
School District Properly Placed Coach on Leave After He Refused to Cease Public Prayers Following Football Games

August 10, 2021
Number 20

Written by:

Sloan R. Simmons
Partner
Sacramento

Alyssa R. Bivins
Associate
Sacramento

UPDATE: On September 14, 2021, Kennedy petitioned for United States Supreme Court review of the Ninth Circuit’s ruling discussed in this Client News Brief. Oral arguments were heard by the Supreme Court on April 25, 2022. How the Supreme Court ultimately decides this case could have significant impacts on religious expression by school staff going forward. Lozano Smith will provide an update following the Supreme Court’s decision, which could be handed down as early as this summer.

In *Kennedy v. Bremerton School District* (9th Cir. 2021) 991 F.3d 1004, the Ninth Circuit Court of Appeals (Ninth Circuit) upheld the Bremerton School District’s (District) placement of high school football coach Joseph Kennedy (Kennedy) on paid administrative leave when Kennedy refused to stop conducting public prayers and religious motivational speeches at the 50-yard line with students following football games. The Ninth Circuit reasoned that the District appropriately prohibited Kennedy from engaging in demonstrative religious activity of this sort, finding that allowing such conduct would have caused the District to violate the Establishment Clause of the United States Constitution. Consequently, the District’s efforts to prevent the conduct violated neither Kennedy’s constitutional rights nor his rights under Title VII against religious discrimination and retaliation. Lozano Smith attorneys Sloan Simmons and Courtney de Groof prepared an amicus curiae brief in this case on behalf of the National School Boards Association, as well as the state school boards associations for California, Alaska, Arizona, Nevada, and Washington.

Background

Kennedy, who coached football in the District from 2008 to 2015, knelt at the 50-yard line after each football game to pray. Players began kneeling with Kennedy after games and praying with him. The prayers took place immediately after each football game, thus, players, students, and members of the community from both teams observed this activity. Eventually, Kennedy’s prayers evolved into religious-based inspirational speeches, with most of the football players from his team, as well as players from the opposing team, kneeling around Kennedy to listen. At least one player on Kennedy’s team “felt compelled to participate” in this post-game activity for fear he would lose playing time if he did not participate.

In September 2015, the District learned of Kennedy's prayers and speeches. The District asked Kennedy to limit his speeches to non-religious topics to avoid alienating any players, but that he could still engage in private, non-demonstrative prayer on the field after spectators had left the stadium.

Kennedy refused to comply with the District's request and offer of accommodation, and he continued to pray at the 50-yard line after the football games, surrounded by players and watched by members of the public from the stands. Kennedy also made numerous media appearances after the District asked him to cease his conduct, to "spread the word about what was going on in Bremerton." As a result, media outlets attended subsequent games, where Kennedy continued to engage in prayer and religious speeches, surrounded by kneeling players.

The District then placed Kennedy on paid administrative leave, indicating that Kennedy's activity gave the appearance of the District's endorsement of religion, thus placing the District at risk of violating the Establishment Clause. After Kennedy was placed on leave, the football players did not initiate their own post-game prayers. Kennedy decided not to apply to coach football at the District for the following season. Several months later, Kennedy sued the District, arguing the District violated his rights to free speech and the free exercise of religion.

Legal Framework

Public employees retain their First Amendment free speech rights when speaking as private citizens. But "when public employees make statements pursuant to their official duties," the United States Supreme Court held in its landmark 2006 ruling in *Garcetti v. Ceballos*, "the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." The Establishment Clause of the First Amendment states: "Congress shall make no law respecting an establishment of religion." The Establishment Clause "mandates government neutrality between religion and religion, and between religion and nonreligion." The Supreme Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," where government "exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure."

Outcome

The Ninth Circuit ruled that Kennedy's activity was not protected speech under the First Amendment because, under the *Garcetti* analysis, Kennedy was speaking as a public employee pursuant to his official duties, rather than as a private citizen. The court reasoned that because Kennedy prayed "immediately after games while in view of parents and students," he was speaking as a public employee. The court found that this activity fell within the scope of Kennedy's official duties because in his role as a school sports coach, Kennedy served as a mentor and role model for student athletes.

The Ninth Circuit also emphasized that determining whether employee speech is protected under the First Amendment requires a fact-specific analysis. The facts in this case—specifically that Kennedy "refused to collaborate" with the District in designing a reasonable accommodation for his religious practice and that Kennedy made it clear that he would continue to pray on the 50-yard line immediately following the game as long as the District employed him—tipped the scales against Kennedy's claim that he was engaging in such activity as a private citizen rather than a public employee.

As to the Establishment Clause issue, the Ninth Circuit ruled that if the District had permitted Kennedy to continue with his religious speeches and prayers, it would have given the appearance of the District endorsing Kennedy's religion. The Ninth Circuit noted that, as with free speech issues, Establishment Clause issues require heavy factual analysis. The Ninth Circuit emphasized that "[c]ontext matters," noting that in giving the motivational speeches, Kennedy was acting in his capacity as a public school coach, as his job duties extended at least until the players were released after entering the locker room. Further, as a coach, particularly at the conclusion of a game, he served as a role model and mentor for the players. The Ninth Circuit drew a distinction between this set of facts and a teacher "bowing her head in silent prayer before a meal in the school cafeteria."

Further exemplifying the fact-specific analysis required with respect to Establishment Clause issues, the Ninth Circuit highlighted that Kennedy went on a "media blitz" after he was asked to stop praying and continued to use his position as an employee to gain access to the field where he was watched by members of the community and the media. Given these specific facts, the Ninth Circuit found that the District appropriately placed Kennedy on administrative leave following his failure to comply with the District's requests to cease praying on the field directly following football games.

Takeaways

Consistent with the *Kennedy* court's conclusions, school districts must refrain from the appearance of endorsing religion to avoid violating the Establishment Clause. Factors to consider are the public nature of the religious activity, the role of the individual engaging in the activity, and the activity's impact on the student body, staff, and community. School districts must analyze employee engagement in religious activity on a case-by-case basis to determine whether allowing certain religious practices by employees could violate the Establishment Clause.

Note, Lozano Smith previously addressed this case in our [2017 Client News Brief Number 58](#). At that time, the Ninth Circuit upheld the denial of a preliminary injunction sought by Kennedy, where Kennedy argued the District violated his First Amendment free speech rights when it refused to allow him to pray on the field. Following the original Ninth Circuit ruling, Kennedy sought review before the United States Supreme Court, which was denied. Thereafter, the case returned to the district court, where the District prevailed on summary judgment. The Ninth Circuit found in the District's favor in March 2021, which was followed by the Ninth Circuit's consideration of whether to take up the case *en banc* (before the Ninth Circuit judges as a whole). In July 2021, the Ninth Circuit denied the request for *en banc* review, which resulted in a range of splintered opinions and statements by various judges, all of which might constitute fodder for Kennedy's anticipated further request for the Supreme Court to weigh in on this case. Should this case continue to wind its way through the federal court system, Lozano Smith will keep public agencies apprised of further developments and changes in the law.

If you have any questions regarding the *Kennedy* decisions, employee free speech or Establishment Clauses issues in general, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

Client News Brief

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

