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SCOTUS to Assess the Scope of Public Employers' First Amendment Obligations

The U.S. Supreme Court has agreed to hear a First Amendment free speech and religious freedom case with potential major implications for all public employers.

In *Kennedy v. Bremerton School District*, the Court will determine whether a public school district unconstitutionally violated a former high school football coach's First Amendment free speech and free exercise rights when it suspended his employment after he defied the district's repeated directives to stop praying at mid-field following his team's games.

The case involves multiple significant First Amendment questions for public employers, including the scope of what constitutes government speech and whether public employers may rely on the Establishment Clause to prohibit otherwise private and protected religious expression. The Court's decision to hear the case, particularly with its conservative super-majority, portends the Court broadly curtailing public employers' ability to restrict religious expression in the workplace.

Kennedy v. Bremerton School District

A. Factual background

As we discussed in our previous commentary, Kennedy, a practicing Christian, began his career as a football coach in 2008 at Bremerton High School, a public school in Washington state. He initially instituted a practice of praying alone at mid-field that evolved to include simple prayers with student athletes and finally, to longer motivational speeches at midfield after the games with religious content.

In September 2015, the school district ordered Kennedy to stop praying so that the district did not violate the Establishment Clause, and it offered him several accommodations to enable him to pray privately. Kennedy declined these accommodations, insisting that his religious activities must take place at mid-field after the game in full public view. He took to multiple social media sites to announce publicly his non-compliance. Thereafter, the district placed Kennedy on administrative leave, and he was not recommended for re-hire during the annual renewal process.

Kennedy did not apply for a 2016 coaching position. In August 2016, Kennedy sued the school district in federal district court, alleging the district violated his rights under the First Amendment and Title VII, and sought injunctive relief in the form of reinstatement.

B. SCOTUS declines to hear Kennedy's bid for injunctive relief

The case has a long procedural history. Most notably, in 2019, the Supreme Court previously declined to hear Kennedy's appeal of the Ninth Circuit's refusal to grant him injunctive relief in the form of reinstatement during the pendency of his lawsuit. Justice Alito, however, wrote a statement regarding that denial, joined by Justices Thomas, Gorsuch and Kavanaugh, in which he criticized the Ninth Circuit, saying its "understanding of the free speech rights of public-school teachers" was both "troubling" and something that "may justify review" by the Court in the future.

C. The Ninth Circuit sides with school district, affirms dismissal of case

On the merits, in March 2020, the district court granted the school district's motion for summary judgment, holding that "the risk of constitutional liability associated with Kennedy's religious conduct was the 'sole reason' the district ultimately suspended him." The lower court further held that the school district's actions were justified due to the risk of an Establishment Clause violation if the school district allowed Kennedy to continue with his religious conduct.

The Ninth Circuit affirmed in March 2021. As to Kennedy's free speech claim, the Ninth Circuit held that Kennedy's prayers occurred within the scope of his official duties as a public employee and, therefore, under Supreme Court precedent, the First Amendment did not protect his speech. The Ninth Circuit specifically noted the following facts in support of its ruling:

Kennedy admitted that his public employee responsibilities extended to post-game interactions with his players,

He acknowledged serving as a mentor, motivational speaker and role model to his students *specifically at the conclusion of the game*,

The scope of Kennedy's employment included providing short, secular motivational speeches, and

Kennedy's speech occurred in plain view of people in the stands while players stood next to him at mid-field.

Taken together, the Ninth Circuit ruled Kennedy's religious conduct occurred in the course of his public duties. The Ninth Circuit further held that the school district had a compelling state interest in avoiding an Establishment Clause violation, therefore justifying regulation of Kennedy's speech even if private and protected.

With respect to Kennedy's free exercise claim, the Ninth Circuit held that the school district had the same compelling state interest in avoiding a violation of the Establishment Clause, therefore satisfying the onerous strict scrutiny standard to justify the school district's admitted impingement on Kennedy's free exercise rights. Specifically, in large part because Kennedy refused any accommodations from the school district that would allow it to avoid violating the Establishment Clause, the court ruled the district's directives to stop praying at mid-field were narrowly tailored to the compelling state interest of avoiding a violation of the Establishment Clause.

What this means for you

All public employers should pay close attention to how the Court rules in *Kennedy*. The case involves multiple significant First Amendment questions with potential larger implications for all public employers.

The first question involves the scope of what constitutes government speech, i.e., whether Kennedy's religious speech came as a public employee, with no First Amendment protection, or as a private citizen, with ordinary First Amendment protections. In general, determining whether a public employee's speech is protected under the First Amendment requires a fact-intensive balancing test, with particular focus on whether the speech occurred within the scope of the public employee's official duties. The Court's decision to accept this case suggests that at least four, and likely more, members of the Court's conservative super-majority want to ensure that public employers understand and respect their employees' rights to religious expression in the workplace. The Court may take this opportunity to broaden how and why quasi-public speech in the "workplace" like Kennedy's prayers are protected under the First Amendment. At minimum, public employers should expect the Court to clarify when a public employee's speech is private and, therefore, subject to ordinary First Amendment protection.

The second question confronting the Court is whether, assuming Kennedy's speech is private and protected, the Establishment Clause nonetheless compels public schools to prohibit such religious expression. This inquiry will require the Court to weigh the relationship between the Establishment Clause, the Free Exercise Clause and the Free Speech Clause. The Court has trended towards affirming greater (i.e., ordinary) First Amendment free speech protection in recent terms. The Court also seems unlikely to relegate an individual's free exercise rights to the government's interest in

avoiding an Establishment Clause violation except in extremely narrow circumstances. At minimum, public employers should expect the Court to clarify the circumstances when the Establishment Clause compels public employers to act against their employees' faith that may otherwise constitute religious discrimination.

It is unclear whether the Court will answer these questions narrowly or provide broader guidance. Justice Alito's earlier statement, joined by three conservative justices, suggests the Court's new conservative supermajority is poised to curtail public employers' ability to restrict religious expression in the workplace more broadly than just on the facts of Kennedy's case.

Contact us

If you have questions about the potential implications of this case on your public workplace, please contact John Borkowski, Aleks Rushing, Sam Mitchell or your Husch Blackwell attorney.