depot leased by the Town for use as a community center. A committee appointed by the Town's Board of Aldermen coordinates events at the Depot. On Friday nights the Town opens the Depot and sponsors musical entertainment, permitting local groups to sign up for playing time. The Friday night concerts are for the benefit of the public and are attended by community members of all ages. During the Friday night concerts, the musicians perform on a stage, which is located in front of rows of auditorium-style seats where people can sit and listen to the music. There is no real dance floor in the Depot, but there is small area off to the side of the stage and seating area where people often dance. Posted on the back wall of the Depot was a list of the Depot's "Rules of Behavior," but there were no posted rules or regulations regarding dress or appropriate behavior at the Depot.

Rebecca Willis regularly attended the Friday night concerts, where she particularly enjoyed dancing. According to the Town's evidence, Willis danced in a sexually provocative manner — gyrating and simulating sexual intercourse with her partner while "hunch[ed]" on the floor. The Town's evidence indicates that Willis wore very short skirts and would frequently bend over while dancing, exposing her underwear, her buttocks, and her "privates."

Community members were concerned about their children being exposed to Willis's dancing, and a number of them complained to members of the Depot Committee. The Town contends that members of the Depot Committee repeatedly spoke to Willis about her dancing and asked her to

"please curtail the provocativeness of her dances." These requests were allegedly met with defiance. The Town says that rather than toning down her dancing, Willis began to dance even more provocatively.

Willis took issue with the Town's view of the facts. Willis described her style of dance as "exuberant and flamboyant," but not inappropriate in any way. Willis acknowledged that she wore short skirts to the Depot, but she stated that she always wore underwear and pantyhose and thus could not have exposed her "privates." According to Willis, only one of the Depot Committee members once told her to "cool it", but the committee member later that night told Willis that she had been joking.

In any event, the Depot Committee ultimately decided to ban Willis from attending events at the Depot. This decision was conveyed to Willis by way of a letter from the Town's mayor. The letter, dated December 12, 2000, stated: "Due to the inappropriate behavior exhibited by you and having received previous warnings from the Marshall Depot Committee it is the consensus of the Committee that you are banned from the Marshall Depot. This action is effective as of today's date."

After receiving the banishment letter, Willis contacted an attorney. Her attorney conveyed to the Board Willis's willingness to apologize for any inadvertent displays of her underwear and to abide by any dress code that the Board might adopt if the Board would permit her to return to the Depot. The Board declined to lift the banishment, and this action followed.

THE COMPLAINT

In her complaint, Willis alleged that the Town violated her First Amendment rights of free expression. The district court granted summary judgment in favor of the town. The court concluded that Willis's recreational dancing did not amount to speech and thus was not constitutionally protected. To the extent that Willis had a First Amendment right to receive information provided during the Depot events, the district court concluded that the Town's decision to ban Willis because of her conduct and attire was a reasonable regulation of conduct unrelated to her right to receive information. Willis appealed.

ON APPEAL

The issue on appeal was whether Willis had presented evidence sufficient to show the Town had violated any of her constitutional rights, specifically her First Amendment rights. As noted by the federal appeals court, there would be no need to address Willis's constitutional challenge in the absence of any protected First Amendment right under the circumstances of this particular case.

As described by the appeals court, "[i]t is well established that the First Amendment protects expressive conduct as well as pure speech."

We have long recognized that the First Amendment's protection does not end at the spoken or written word. Conduct may be sufficiently imbued with elements of

communication to fall within the scope of the First and Fourteenth Amendments. There is no doubt that, under some circumstances, dancing will amount to expressive conduct protected by the First Amendment. For example, most forms of dance, whether ballet or striptease, when performed for the benefit of an audience, are considered expressive conduct protected by the First Amendment.

The Constitution protects not just political and ideological speech, but also live entertainment, including nude dancing and other performances involving nudity or other sexual elements... First Amendment principles governing live entertainment are relatively clear: short of obscenity, it is generally protected.

Applying these principles to the facts of the case, the specific question before the court was, therefore, “whether this kind of social or recreational dancing is entitled to First Amendment protection.” On appeal, Willis contended that “the kind of dancing she engaged in at the Depot is expressive conduct protected by the First Amendment.” Specifically, Willis suggested that “some at the Depot events viewed her dancing as part of the entertainment, such that she should be considered a performer whose dance is constitutionally protected.” The appeals court rejected this argument. In so doing, the court noted that “there likely will be some whose dancing is sufficiently good or unusual as to gain an audience among the other dancers” in “every group of recreational dancers.” Despite the fact that such recreational dancing may contain a “kernel of expression,” the appeals court found such conduct is not “sufficiently communicative to bring it within the protection of the First Amendment.”

