No. 21-2475

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOHN M. KLUGE,

Plaintiffs-Appellant,
v.

BROWNSBURG COMMUNITY SCHOOL CORPORATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division
Honorable Jane Magnus-Stinson
Case No. 1:19-cv-02462-JMS-DLP

Brief of the Secular Student Alliance as *Amicus Curiae* in support of Appellee and affirmance

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Appellate Court No: 21-2475

Short Caption: Kluge v. Brownsburg Community School Corporation

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INTEREST OF AMICI[1]

The Secular Student Alliance ("SSA") is a 501(c)(3) nonprofit and network of over 200 groups on high school and college campuses dedicated to advancing nonreligious viewpoints in public discourse. SSA empowers secular students to proudly express their identity, build welcoming communities, promote secular values, and set a course for lifelong activism. SSA and its chapters and affiliates value the efforts of high schools, colleges, and universities to ensure an inclusive and welcoming educational environment.

[1] All parties consented to the filing of this amicus brief. No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person, other than amicus, its members, or its counsel (and the Freedom From Religion Foundation) contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

A teacher's conduct, even if motivated by religious belief, occurs within an environment that requires schools to make decisions with the best interests of students in mind. Based on both pedagogical concerns and concerns over potential harm to students, Brownsburg Community School Corporation was well within its rights to deny John Kluge's requested accommodation related to student names.

I. The Court should consider unique aspects of the educational environment when analyzing undue hardship.

Kluge's request to not use students' first names occurs within the context of a public education system, which has important responsibilities to students. Three aspects of the educational environment are factors relevant to the undue hardship that Brownsburg faces if it were to allow Kluge to disregard Brownsburg's policy relating to student names. First, public school teachers have a position of power and responsibility. Second, students are subject to compulsory education laws. Third, teacher conduct within the classroom is attributable to the school system, not merely the individual teacher.

A. Public school teachers have a position of authority.

This Court has recognized the unique role that teachers play in public primary and secondary schools. In prior cases involving First Amendment challenges, the Court has noted, "[T]eachers occupy a unique position for influencing secondary school students, thus creating a concomitant power in school authorities to choose the teachers and regulate their pedagogical methods." *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1007 (7th Cir. 1990), *citing Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F.2d 1300, 1304 (7th Cir. 1980). Because teachers seek to influence students, both by design and in practice, teacher behavior and comments in the classroom have a resulting impact on students. Schools would be irresponsible if they disregarded the functions and responsibilities of teachers when assessing whether a teacher's request for a special exemption from school policies should be permitted.

While teachers are entitled to their own beliefs, they are not entitled to act on those beliefs in the classroom in all instances. Teachers have authority over minors who are susceptible to coercive pressures from instructors. Students are at the mercy of teachers, who

can assign them course work, discipline them, and who grade them. It is no surprise then that students typically seek to stay in a teacher's good graces. Because of the power that teachers have, schools must control how teachers interact with students in order to ensure the best educational environment for students.

B. Students are mandated to attend school.

Teachers interact with students who are mandated to attend school. Indiana, like all other states, has a compulsory education law. Ind. Code § 20-33-2-4. This Court has weighed that factor in considering whether teachers may teach in a manner that contravenes school policy. The Court recognized, "The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Webster,* 917 F.2d at 1007; *citing Edwards v. Aguillard,* 482 U.S. 578, 584 (1987).

In *Mayer v. Monroe Cty. Cmty. Sch. Corp.,* the Court determined that a teacher's Free Speech claim failed when she was not rehired after making remarks about the Iraq war in class. 474 F.3d 477, 479 (7th Cir. 2007). The Court found, "The Constitution does not entitle teachers to

present personal views to captive audiences against the instructions of elected officials." *Id.* at 480 (7th Cir. 2007). The Court highlighted that education is "compulsory" and stated that children who must attend school "ought not be subject to teachers' idiosyncratic perspectives." *Id.* The Court recognized that determinations about what topics will be expressed in the classroom are left to democratically elected school boards. *Id.* at 479-480.

