LAW UPDATE
LABOR AND EMPLOYMENT
SCHOOLS LEGAL SERVICE
PHONE: (661) 636-4830 • FAX: (661) 636-4843
E-mail: sls@kern.org • www.schoolslegalservice.org

August 2021

BETWEEN THE FIRST AMENDMENT'S ESTABLISHMENT AND FREE EXERCISE/SPEECH CLAUSES, WHAT IS A PUBLIC SCHOOL DISTRICT TO DO WITH AN EDUCATOR'S PUBLIC PRAYER? (*JOSEPH A. KENNEDY V. BREMERTON SCHOOL DISTRICT*)

Joseph Kennedy (Kennedy) is a former assistant football coach at Bremerton High School (BHS). He was suspended in 2015 for his refusal to alter his practice (since 2008) of praying at the 50-yard line immediately following each game. Kennedy is a practicing Christian with a sincerely held belief that he, in his words, "give thanks through prayer, at the end of each game, for what the players had accomplished and for the opportunity to be a part of their lives through the game of football."[1] Kennedy supervised student athletes, and his coaching contract required him to act as a "mentor and role model for the student athletes, . . . exhibit sportsmanlike conduct at all times, . . . maintain positive media relations . . . [and strive to] create good athletes and good human beings." In the months just preceding Kennedy's suspension during the 2015 football season, BHS received a complaint from the coach of an opposing team alleging that Kennedy had asked his players to join him in prayer on the field after the game. Shortly after the Athletic Director of BHS spoke to Kennedy of his disapproval, Kennedy posted on Facebook that he might get fired for praying. The dispute went viral, drawing public attention on both sides of the issue. In its effort to enforce its board policy requiring school staff to neither encourage nor discourage students from engaging in religious activity, BHS issued Kennedy the following directive:

> Student religious activity must be entirely and genuinely student-initiated, and may not be suggested, encouraged (or discouraged), or supervised by any District staff. . . . You and all District staff are free to engage in religious activity, including prayer, so long as it does not interfere with job responsibilities. Such activity must be physically separate from any student activity, and students may not be allowed to join such activity. In order to avoid the perception of endorsement discussed above, such activity should either be non-demonstrative (i.e., not outwardly discernable as religious activity) if students are also engaged in religious conduct, or it should occur while students are not engaging in such conduct.[2]

Kennedy and his attorneys objected to the directive and requested religious accommodation, while some students and their parents expressed thanks stating some players participated in the prayers to avoid

[1] *Kennedy v. Bremerton School District* (U.S.D.C. W.D. Wash, 2020) 443 F.Supp.3d 1223, 1228.
[2] *Id.* at 1229.

being separated from the rest of the team or to ensure playing time. Following the directive, Kennedy began making media appearances and proclaiming he intended to continue to pray as he has "always done" at upcoming games. BHS ultimately suspended Kennedy, citing as the "sole reason" the potential risk of constitutional liability associated with Kennedy's decision to keep praying on the field after the game.[3]

Kennedy filed suit in federal court alleging BHS violated his First Amendment rights to free speech and free exercise, and discriminated against him in violation of his rights under Title VII of the Civil Rights Act of 1964.[4] Kennedy also sought a preliminary injunction based on his free speech claim, but the District Court denied the request. Kennedy appealed to the Ninth Circuit Court of Appeals that affirmed the lower court ruling on the basis that Kennedy's prayers were delivered in his capacity as a public employee and were, therefore, unprotected speech.[5] Kennedy sought review in the United States Supreme Court, but, as noted in a very rare statement of concurrence by four Supreme Court Justices, the high court generally does not grant discretionary review of highly fact-specific questions early in litigation. Nevertheless, in the statement issued by Justice Alito (with Justices Thomas, Gorsuch and Kavanaugh joining), the Ninth Circuit Court of Appeals opinion was described as "troubling," "tendentious" and one which may "justify review in the future." Justice Alito wrote:

> The Ninth Circuit's opinion applies our decision in *Garcetti v. Ceballos, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006)*, to public school teachers and coaches in a highly tendentious way. According to the Ninth Circuit, public school teachers and coaches may be fired if they engage in any expression that the school does not like while they are on duty, and the Ninth Circuit appears to regard teachers and coaches as being on duty at all times from the moment they report to work to the moment they depart, provided that they are within eyesight of students. Under this interpretation of *Garcetti*, if teachers are visible to a student while eating lunch, they can be ordered not to engage in any "demonstrative" conduct of a religious nature, such as folding their hands or bowing their heads in prayer. And a school could also regulate what teachers do during a period when they are not teaching by preventing them from reading things that might be spotted by students or saying things that might be overheard.
>
> This court certainly has never read *Garcetti* to go that far. While *Garcetti* permits a public employer to regulate employee speech that is part of the employee's job duties, we warned that a public employer cannot convert private speech into public speech "by creating excessively broad job descriptions." *Id., at 424*. If the Ninth Circuit continues to apply its interpretation of *Garcetti* in future cases involving public school teachers or coaches, review by this Court may be appropriate.
>
> What is perhaps most troubling about the Ninth Circuit's opinion is language that can be understood to mean that a coach's duty to serve as a good role model requires the coach to refrain from any manifestation of religious faith—even when the coach is plainly not on

[3] *Id.* at 1231.
[4] "Congress passed Title VII to remove 'artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification,' such as religion." *Id.* at 1240-1241 (citing *McDonnell Douglas Corp. v. Green* (1993) 411 U.S. 792, 801).
[5] *Kennedy v. Bremerton Sch. Dist.* (9th Cir. 2017) 869 F.3d 813.

