

## ***BAUCHMAN v. WEST HIGH SCHOOL (1998)***

### **School Choir's Use of Songs, Sites Tied to Christianity is Constitutional**

*Public school choir director's selection of Christian songs and use of Christian churches for performances does not violate Jewish student's rights under Establishment Clause, Free Exercise Clause, or Free Speech Clause, even when supplemented by 20-year-history of director's religious advocacy.*

A Jewish student in a public high school who alleged that the Mormon director of the school choir selected Christian songs and performance sites for the purpose of advancing religion failed to state a claim under the First Amendment, the U. S. Court of Appeals for the Tenth Circuit held December 18. (*Bauchman v. West High School*, CA 10, No. 95-4084, 12/18/97)

In affirming the district court's refusal to permit amendment of the complaint to detail the choir director's past acts, the appeals court said that in First amendment Establishment Clause cases, "our examination must stop short of an attempt to discern a defendant's psychological motives vis a vis his past conduct, underlying belief system or religious character." That aspect of the decision drew a vigorous dissent.

The student originally complained that the director advocated and endorsed his religion by requiring the choir to perform a preponderance of Christian songs that he selected for the religious messages they conveyed; arranging for the choir to perform Christian devotional songs in Christian churches; choosing two explicitly Christian devotional songs to be sung at the school's 1995 graduation; and ostracizing students who dissented from this religious advocacy.

The district court dismissed the complaint on the pleadings and rejected an amended complaint as futile. See 64 LW 2190.

**No Religious Purpose or Effect.** Affirming, the Tenth Circuit analyzed the case under the three-part Establishment Clause test of *Lemon v. Kurtzman*, 403 U. S. 602 (1971). Judge Wade Brorby noted that "a significant percentage of serious choral music is based on religious themes or text," and that a choir director "would be expected to select any particular piece of sacred choral music, in part for its unique qualities useful to teach a variety of vocal music skills." Moreover, churches might be selected as performance sites for their acoustical and seating capacities, the court said.

Given these "obvious" secular purposes, the plaintiff's exclusive focus on the religious components of the choir's activities does not support her Establishment Clause claim, the court said.

The court further found that a reasonable observer aware of "the historical tension between the government and the Mormon Church, and the traditional and ubiquitous presence of religious themes in vocal music," would perceive that, while many of the choir's songs have religious content, others are secular songs, and both are performed in religious and non-religious settings that "reflect the community's culture and heritage." The "natural consequences" of the choir's activities "viewed in context in their entirety" would thus not be the advancement or endorsement of religion, the court said.

As for the third *Lemon* prong, the court found that the above “religiously neutral educational choices” entail “no state involvement with recognized religious activity” and thus do not amount to excessive entanglement of church and state.

The plaintiff’s claims that she was subjected to ridicule and harassment for opposing the director’s choices evidence insensitivity on the part of students, their parents, teachers, and administrators, but “do not rise to the level of a constitutional violation,” the court said, adding that they cannot “be used to breath constitutional life into otherwise unactionable conduct.”

**Past Acts Irrelevant.** In her amended complaint, the student alleged that over the course of 20 years, the choir director had endorsed religion through such acts as forcing his choir class to attend the offering of prayers and sacraments at Mormon churches; inquiring of choir applicants’ religious views in class; and portraying the school choir as a Mormon religious choir.

But, “any attempt to use allegations regarding [the director’s] past conduct to evidence a continual, controlling unexpressed or psychological motive to further a religious purpose by selecting religious songs and religious performance venues oversteps what we believe are pragmatic limits on the nature of our inquiry into the ‘actual’ purposes of the challenged conduct,” the court said. “We must focus instead on objectively discernible conduct or communication that is temporally conducted to the challenged activity and manifests a subjective intent by the defendant to favor religion or a particular religious belief.”

An Establishment Clause claim “must be supported by allegations of conduct or statements that expressly (without resorting to psychoanalysis) indicate the defendant believed his selection of songs and performance venues would serve a religious *purpose* — e.g., constitute religious exercise, cause students to become religious, or cause students to adopt particular religious beliefs,” the court said.

The plaintiff’s amended complaint, dwelling on the director’s past conduct, does not show he had a religious purpose “during the 1994-95 school year” at issue, the court said.

The student’s free exercise claim failed because she was given the option of not participating in activities that conflicted with her religious beliefs, and the assurance that it would not affect her grade, and thus she could not show coercion, the court found. It rejected her free speech claim for like reasons.

**Dissent.** Judge Michael R. Murphy agreed that the original complaint did not state an Establishment Clause claim but said the majority erred in finding that the director’s motive in undertaking past acts is irrelevant in proving present purpose. Any distinction between motive and purpose is unsupported by U.S. Supreme Court Establishment Clause cases,” he said. Moreover, the majority’s finding clashes with Fed.R.Ev.404(b), which authorizes use of past acts for proof of motive or intent. Murphy would have remanded for further proceedings under the amended complaint.