
Coates' Canons Blog: Governmental Employees and Religious Email Sign-offs

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Here is a question that came to me from a North Carolina public employer not too long ago. An employee regularly includes “Put Your Faith in the Lord” as part of his closing on emails, whether the emails are to fellow employees, friends, or citizens. Should the unit of government direct the employee to stop the practice? May it direct the employee to stop?

When a public employer restricts an employee’s expression of religious sentiments, there are many legal considerations at play. The complexity of the analysis stumps the courts.

On the one hand, there are traditional free speech considerations under the free speech protections of the First Amendment. A public employee cannot be fired, suspended, or otherwise disciplined on account of what he says if he is speaking as a citizen on a matter of public concern and is not causing turmoil or disruption in the ability of the public employer to get its work done.

On the other hand, because the speech at issue is religious expression, there are also concerns under the religious freedom protections of the First Amendment. Those protections have two distinct parts. First is the protection of religious expression—the Free Exercise Clause. As Americans we are free to express religious or non-religious thoughts without fear of governmental restriction. Second is the protection against government endorsement of religion—the Establishment Clause. Government at all levels must act in a way that is neutral between types of religious expression and between religious and anti-religious expression.

This can be a very fine line for public employers to walk. If a public employer allows an employee to communicate religious expression in the course of his duties to outsiders who are served by the employer, the employer can be said to be endorsing that religious expression, not acting neutrally, and thus violating the Establishment Clause. If, by contrast, the public employer prohibits the religious expression, the employer can be said to be denying the employee’s rights under the Free Exercise Clause.

So, when a public employee signs her communications with a religious statement, is she exercising her rights to free speech and freedom of religious expression, which the governmental employer must permit? Or if the governmental employer permits the religious communication, is it unlawfully engaged in the endorsement of religion?

An illustrative case is *Draper v. Logan County Public Library*, 403 F. Supp. 2d 608, a federal district court case from Kentucky in 2005. It is just a district court case and it is in Kentucky, so it does not have any controlling value here in North Carolina, but I think it is illustrative. In that case, a public library adopted a policy banning all displays of religious symbols by its employees. It fired a librarian who refused to stop wearing a necklace containing a cross. The librarian sued and she prevailed on both her free speech and free expression claims.

With respect to the traditional free speech considerations, the court said (a) that wearing the cross was speech on a matter of public concern and (b) that there was no evidence that it caused any turmoil or disruption or interfered with the library’s ability to get its work done. So, firing the employee for wearing the cross in violation of the ban was a First Amendment free speech violation. The court did note, however, that not all courts agree that this kind of religious expression does in fact amount to speech on a matter of public concern. Some courts characterize it as inherently personal.

With respect to the religious freedom issues, the court said that while in the right circumstances a governmental unit might prohibit religious expression by employees to avoid the appearance of endorsing a religion, in this case it could not. It is true, the court said, that “the governmental employer must be accorded some breathing space to regulate in this difficult context” and “the employee must accept that he does not retain the full extent of free exercise rights that he would enjoy

as a private citizen.” Nevertheless, in this case, the court said, there was no reasonable possibility that allowing crosses on necklaces could be perceived as the county establishing or endorsing the librarian’s religion. The court said:

“A different conclusion might be justified if, for example, the library allowed employees to actively proselytize or if it permitted religious banners or slogans to be hung from the rafters. [But in this case] [t]here is simply no danger that Defendants might face an Establishment Clause violation because of Draper’s conduct or similar conduct of her co-workers.”

So, according to this court, if you let an employee hang a religious banner, you have violated the prohibition on establishment of religion, so you should stop the employee. On the other hand, if you let an employee wear a cross on a necklace, you have not violated the prohibition on establishment of religion, so you must allow the employee to wear the cross.

What about the situation I was asked about? Allowing an employee to sign off on emails with a clearly religious message amounts to something more than allowing a cross on a necklace but it is surely something less than allowing a banner. Where does it fall? I don’t know.

In a 15-year-old case from a federal appellate court in California, *Tucker v. State of Cal. Dept. of Educ.*, 97 F.3d 1204 (9th Cir. 1996), a governmental employee was, like the employee in our question, using a religious slogan in his signature line: “SOTLJC,” standing for “Servant of the Lord Jesus Christ.” The employer adopted a policy banning such sign-offs and also banning religious displays generally. The court struck down the ban on religious displays in parts of the building that the public did not have access to. But the employee had not appealed the ban on the signature line, so it stood. It’s too bad the signature line was not directly at issue on appeal.

So, I have two chief pieces of advice for units of government in North Carolina faced with this question. The first one is, at a minimum, let the employee continue to use the religious sign-off if you allow others to use non-religious inspirational type signoffs. The second one is more important: before you take any adverse action with regard to such an employee, consult with your unit’s attorney.