> duty. . . . After emphasizing that petitioner was hired to "communicate a positive message through the example set by his own conduct," the court criticized him for "his media appearances and prayer in the BHS bleachers (while wearing BHS apparel and surrounded by others)." *869 F.3d, at 826*. This conduct, in the opinion of the Ninth Circuit, "signal[ed] his intent to send a message to students and parents about appropriate behavior and what he values as a coach." *Ibid.* But when petitioner prayed in the bleachers he had been suspended. He was attending a game like any other fan. The suggestion that even while off duty, a teacher or coach cannot engage in any outward manifestation of religious faith is remarkable.[6]

Kennedy's case was returned to the district court for adjudication and both parties filed dispositive motions for summary judgment based on undisputed facts. The district court applied the following test from *Garcetti,* and Ninth Circuit cases interpreting *Garcetti*, which required asking the following five questions: (1) whether Kennedy spoke on a matter of public concern; (2) whether Kennedy spoke as a private citizen or public employee; (3) whether Kennedy's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether BHS had an adequate justification for treating Kennedy differently from other members of the general public; and (5) whether BHS would have taken the adverse action even absent the protected speech. The court concluded Kennedy spoke as a public employee (Kennedy's speech at the 50-yard line "owes its existence" to his coaching position) and BHS's action was otherwise justified to avoid an Establishment Clause violation (both the perception of school endorsement and the subtle coercion of students participating in or attending the game).

On March 21, 2021, a panel (three judges) of the Ninth Circuit agreed with the district court and held: (1) Kennedy's free speech claim failed because he spoke as a public employee—he engaged in on-field, demonstrative religious activity so his speech was not protected, and even if Kennedy spoke as a private citizen, BHS had an adequate justification for its action because an objective observer, familiar with the history of Kennedy's practice, would view his demonstrations as BHS's endorsement of a particular faith; and (2) Kennedy's free exercise claim failed because BHS had a compelling state interest in seeking to avoid a violation of the Establishment Clause and it tried repeatedly to find an accommodation or other options that were narrowly tailored to protect Kennedy's rights.[7]

On April 21, 2021, the Ninth Circuit, on its own, requested the parties submit briefs addressing whether this case should be reheard *en banc*.[8] On July 19, 2021, the Ninth Circuit issued a 92-page decision denying a rehearing with judges taking vastly different views on both sides of the issue, each criticizing the other for either not faithfully following *Garcetti* ("obliterating" the First Amendment and Justice Alito's guidance a few years earlier), or ignoring the unique facts that showed Kennedy did not meet his burden in showing that he spoke as a private citizen (with one judge stating Kennedy, by his specific conduct, created the dilemma). One of the original panel judges even wrote:

---

[6] *Kennedy v. Bremerton Sch. Dist.* (Jan. 22, 2019) 139 S.Ct. 634, 636-637.

[7] *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004.

[8] *En banc* means the case is heard by the full court without considering the panel's decision. Given the number of judges on the Ninth Circuit, rehearing *en banc* means a rehearing with *11* judges. (Circuit Rule 35-3) Grounds for rehearing *en banc* are where the case involves "a question of exceptional importance" or a panel's decision creates an "intracircuit conflict". (FRAP 35(a).)

> I hope as this case proceeds that the truth of what actually happened will prevail, but whether it does or not, I personally find it more than a little ironic that Kennedy's "everybody watch me pray" staged public prayers (that spawned this multi-year litigation) so clearly flout the instructions found in the Sermon on the Mount on the appropriate way to pray.[9]

Clearly a conflict on an important issue exists, necessitating review by the Supreme Court. As detailed in the facts, BHS attempted to accommodate Kennedy's beliefs once the issue was brought to their attention by the opposing team's coach. The parties, however, were unable to reach a mutual solution, with the public and the courts sympathizing with the parties on both sides of the aisle. As this case illustrates, determining whether an employee's speech is private or public, and whether the employer's response to it is justified, is factually intensive and requires thorough legal analysis before adverse action is taken. Districts are encouraged to contact legal counsel as soon as these situations occur to ensure the rights of both parties can be maintained. This is a case to watch and hopefully will be headed back to the Supreme Court now that the facts of the case have been laid out and application of those facts to a final interpretation of the law can be made. We will keep you updated on anticipated further developments in this case.

Please contact Schools Legal Service with any questions you may have about this case or other First Amendment issues that affect public school employers.

Kelly A. Lazerson

[9] The opinion then quotes from Matthew 6:5-6 of the King James version of the Bible. (See *Kennedy v. Bremerton Sch. Dist*, 2021 U.S. App. LEXIS21253.)