Teachers and students are not on an equal footing when it comes to their interactions. This is because students are compelled to attend school and because of the inherent authority that teachers have. Any teacher accommodation that relates to teacher-student relations will become part of an educational system where there is an imbalance of power that favors the teachers.

C. Teacher conduct in the classroom is attributable to the school system.

Kluge's request to violate school policy in how to address students ignores that a teacher's remarks in the classroom are attributable to the school system. In *Mayer,* the Court recognized, "[T]he school system does not 'regulate' teachers' speech as much as it *hires* that speech." 474 F.3d at 479; *see also, Brown v. Chicago Bd. of Educ.*, 824 F.3d 713, 715

(7th Cir. 2016). Classroom expression "is a teacher's stock in trade." *Id.* For instance, the Court analogized that a teacher couldn't deviate from the school curriculum in various ways to teach their own preferred platform, such as by teaching a revisionist perspective that Benedict Arnold really was not a traitor. *Id.* Were the rule otherwise, teachers in primary and secondary schools could simply do as they wish and ignore the directives of the duly elected school boards which make curriculum decisions.

The conduct and remarks by school staff may potentially violate the legal rights of others, which poses liability for the school system. In *Grossman v. S. Shore Pub. Sch. Dist.*, a school guidance counselor claimed the school system engaged in religious discrimination under Title VII when it did not renew her contract. 507 F.3d 1097 (7th Cir. 2007). The counselor had prayed with students and discarded school materials on contraceptives and replaced them with abstinence-only materials. *Id.* at 1098. This Court stated:

> Teachers and other public school employees have no right to make the promotion of religion a part of their job description and by doing so precipitate a possible violation of the First Amendment's establishment clause... even if the religious composition of the local community makes a legal challenge unlikely.

Id. at 1099-100. The Court continued, "The First Amendment is 'not a teacher license for uncontrolled expression at variance with established curricular content.'" *Id., quoting Palmer v. Board of Education,* 603 F.2d 1271, 1273 (7th Cir.1979).

When taking an adverse employment action against an employee, a school system does not need to definitively prove that a legal right asserted by potential students would be violated by the staff member. In *Grossman,* it was sufficient that the counselor's conduct raised potential liability under the Establishment Clause. The Court said that it was unlikely that the district was in "serious danger" of being sued, but that "religion is such a sensitive subject that it is understandable why the school authorities would be worried by such incidents." *Id.* at 1099. This Court has recognized that employers do not need to put themselves on the "razor's edge" of violating the rights of others in adopting an accommodation for an employee. *See Matthews v. Wal-Mart Stores, Inc.*, 417 F. App'x 552, 554 (7th Cir. 2011). It is well established that a staff member's conduct is attributable to the school and that conduct may pose liability on the school system.

The actions of teachers constitute government action on behalf of the school system. When combined with the fact that teachers have a position of authority over students who are mandated to attend school, a school district must exercise great care in determining how teachers may interact with impressionable students.

II. Schools may limit a teacher's religiously-motivated behavior in the classroom due to both pedagogical concerns and potential to harm students

Schools are in the "business" of teaching and any accommodation provided to teachers that interferes with student learning poses more than a slight burden on the school system. It is especially problematic that the "last names" accommodation requested by Kluge would put a burden on students, rather than the employer. Even considering Brownsburg's burden, it has legitimate pedagogical concerns and concerns for the potential harm to students.

School districts must be careful to ensure that students feel welcome in the school environment. One of the great features of our public school system is that students from different backgrounds, religions, and numerous other characteristics, attend the same schools.

Brownsburg provided for the education of all students when it adopted an inclusive policy relating to how teachers refer to students inside of the classroom.