It is possible to find some kernel of expression in almost every activity a person undertakes — for example, walking down the street or meeting one's friends at a shopping mall — but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.

Similarly, in this particular instance, the appeals court found Willis “was not a performer in any meaningful sense — she was simply dancing for her own enjoyment.”

The dancing here is not claimed to involve any political or ideological expression. It is not intended to convey any kind of message.... In these circumstances, it is our view that conduct as opposed to speech is involved.

As a result, the court concluded that “the activity of these dance-hall patrons — coming together to engage in recreational dancing — is not protected by the First Amendment.”

The Town's decision to prohibit lewd dancing at the Depot is no different from a decision permitting or prohibiting any other conduct at the Depot. Just as the Town can prohibit drinking alcohol or smoking and can require patrons to wear shoes and shirts, the Town can prohibit lewd or otherwise inappropriate dancing, all without running afoul of the First Amendment.

In reaching this determination, the appeals court recognized that “there is a First Amendment issue lurking in the background of this case.” Specifically, the court acknowledged that “Music,

as a form of expression and communication, is protected under the First Amendment." As a result, the court found "[t]he live music performed at the Friday night concerts thus is a form of expression protected by the First Amendment." Moreover, the court noted that the First Amendment "protects *both* a speaker's right to communicate information and ideas to a broad audience *and* the intended recipients' right to receive that information and those ideas." As a result, Willis had a First Amendment right to listen to the musical performances at the Depot because the music at the Depot involved protected expression.

Willis's claim of a constitutional right to listen to amateur bluegrass and country music seems somewhat less compelling than, for example, the right to read a newspaper article conveying accurate information about a political candidate... Nonetheless, musical performances like those at the Depot are clearly a form of speech entitled to First Amendment protection. And where there is a protected right of speech, there is likewise a protected right to receive the speech.

Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.

Despite Willis's "right to receive speech (in essence, the right to listen)" to the music being performed at the Depot, the appeals court found this right was "not sufficient to trigger First Amendment scrutiny as to the Town's lewd-dancing policy." On the contrary, the court found that "First Amendment scrutiny applies only if there is government action that directly or at least incidentally affects a protected expressive activity."

While application of the Town's policy on lewd dancing ultimately prevented Willis from exercising her right to listen, that attenuated, indirect effect on speech is insufficient to bring the First Amendment into play... [E]very civil and criminal remedy imposes some conceivable burden on First Amendment protected activities... First Amendment scrutiny should not be applied if the government is regulating neither speech nor an incidental, non-expressive effect of speech.

Accordingly, the federal appeals court affirmed the district court's grant of summary judgment in favor of the Town on Willis's First Amendment claims.

EQUAL PROTECTION

Willis also challenged the Town's actions on Equal Protection grounds. In the absence of a classification which infringes on a fundamental constitutional right, or a suspect classification (i.e., race, creed, religion, national origin), the appeals court noted that a classification will be upheld against an Equal Protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Having determined that recreational dancing was not protected by the First Amendment, the equal protection issue was, therefore, whether the classification in this particular instance (i.e., the Town's treatment of lewd dancing) was "rationally related to a legitimate state interest." In the opinion of the court, the Town's "prohibition against lewd or suggestive dancing at the Depot is unquestionably valid."

The Town opened up the Depot for the Friday night events to provide a venue for wholesome, family entertainment. Protecting children from inappropriate sexual displays at the Depot is, at the very least, a legitimate governmental interest... [T]he government has a "compelling interest in protecting the physical and psychological well-being of minors... A ban on lewd or suggestive dancing is rationally related to that interest. Accordingly, to the extent that Willis challenges the Town's lewd-dancing policy, that challenge fails.

While contending that "she did not dance inappropriately," Willis had also claimed that "the Town used its power to regulate the behavior of those attending events at the Depot arbitrarily, by singling her out for punishment, while refusing to punish others who danced or dressed similarly." In particular, Willis noted that "no action was taken against her unnamed partner" who also engaged in lewd dancing.

The appeals court acknowledged that an Equal Protection claim might exist "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." However, in this particular instance, the district court had found that there was no evidence that the Town received complaints regarding the behavior of any other people who Willis claimed danced in a similar lewd fashion. Despite such findings, the appeals court found "no *evidence* in the record demonstrating the absence of complaints," just the Town's assertion that it "received no complaints about any other Depot dancer." In the absence of such evidence, the appeals court determined that Willis should have an "opportunity to demonstrate that others situated similarly in this regard were not treated similarly." The appeals court, therefore, ordered that the district court provide such an opportunity for Willis to pursue her Equal Protection claim on the basis that the Town had arbitrarily singled her out for punishment, while refusing to punish others who danced or dressed similarly.