

DISCUSSION ON RELIGIOUS EXERCISE AND RELIGIOUS EXPRESSION BY STATE UNIVERSITY FACULTY

I. State university faculty should always begin by distinguishing between those occasions when you are acting in your capacity as a member of the faculty and hence employee of the university from those occasions when you are not acting in that capacity. We all have private and social aspects to our lives. When acting in a capacity other than as a university employee, we are considered not “governmental actors.” The constitutional restrictions on the “no establishment of religion” are binding only on government, its officers and employees, hence the restrictions do not apply to a faculty member outside his or her capacity as a university employee.

It is not always clear when a faculty member is not acting in his or her capacity as a university employee. On many occasions, when we leave campus we are no longer acting as a faculty member. That is not always true, however. For example, if a student calls us at home to discuss a class assignment, we have reverted back to our role as faculty. Likewise, you could have lunch at the Union with a faculty colleague and among other matters discuss religious topics. I would argue that the lunch period is “private time,” and thus not ordinarily in your capacity as faculty.

II. For the balance of this Discussion, assume that you are serving in your capacity as faculty (or there is a reasonable argument that is so) and thereby as an employee of the university. Hence, the constitutional restrictions have to be considered.

We all served many different roles: teacher in the classroom or laboratory; academic advisor; assisting our students outside of the formal class or lab setting; faculty advisor to university-recognized student groups; assisting students involved in extracurricular activities that are official university activities or events; informal activities and contacts with students; faculty committees; faculty-student committees; and etc. We also interact with the public in our role as faculty. For example, we may present a paper at a conference in our discipline, send a letter of reference for a student seeking employment, or we may be interviewed by a newspaper.

As a beginning point, there are more church/state restrictions on faculty when teaching during a regular class or lab and what we say to students, than when faculty are asked by a newspaper reporter to comment on an ongoing news event like radical Islam and terrorism. Classroom students are a captive audience. They are present “under compulsion” in the sense that students must be present to do well in the course and obtain the desired credit.

Nearly all of the case law decided under the Establishment Clause involves K-12 public schools. Obviously, teachers at K-12 schools will have less freedom than university faculty. This is due to the less mature nature of students in grades K-12, as well as the closed campus and compulsory nature of primary and secondary education. Consider the following as cautionary rules of thumb:

1. Do not give a personal testimony in the classroom. *Bishop v. Aronov*, 926 F.2d 1066

(11th Cir. 1991) (holding that university could, consistent with first amendment, compel assistant professor [of Health, Physical Education and Recreation] to refrain from interjecting religious beliefs into classroom discussion, and from holding optional sessions with students to discuss Christian perspective on topics).

2. A teacher's expression of a personal religious viewpoint in the K-12 classroom is not being protected in the lower federal courts. See *Helland v. South Bend Community School Corp.*, 93 F.3d 327, 330 (7th Cir. 1996). If relevant to the subject matter, teach various viewpoints, including the religious viewpoint(s). Teach the controversy or clash of viewpoints, but do not identify any particular perspective as the "right" viewpoint.

3. Non-germane religious literature distribution in the classroom by a teacher is not permitted, unless the teacher is simply distributing religious literature on the same basis as other secular literature is so distributed.

4. Teachers should not invite outside groups to distribute religious literature to students in the classroom. However, such distribution by students is permitted if students may so distribute nonreligious literature.

III. Only rarely have court rulings pertained to state university faculty. Thus, the next best thing is to go to federal guidelines adopted in August of 1997 to govern federal employees. They are: ***Guidelines On Religious Exercise And Religious Expression In The Federal Workplace***, issued by The White House, Office of the Press Secretary, on August 14, 1997, available at www.onr.navy/mainpage/jobs/guidelines.htm.

What appears below are relevant excerpts from these **Guidelines**. These will structure our discussion along fruitful avenues. Reliance on the excerpts should occur only after consulting the entire **Guidelines**, thus ensuring the complete context before making any decisions.

SECTION 2. GUIDING LEGAL PRINCIPLES. In applying the guidance set forth in section 1 of this order, executive branch departments and agencies should consider the following legal principles.

F. Establishment of Religion. The Establishment Clause of the First Amendment prohibits the Government -- including its employees -- from acting in a manner that would lead a reasonable observer to conclude that the Government is sponsoring, endorsing or inhibiting religion generally or favoring or disfavoring a particular religion. For example, where the public has access to the Federal workplace, employee religious expression should be prohibited where the public reasonably would perceive that the employee is acting in an official, rather than a private, capacity, or under circumstances that would lead a reasonable observer to conclude that the Government is endorsing or disparaging religion. The Establishment Clause also forbids Federal employees from using

Government funds or resources (other than those facilities generally available to government employees) for private religious uses.