A. Kluge's request to not call students by their name is a burden shouldered by students

By refusing to call students by their name as recorded in the PowerSchool database and instead calling students by their last names, Kluge places the burden of accommodating him on students. This is problematic at a threshold level because it is only the *employer* who may need to shoulder a slight burden under Title VII of the Civil Rights Act of 1964. *See Equal Emp. Opportunity Comm'n v. Walmart Stores E., L.P.*, 992 F.3d 656, 659 (7th Cir. 2021). When the burden falls upon other employees, for instance, the accommodation claim fails as a matter of law. In *EEOC v. Walmart Stores,* the Court rejected a proffered shift-trading accommodation because it "would thrust on *other workers* the need to accommodate [the employee's] religious beliefs. That's not what the statute requires." *Id.* Similarly, students must not be tasked with accommodating Kluge's religious beliefs.

Relatedly, Kluge argues that student "grumblings" are not sufficient to justify Brownsburg's denial of his accommodation request.

Appellant's Opening Brief at 33. Despite the dismissive label that Kluge uses, this type of negative reaction to an accommodation is precisely what demonstrates the burden placed on students. Students complained numerous times about how Kluge was treating them. Shortly after switching to a system of addressing students by their last name, the guidance counselor at the school received several complaints from parents about the well-being of their children. One mother of a transgender student noted that Kluge continued to call her child "Miss" and that it was causing her child "a lot of distress." Doc. 120-13 at 2. Another noted that Kluge's practice was contradictory to the advice of the student's medical providers who "agree that it is in [the] child's best interest to socially transition as a male" and that doing so will "help him live the best life that he can live." Doc. 120-12 at 2.

Additionally, several students complained weekly that the practice made them uncomfortable and noted that while the practice theoretically made everyone equal, it tacitly brought unwanted attention to transgender students who were the source of the accommodation. Doc. 120-14 at 7-8; Doc. 120-14 at 13-14; Doc. 58-2 at 7-8. One student reported that transgender students felt "isolated and

targeted" because they understood that their presence in class was the reason Kluge changed the way he addressed students and another said that Kluge's use of last names made the classroom environment "very awkward." Doc. 58-2 at 2-3; 58-1 at 3-4. Ultimately, one student's experience in Kluge's class influenced his decision not to enroll in orchestra after the 2017-2018 school year and eventually to stop attending Brownsburg High School altogether. Doc. 22-3 at 4-5.

Kluge wants to put the burden of an accommodation on students, yet any complaint raised by students is improperly dismissed by him as mere "grumblings." The out-of-circuit cases cited by Kluge for this legal proposition provide him no support.

First, the decision in *Cummins v. Parker Seal Co.*, 516 F.2d 544, 550 (6th Cir. 1975), was later vacated on rehearing by the Supreme Court. *See Parker Seal Co. v. Cummins,* 433 U.S. 903 (1977). On remand, the Sixth Circuit affirmed the dismissal by the district court in a per curiam opinion. *Cummins v. Parker Seal Co.*,561 F.2d 658, 659 (6th Cir. 1977) 561 F.2d 658, 659 (6th Cir. 1977). Hence, the primary case that Kluge relies on for support, stands for the opposite proposition.

Second, in *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397 (9th Cir. 1978), the employer simply failed to carry its burden of proof. That case involved an employee who desired to pay the equivalent of union dues to charity instead of to the union. *Id.* The employer did not present any evidence that union members considered the employee to be a "free rider." *Id.* at 402. As an aside, the Ninth Circuit remarked that even proof that employees would "grumble" about an accommodation would be insufficient. *Id.* This indicates that the Ninth Circuit would have considered mere *disagreement* by coworkers with the employee receiving a benefit to be insufficient to deny an accommodation. But Kluge's requested accommodation does not involve others complaining that he has received a special benefit that they do not receive. Students have experienced the negative results of his requested accommodation and have complained about them. This is precisely the type of reaction one can expect when an employer attempts an accommodation that imposes more than a slight burden.

