

Ninth Circuit Affirms: Racist Images Circulated Via Personal Text Not a “Matter of Public Concern” Entitled to First Amendment Protection

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The Ninth Circuit recently issued an amended opinion in *Adams v. County of Sacramento* (9th Cir. 2005) 143 F.4th 1027, a case involving a former Sacramento County sheriff’s captain, and former Assistant Chief of Police for the City of Rancho Cordova, Kate Adams (Adams) who alleged she was forced to resign after allegations surfaced that she forwarded racist images via text message.

Adams filed a lawsuit against the County of Sacramento alleging her employer unlawfully retaliated against her for exercising her right to free speech. Adams lost her suit in the trial court, and filed an interlocutory appeal in the Ninth Circuit.

The Ninth Circuit Opinion

The Ninth Circuit reviewed the very limited issue of whether the text messages at issue constituted “a matter of public concern,” which is a requirement to show that her claims were protected under the First Amendment.

The Ninth Circuit reviewed the alleged facts as they were presented by Adams to make this determination. As alleged, in 2013, Adams forwarded “racist images” to two of her colleagues that she had received from an unknown individual. According to the record, “One of the images depicted a white man spraying a young black child with a hose and contained a superimposed racial epithet.” The other image was a picture of a comedian “with superimposed text containing an offensive racial slur.” In forwarding the images to at least one of her colleagues, Adams arguably expressed disapproval of the images, stating “Some rude racist just sent me this!” Years later, Adams’s employer learned of and reviewed the text exchange, and as a result, her employer allegedly gave Adams the option to either resign or be terminated. Adams resigned, but the incident nonetheless gleaned significant news coverage, and Adams claimed her career and reputation were seriously impacted.

Again, the narrow question for the Ninth Circuit was whether forwarding offensive, racist spam images to two friends, in the context of a “friendly, casual text message conversation,” and complaining about those images, constitutes “a matter of legitimate public concern,” under established case law. The “matter of public concern” issue is a crucial threshold inquiry because, if met, Adams’s speech would be entitled to heightened protection

under the First Amendment. In reviewing this issue, the Court of Appeals examined the “content, form, and context,” of the speech to make a determination.

Regarding content, the court reasoned that the images themselves were offensive, ostensibly of no importance or relation to Adams’s local community, her job or the public, and they were also not a subject of “legitimate news interest.” As to the form and content of the text messages, the court looked to Adams’s “motivation and the chosen audience.” To this end, the court noted that Adams sent the texts *privately* to two of her friends, suggesting that she did not intend the text messages to be public. The court further reasoned that Adams sent the texts in the context of conversations that were otherwise “friendly” and unrelated to work. For these reasons, among others, the court also concluded that “Adams’s private texts were only meant to convey a personal grievance about receiving offensive private texts to her friends in the course of social conversation, not to comment on a matter of public concern.”

Based on this analysis, the Ninth Circuit held that the texts did not constitute a matter of public concern and were not subject to the heightened First Amendment Analysis. Consequently, the court affirmed the lower court’s dismissal of Adams’s First Amendment and retaliation and related conspiracy claims. The case was remanded to the lower court for further proceedings. Circuit Judge Consuelo M. Callaghan wrote a dissenting opinion expressing that the majority applied the “matter of public concern” test in an unusually strict manner and arguing that Adams should be given the opportunity “to hold her employer accountable for its harsh reaction to her speech.”

Takeaways

This opinion is limited only to whether the texts, *under the circumstances*, constitute matters of public concern warranting special protection. Here, the court held that they did not. However, employee speech cases are extremely fact-specific, and reasonable minds can differ as to what constitutes a matter of “private” versus “public” concern, as exemplified by the dissent. The dissent in this case further indicates a broader lack of consensus among courts and individual judges as to the proper application of the tests meant to analyze whether employee speech warrants protection, and if so, to what degree.

If you have any questions regarding this case, or discuss any employee free speech issue or other public employment matter, 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](#) and [LinkedIn](#), or download our [mobile app](#).

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