SECTION 1. GUIDELINES FOR RELIGIOUS EXERCISE AND RELIGIOUS EXPRESSION IN THE FEDERAL WORKPLACE. Executive departments and agencies ("agencies ") shall permit personal religious expression by Federal employees to the greatest extent possible, consistent with requirements of law and interests in workplace efficiency as described in this set of Guidelines.

D. Establishment of Religion. Supervisors and employees must not engage in activities or expression that a reasonable observer would interpret as Government endorsement or denigration of religion or a particular religion. Activities of employees need not be officially sanctioned in order to violate this principle; if, in all the circumstances, the activities would leave a reasonable observer with the impression that Government was endorsing, sponsoring, or inhibiting religion generally or favoring or disfavoring a particular religion, they are not permissible. Diverse factors, such as the context of the expression or whether official channels of communication are used, are relevant to what a reasonable observer would conclude.

Examples

(a) At the conclusion of each weekly staff meeting and before anyone leaves the room, an employee leads a prayer in which nearly all employees participate. All employees are required to attend the weekly meeting. The supervisor neither explicitly recognizes the prayer as an official function nor explicitly states that no one need participate in the prayer. This course of conduct is not permitted unless under all the circumstances a reasonable observer would conclude that the prayer was not officially endorsed.

(b) At Christmas time, a supervisor places a wreath over the entrance to the office's main reception area. This course of conduct is permitted.

A. Religious Expression. As a matter of law, agencies shall not restrict personal religious expression by employees in the Federal workplace except where the employee's interest in the expression is outweighed by the government's interest in the efficient provision of public services or where the expression intrudes upon the legitimate rights of other employees or creates the appearance, to a reasonable observer, of an official endorsement of religion.

(1) Expression in Private Work Areas. Employees should be permitted to engage in private religious expression in personal work areas not regularly open to the public to the same extent that they may engage in nonreligious private

expression, subject to reasonable content- and viewpoint-neutral standards and restrictions: such religious expression must be permitted so long as it does not interfere with the agency's carrying out of its official responsibilities.

Examples

(a) An employee may keep a Bible or Koran on her private desk and read it during breaks.

(b) An agency may restrict all posters, or posters of a certain size, in private work areas, or require that such posters be displayed facing the employee, and not on common walls; but the employer typically cannot single out religious or anti-religious posters for harsher or preferential treatment.

(2) *Expression Among Fellow Employees.* Employees should be permitted to engage in religious expression with fellow employees, to the same extent that they may engage in comparable nonreligious private expression, subject to reasonable and content-neutral standards and restrictions: such expression should not be restricted so long as it does not interfere with workplace efficiency. Though agencies are entitled to regulate such employee speech based on reasonable predictions of disruption, they should not restrict speech based on merely hypothetical concerns, having little basis in fact, that the speech will have a deleterious effect on workplace efficiency.

Examples

(a) In informal settings, such as cafeterias and hallways, employees are entitled to discuss their religious views with one another, subject only to the same rules of order as apply to other employee expression. If an agency permits unrestricted nonreligious expression of a controversial nature, it must likewise permit equally controversial religious expression.

(b) Employees are entitled to display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages. So long as they do not convey any governmental endorsement of religion, religious messages may not typically be singled out for suppression.

(c) Employees generally may wear religious medallions over their clothes or so that they are otherwise visible. Typically, this alone will not affect workplace efficiency, and therefore is protected.

(3) *Expression Directed at Fellow Employees.* Employees are permitted to engage in religious expression directed at fellow employees, and may even attempt to persuade fellow employees of the correctness of their religious views, to the same extent as those employees may engage in comparable speech not involving religion. Some religions encourage adherents to spread the faith at every opportunity, a duty that can encompass the adherent's workplace. As a

general matter, proselytizing is as entitled to constitutional protection as any other form of speech -- as long as a reasonable observer would not interpret the expression as government endorsement of religion. Employees may urge a colleague to participate or not to participate in religious activities to the same extent that, consistent with concerns of workplace efficiency, they may urge their colleagues to engage in or refrain from other personal endeavors. But employees must refrain from such expression when a fellow employee asks that it stop or otherwise demonstrates that it is unwelcome. (Such expression by supervisors is subject to special consideration as discussed in Section B(2) of these guidelines.)

Examples

(a) During a coffee break, one employee engages another in a polite discussion of why his faith should be embraced. The other employee disagrees with the first employee's religious exhortations, but does not ask that the conversation stop. Under these circumstances, agencies should not restrict or interfere with such speech.

(b) One employee invites another employee to attend worship services at her church, though she knows that the invitee is a devout adherent of another faith. The invitee is shocked, and asks that the invitation not be repeated. The original invitation is protected, but the employee should honor the request that no further invitations be issued.

