BARNES & THORNBURG LLP

Weighing First Amendment Rights As Private Citizens And Public Employees

February 8, 2019 | Employment Lessons,Labor And Employment

In today's politically charged climate, public employers are especially susceptible to criticism when it comes to varying community values and opinions concerning employee expression or speech. That expression can take the form of anything from taking a knee or praying on the field after a game to statements made on social media.

Unlike the private sector, where employers may have more latitude to regulate speech and expression in the workplace without violating the Constitution, public employers must follow First Amendment guidelines. After all, public school employees "do not check their First Amendment rights at the schoolhouse gate," as established in *Tinker v. Des Moines Ind. Comm. Sch. Dist.*

How does a public employer decide whether certain employee expression or speech has lost the proverbial First Amendment protection? School employers must determine whether the employee's speech or actions are those of a private citizen on a matter of public concern, and whether the employee's interest in commenting on matters of public concern outweighs the interest of the school district in promoting the efficiency of its operations or services. Easy task, right?

A recent example of how employment decisions regarding employee expression can result in lengthy litigation arose in *Kennedy v. Bremerton Sch. Dist.*, where a school district was forced to take a position on an employee's religious expression after it received complaints from community members regarding the high school football coach and prayer.

The coach was placed on administrative leave after he declined to follow the superintendent's directive to refrain from kneeling and praying on the 50-yard line in view of students and parents immediately after football games. The

RELATED PRACTICE AREAS

Labor and Employment

coach sued the school district, seeking reinstatement as a coach and a ruling that he had the right to pray on the field after games. A federal district court ruled against the coach. In 2017, a unanimous three-judge panel of the U.S. Court of Appeals for the 9th Circuit, in San Francisco, also ruled in favor of the school district.

Public employers are prohibited by the First Amendment's Establishment Clause from endorsing or promoting a specific religion. Like in the *Kennedy* case, public school employers must balance the constitutional rights of employees with their responsibility to prohibit employees from proselytizing students.

When weighing a public employee's right to express religious speech on school property over the rights of the schools to enforce speech rules, courts often allow restriction of the employee's rights in part because students are a "captive audience," as was the case in *Fowler v. Board of Educ. of Lincoln Cnty*.

The *Kennedy* case sets an important reminder for public employers to conduct a thorough First Amendment analysis prior to taking adverse actions against an employee for expression or speech. Failure to do so may result in lengthy litigation, reversal of the employment decision, and possibly damages.