

YOU AND THE LAW

Private Citizen Versus Public Official: A Case Analysis of Coaches' Freedom of Religion

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Joseph A. Kennedy v. Bremerton School District
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Abstract

When does the establishment clause end and the free exercise clause begin for public school coaches? As public officials, sport coaches are subject to constitutional restrictions prohibiting the endorsement of religion, which may in turn infringe upon their rights as private citizens. In the case of Joseph A. Kennedy v. Bremerton School District (2017), Coach Kennedy was restricted from praying on the 50-yard line immediately after football games in view of students and parents and subsequently filed a lawsuit claiming violation of his freedom of religion. The purpose of this law review is to analyze the aforementioned case and provide implications for schools and coaches to protect individual civil liberties and mitigate legal liability.

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Facts of the Case

Joseph Kennedy was a high school football coach employed by Bremerton High School (BHS) in Kitsap County, Washington, from 2008 to 2015. While acting as a football coach, Kennedy often led students and other coaches in a locker room prayer before games, participated in team prayers after games, and could be observed kneeling in private prayer at the 50-yard line immediately following games. Over time, Kennedy's midfield prayer evolved into a larger demonstration as players from both BHS and the opposing team gathered around Kennedy, took a knee, and listened to motivational speeches containing religious content delivered by Kennedy. In September 2015, the school district became aware of Kennedy's involvement in these religious activities and sent him a letter notifying him of potential legal issues regarding the activities. The school advised Kennedy that he was "free to engage in religious activity, including prayer... [but] such activity must be physically separate from any student activity, and students may not be allowed to join such activity."

In response to the letter from Bremerton School District (BSD) Superintendent Aaron Leavell, Kennedy suspended his practice of leading an on-field prayer immediately following games; he instead waited for the field to clear before kneeling and praying by himself. After several weeks of complying in this manner, Kennedy wrote a letter to the school asking for a religious accommodation under the Civil Rights Act of 1964. In his request, Kennedy claimed that his postgame speeches occurred during "non-instructional hours" and did not endorse any single religion and he therefore planned to resume this practice. Kennedy's intention to resume his prayers at the October 16 game received large media attention, including media appearances by Kennedy. Following this game, Kennedy knelt and closed his eyes in prayer on the field; he was joined on the field by coaches and players from both teams and by members of the general public and media. After these events occurred, BSD made arrangements to restrict access and secure the field after games.

Following the October 16 demonstration, Leavell sent two more letters to Kennedy explaining the district felt his actions were not in compliance with BSD's policies. The school expressed concerns that Kennedy's actions interfered with his ability to perform his job,

which included the supervision of students immediately after games. Additionally, the school expressed concern that Kennedy, who was wearing school attire and on school grounds during his prayer, could be viewed by a reasonable observer as representing the school while endorsing his religious beliefs. The district informed him that any religious activities he engaged in going forward should not be readily observable by students or the attending public. The district offered to accommodate Kennedy's religious beliefs by offering a private area to pray or allowing him to return to the field after students and fans had cleared the stadium.

After receiving these additional notices from the school, Kennedy continued his practice of praying on the field immediately after games, against the direction of the school. He was subsequently put on administrative leave. While on leave, Kennedy attended a game as a member of the public, wearing his school attire, and drew considerable media attention by performing his postgame prayer from the bleachers. After the football season ended, the athletic director recommended that Kennedy not be rehired and the school did not offer Kennedy a new contract after his expired.

Case History

Kennedy's suit was filed in the Western District of Washington on August 9, 2016, on the grounds that his rights under the First Amendment were violated. In his complaint, Kennedy moved for a preliminary injunction requesting BSD to (1) cease discrimination against him that is in violation of the First Amendment, (2) reinstate Kennedy as the BHS football coach, and (3) allow him to kneel and pray on the 50-yard line immediately after BHS football games. To succeed in seeking a preliminary injunction, a plaintiff must establish (1) they are likely to succeed on the merits of their claim, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest (*Sanders Cty. Republican Cent. Comm. v. Bullock*, 2012).

In review of the preliminary injunction request, the district court applied the five-step framework laid out in *Eng v. Cooley* (2009) to determine the likelihood to prevail. Within this framework, the plaintiff bears the burden of showing (1) their speech addressed an issue of public concern, (2) the speech was spoken in the capacity

of a private citizen and not that as a public employee, and (3) the state “took adverse employment action” and that the speech was a “substantial or motivating” factor in the adverse action. Assuming the previous three steps have been met, the burden shifts to the government entity to show (4) there was adequate justification for treating the employee differently from any other member of the general public and (5) it would have taken the same actions in the absence of protected conduct.