(c) In a parking lot, a non-supervisory employee hands another employee a religious tract urging that she convert to another religion lest she be condemned to eternal damnation. The proselytizing employee says nothing further and does not inquire of his colleague whether she followed the pamphlet's urging. This speech typically should not be restricted.

Though personal religious expression such as that described in these examples, standing alone, is protected in the same way, and to the same extent, as other constitutionally valued speech in the Federal workplace, such expression should not be permitted if it is part of a larger pattern of verbal attacks on fellow employees (or a specific employee) not sharing the faith of the speaker. Such speech, by virtue of its excessive or harassing nature, may constitute religious harassment or create a hostile work environment, as described in Part B(3) of these Guidelines, and an agency should not tolerate it.

(4) Expression in Areas Accessible to the Public. Where the public has access to the Federal workplace, all Federal employers must be sensitive to the Establishment Clause's requirement that expression not create the reasonable impression that the government is sponsoring, endorsing, or inhibiting religion generally, or favoring or disfavoring a particular religion. This is particularly important in agencies with adjudicatory functions.

However, even in workplaces open to the public, not all private employee religious expression is forbidden. For example, Federal employees may wear personal religious jewelry absent special circumstances (such as safety concerns) that might require a ban on all similar nonreligious jewelry. Employees may also display religious art and literature in their personal work areas to the same extent that they may display other art and literature, so long as the viewing public would reasonably understand the religious expression to be that of the employee acting in her personal capacity, and not that of the government itself. Similarly, in their private time employees may discuss religion with willing coworkers in public spaces to the same extent as they may discuss other subjects, so long as the public would reasonably understand the religious expression to be that of the employees acting in their personal capacities.

B. Religious Discrimination. Federal agencies may not discriminate against employees on the basis of their religion, religious beliefs, or views concerning religion.

(2) Coercion of Employee's Participation or Nonparticipation in Religious Activities. A person holding supervisory authority over an employee may not, explicitly or implicitly, insist that the employee participate in religious activities as a condition of continued employment, promotion, salary increases, preferred job assignments, or any other incidents of employment. Nor may a supervisor insist that an employee refrain from participating in religious activities outside the workplace except pursuant to otherwise legal, neutral restrictions that apply to employees' off-duty conduct and expression in general (e.g., restrictions on political activities prohibited by the Hatch Act).

This prohibition leaves supervisors free to engage in some kinds of speech about religion. Where a supervisor's religious expression is not coercive and is understood as his or her personal view, that expression is protected in the Federal workplace in the same way and to the same extent as other constitutionally valued speech. For example, if surrounding circumstances indicate that the expression is merely the personal view of the supervisor and that employees are free to reject or ignore the supervisor's point of view or invitation without any harm to their careers or professional lives, such expression is so protected.

Because supervisors have the power to hire, fire, or promote, employees may reasonably perceive their supervisors' religious expression as coercive, even if it was not intended as such. Therefore, supervisors should be careful to ensure that their statements and actions are such that employees do not perceive any coercion of religious or non-religious behavior (or respond as if such coercion is occurring), and should, where necessary, take appropriate steps to dispel such misperceptions.

Examples

(a) A supervisor may invite co-workers to a son's confirmation in a church, a daughter's bat mitzvah in a synagogue, or to his own wedding at a temple.

but * A supervisor should not say to an employee: "I didn't see you in church this week. I expect to see you there this Sunday. "

(b) On a bulletin board on which personal notices unrelated to work regularly are permitted, a supervisor may post a flyer announcing an Easter musical service at her church, with a handwritten notice inviting co-workers to attend.

but * A supervisor should not circulate a memo announcing that he will be leading a lunch-hour Talmud class that employees should attend in order to participate in a discussion of career advancement that will convene at the conclusion of the class.

(c) During a wide-ranging discussion in the cafeteria about various non-work related matters, a supervisor states to an employee her belief that religion is important in one's life. Without more, this is not coercive, and the statement is protected in the Federal workplace in the same way, and to the same extent, as other constitutionally valued speech.

(d) A supervisor who is an atheist has made it known that he thinks that anyone who attends church regularly should not be trusted with the public weal. Over a period of years, the supervisor regularly awards merit increases to employees who do not attend church routinely, but not to employees of equal merit who do attend church. This course of conduct would reasonably be perceived as coercive and should be prohibited.

(e) At a lunch-table discussion about abortion, during which a wide range of views are vigorously expressed, a supervisor shares with those he supervises his belief that God demands full respect for unborn life, and that he believes it is appropriate for all persons to pray for the unborn. Another supervisor expresses the view that abortion should be kept legal because God teaches that women must have control over their own bodies. Without more, neither of these comments coerces employees' religious conformity or conduct. Therefore, unless the supervisors take further steps to coerce agreement with their view or act in ways that could reasonably be perceived as coercive, their expressions are protected in the Federal workplace in the same way and to the same extent as other constitutionally valued speech.

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