B. Brownsburg's pedagogical interests and interest in protecting students are significant interests, which allow for limitations on religious accommodations

Schools are concerned about those who they serve and not just the direct financial costs of an accommodation. Even in the business context, employers may reject accommodating behavior that does not translate into a purely financial burden. In *Anderson v. U.S.F. Logistics*, this Court held that an employer reasonably accommodated an employee's religious practice by allowing her to include a "Blessed Day" phrase when signing official company communications with some people but not with certain customers. *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470 (7th Cir. 2001). The Court noted that the employee's use of the "Blessed Day" phrase could be an imposition of her religious beliefs on the employer's customers. *Id.* at 477. Because at least one customer complained about the employee's phrase, the evidence suggested that the employee's use of the phrase could damage the employer's relationship with the customer. *Id.*

Like protecting business relationships in *Anderson*, a school district has an interest in protecting its pedagogical interests in the classroom. School districts are in the "business" of teaching students,

and teacher accommodations which hinder the district's ability to educate students cause more than a slight hardship. It is paramount that teachers and schools avoid damaging relationships with students.

Employer concerns relating to relationships are especially acute when the employee has a position of authority. An authority figure that seeks an accommodation relating to how he treats subordinates is far afield from the purpose of accommodations under Title VII. At a broad level, typical accommodations involve requests by employees to modify their own behavior in ways that do not interfere with relationships. Those accommodations often involve requests relating to changed schedules, *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977), or workplace attire and appearance, *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015). These accommodations most directly impact the employee rather than the employee's interactions with third parties.

Courts have denied Title VII religious discrimination cases when the employee seeks to alter the relationship between an employee and customers, patients, or subordinates. *See Anderson*, 274 F.3d at 477 (Noting that use of religious phrase by employee on customer who

complained could be an imposition of religious beliefs on customer); *Baz v. Walters*, 782 F.2d 701, 706–07 (7th Cir. 1986) (Finding that chaplain's accommodation request to proselytize could not supplant VA hospital's philosophy of care for the overall well-being of patients); *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1021 (4th Cir. 1996) (Finding that employer would not be able to accommodate employee's desire to send religiously critical letters to coworkers and subordinates). The relationships between teachers and students warrants similar consideration as that between an employee and customers, patients, or subordinates.

Brownsburg has legitimate pedagogical concerns and concerns for the potential harm to students with Kluge's requested accommodation. Not only are these concerns, Kluge's use of last names only has harmed some students. One or more students have been caused distress, made uncomfortable, felt singled out, or dropped out of orchestra. Harm, per se, always rises above the level of a slight burden. Here, given that harm was caused to several students in Kluge's class, Brownsburg would be undertaking more than a slight burden if it continued a harmful accommodation.

Even if Brownsburg did not demonstrate that students were already harmed, it was justified in denying the continued use of only last names by Kluge. Because of the potential for problems relating to student names, Brownsburg determined it was best to establish a set protocol for use of student first and last names as designated in PowerSchool.

One potential problem for Brownsburg is liability relating to its treatment of transgender students. If educators are allowed to engage in conduct that violates the rights of transgender students, the school system may be held liable. *See Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017) (Finding that student was likely to succeed on the merits of Title XI and equal protection claims). Brownsburg is not required to definitively prove that transgender students have a winning discrimination claim based on Kluge's conduct. Rather, Brownsburg correctly recognizes the potential liability created by Kluge's requested accommodation and it seeks to avoid potentially violating the rights of students. The school system has a legitimate interest in not violating student rights and it may ensure Kluge follows school policy to avoid such violations.

CONCLUSION

Public schools, and their teachers, hold a unique role in our society. Students themselves are mandated by law to attend and are placed under the authority of a teacher, whom school officials have an interest in regulating to achieve the school's educational mission. An accommodation that harms students or conflicts with a school system's pedagogical interests poses more than a slight burden under Title VII.

The judgment of the district court should be affirmed.

Dated: Nov. 8, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Patrick C. Elliott, certify that:

1. This brief complies with the type-volume limitation of Circuit Rule 29 because this brief contains 3,013 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) and Circuit Rule 32 because this brief has been prepared in a proportionally spaced typeface in 14-point Century Schoolbook.

Dated: November 8, 2021

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 8, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: November 8, 2021

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