Within the context of this framework, the district court denied the requested preliminary injunction, finding Kennedy was unlikely to prevail on the merits of his First Amendment retaliation claim. The court observed that Kennedy had been “dressed in school colors,” chose a time and event that “is a big deal,” and subsequently “used that opportunity to convey his religious views” while still being “responsible for the conduct of his students.” Additionally, the court noted that Kennedy’s prayer resulted in “subtle coercion,” since athletes are “impressionable” and keen to “please” their coach to seek more playing time. As such, Kennedy would be seen as acting in the capacity of a public employee, not a private citizen. Furthermore, the court concluded that any reasonable observer would have concluded that Kennedy, as a coach, was leading an “orchestrated session of faith.” Therefore, BSD was justified by their need to avoid violating the Establishment Clause. Kennedy filed for appeal.

Case Analysis

On appeal, Kennedy argued the district court erred in their decision that he was unlikely to succeed on the merits of his legal complaint that BSD retaliated against him for exercising his right to free speech protected under the First Amendment. To evaluate Kennedy’s First Amendment retaliation claim, the United States Court of Appeals for the Ninth Circuit utilized the First Amendment Retaliation Test in *Eng v. Cooley* (2009) as a guiding framework (see Case History). As the parties did not contest factors one, three, or five of the First Amendment Retaliation Test, the court of appeals focused on factors two and four in their deliberation.

Private Citizen or Public Employee

To determine whether Kennedy’s speech was spoken as a private citizen or public employee, the court of appeals utilized pre-

edent, including *Pickering v. Board of Ed. Township High Sch. Dist.* (1968), *Garcetti v. Ceballos* (2006), *Johnson v. Poway Unified Sch. Dist.* (2011), and *Coomes v. Edmonds Sch. Dist. No. 15* (2016). As outlined in *Garcetti v. Ceballos* (2006), the court must first make a factual determination of Kennedy’s job responsibilities and second determine the constitutional significance of Kennedy’s job responsibilities, to discern whether his speech was spoken as a private citizen or public employee. The court of appeals’ analysis was limited to relevant “speech at issue,” involving Kennedy kneeling and praying on the 50-yard line *immediately* after football games *in view* of students and parents.

Among a number of job duties, the court of appeals found BSD required Kennedy to “be a coach, mentor, and role model for the student athletes,” “exhibit sportsmanlike conduct at all times,” “communicate effectively” with parents, “maintain positive media relations,” acknowledge that he was “constantly being observed by others,” “[o]bey all the Rules of Conduct before players and the public,” “use proper conduct before the public and players,” and endeavor to “create good athletes” and “good human beings” (*Kennedy v. Bremerton Sch. Dist.*, 2017). The evidence suggests Kennedy’s speech at issue after games in view of students and parents was pursuant to his responsibilities to serve as a role model and moral exemplar. However, his rejection of BSD’s accommodations and off-field conduct (i.e., media appearances, praying publicly in BHS apparel) suggests demonstrative communication intended to send a message. Moreover, Kennedy’s acknowledgment that he was “constantly being observed by others” and insistence that his speech at issue occur in view of students and parents suggests his speech was not solely directed to God but also directed in part to the surrounding spectators. According to *Pickering v. Board of Ed. Township High Sch. Dist.* (1968) and *Johnson v. Poway Unified Sch. Dist.* (2011), school officials’ conduct falls within the ordinary scope of their professional responsibilities when at a school function, in the presence of students, or when acting in a capacity perceived as official. As communication to students, parents, and spectators was found within the scope of Kennedy’s duties, the demonstrative speech at issue was determined to occur while he acted in his official capacity as a football coach.

Kennedy’s job as a football coach was deemed akin to being a teacher, “clothed with the mantle of one who imparts knowledge and wisdom” (*Johnson v. Poway Unified Sch. Dist.*, 2011). Further, Kennedy’s expressions were considered to carry great weight, for it was observed that in Kennedy’s absence, players elected to not pray on the field after games. As Kennedy’s prayer celebrated sportsmanship—aligning with his job duty to “exhibit sportsmanlike conduct”—the speech at issue was considered to fall within the scope of his professional responsibilities and was thus subject to regulation. BSD’s “Religious-Related Activities and Practices” policy does not prohibit prayer by employees while on the job, but rather stipulates that religious exercise must not interfere with an employee’s job responsibilities or lead to a perception of BSD endorsing religion, per the Establishment Clause of the First Amendment. Not only did Kennedy’s conduct violate this policy, but also per *Johnson v. Poway Unified Sch. Dist.* (2011), he “took advantage of his position to press his particular views upon the impressionable and captive minds before him” (followed by *Coomes v. Edmonds Sch. Dist. No. 15*, 2016). More specifically, Kennedy utilized his special access to the field as a football coach to pray on the 50-yard line immediately after games.

As Kennedy was not able to demonstrate the first three factors of the First Amendment Retaliation Test (*Eng v. Cooley*, 2009), the inquiry did not need to proceed to factor four. Therefore, the court of appeals affirmed the district court’s judgment denying Kennedy’s motion for preliminary injunction. Ultimately, the court of appeals recognized the important role of public worship for many communities, however, distinguished that such activities risk alienating community members and promoting disunity in a public environment intended to be inclusive and welcoming to all, thus justifying the preservation of religious practice for the private domain.

Implications

As demonstrated in the case, there can be tension between the Establishment Clause and Free Exercise Clause of the First Amendment for public school officials seeking to observe their religious beliefs or practices while working in their official capacity. The following implications reflect strategies to mitigate legal liability while promoting religious freedoms:

1. **Accommodation:** The First Amendment of the U.S. Constitution and Title VII of the Civil Rights Act of 1964 require employers to accommodate the religious practices of employees, as long as the accommodation does not impose undue hardship on the employer (U.S. Equal Employment Opportunity Commission, n.d.). It would not be acceptable to simply bar a coach or school official from discussing their religion or use of their faith to inform guiding moral principles. Religious accommodations may include provision of private space for religious practice, exceptions to dress code policies, schedule changes, or excused leave. Sport administrators and coaches should also recognize their religious freedoms as private citizens and advocate for reasonable accommodation from their senior leadership to enable their observance of religious beliefs or practices. Similarly, schools should proactively develop policies that accommodate the varied religious practices of employees to create an inclusive environment, free of discrimination.
2. **Tradition:** While prayer may be traced across the history of sport traditions and rituals, tradition does not justify practices deemed unconstitutional, regardless of intent. When a school officials' conduct infringes upon the legally protected rights of others, such conduct becomes subject to institutional regulation. For example, though school sport initiation rituals may arguably enhance group cohesion, they may also be destructive to sport participants—such as hazing—and thus should be regulated by the school (Levinson-King, 2019). Sport administrators and coaches may allow the tradition of prayer before or after sport events to continue only if in appropriate contexts where school officials do not endorse religion nor infringe upon students' free exercise of religion.
3. **Media:** The activities of school administrators and coaches often garner public interest. Coaches may be interviewed or conduct postgame press conferences while still in their team's apparel. These appearances are often broadcast to innumerable viewers and may delve into the personal faith and philosophies of the coach and how those influence the team composition and results on the field. Addressing the media

is considered well within the scope of a coach's job responsibilities but could infringe upon the division of church and state. To help coaches successfully navigate media attention, schools should (1) Have a well-defined employee handbook that defines coach's job duties pertaining to engaging the public in their official capacity; (2) train coaches on how to appropriately communicate with the media; (3) provide supplemental training on managing issues likely to draw media scrutiny; (4) consult with public relations professionals before making public statements to the media; (5) draw clear distinctions about when an employee can make a media appearance in their school-branded attire, to help avoid the public-private confusion; and (6) adopt a proactive mindset to help conflicting situations from catching fire in the media—strong initial statements will make the school's position and actions clear.

4. **Chaplain:** The Freedom From Religion Foundation has notably filed complaints with public institutions based upon program inclusions of religion beyond moral, principle-based guidelines (e.g., Marcello, 2015). In response, many public institutions have designated chaplains to conduct faith-based activities. The sport chaplain role is typically an “unpaid, appointed position that allows the chaplain to remain neutral while serving administrators, coaches, and parents” (Waller, Dzikus, & Hardin, 2008, p. 108). Public schools interested in utilizing the services of a sport chaplain should examine chaplains' training and credentials to ensure they provide appropriate counsel equivalent to their certifications and do not expose the school to legal liability. The *FCA Chaplain Training Manual* is a resource that may aid schools navigating sport chaplaincy (Fellowship of Christian Athletes, 2007).

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