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The Right to Kneel: Can an Employer Interfere with Employees' Political Speech?

By Cynthia Schmidt
UCF Forum columnist
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Americans have a number of rights, and we often confuse which rights we can use where. The Bill of Rights spells out our rights, but do we have the same rights on, say, the football field, as opposed to at the courthouse?

We have the most rights when we are interacting with the government. We have fewer rights when we are in private spaces and dealing with a private employer. Following are some of the issues involved with the ongoing controversy of kneeling during national anthems, both at government events and on the sports fields.

And like any good professor teaching law I have more questions for you than answers.

First, some givens: Americans cannot be compelled by the government to stand for or state the Pledge of Allegiance. This is true, too, for little Americans in school. The U.S. Supreme Court in 1943 ruled in *West Virginia State Board of Education v.*

Barnette that because of the free-speech clause even children in public school have the right to refrain from saying the pledge. For speech to be free, it cannot be forced. So freedom to speak means freedom to not speak.

This ruling on the pledge makes sense apart from case law. What kind of Pledge of Allegiance would it be if it was a forced pledge? And what evidence of “liberty” (as in “liberty, and justice for all”) would there be if a person said this under threat of penalty? (Per the Florida Department of Education, students excused from the pledge by their parents may remain seated; they do not have to stand nor leave the room.) Yet in this discussion of the schoolchild I have placed the student in a public school. And we’ve established here that a person has greater rights when dealing with the government than with a private school or private employer.

A federal appeals court in 2013 (*Swartz v. Isogna*) held that a person has a First Amendment right to flip off a police officer. This is considered protected, political speech. And we learn in the U.S. Supreme Court case *Cohen v. California* that a person can wear a jacket with the words “F* the Draft” – to the courthouse, no less.

But I am confident none of us can say without consequence “Screw you” to the boss at work, wherever we work. The message to the police is political speech, and the other statement here is insubordination that contradicts the mission of the employment.

So, a question: If a football player takes a knee during the playing of the national anthem is this like a school student remaining seated for the pledge at a public school? Or is this closer to the office hypothetical where you’ve said something your employer does not approve of?

Can actions without words be speech? Is it a form of expressive conduct?

First we must look at whether taking a knee is even speech. Can actions without words be speech? Is it a form of expressive conduct? Yes, sometimes action sends a message and that can make it speech.

Let’s look at *Texas v. Johnson*. In 1989 the U.S Supreme Court ruled that burning the American flag is protected by the free speech clause of the First Amendment. The court noted that the Texas law allowed a flag to be burned if it was old and needed to be retired, but the same Texas law barred the burning of a flag if a citizen was doing so in protest. One action (flag burning) was provided for under state law if your intention was an approved one, but another flag burning resulted in a one-year jail sentence for Mr. Johnson, since he did this as a form of protest.

The U.S. Supreme Court ruled the state may not mandate that citizens could do one act while thinking in one manner, and go to jail for the same act while having intentions the government does not favor. As a result, we have case law that says burning a flag is symbolic speech, and lawful speech.

So given that speech action can be a form of speech and some speech is protected, what can we establish about the football players? It gets even more complicated by way of

their contract. Does their job start at kickoff? Have they contracted that the employer can regulate their life on and off the field, before kickoff as well as after the whistle? Where must the contract end? Could the contract dictate how they vote? Certainly not; that would be an unlawful contract. So we have contracts to consider but they are not without scrutiny.

Is it relevant to our analysis of government vs. private action that some stadiums were built with public financing, or that the NFL was given nonprofit status per the IRS code? To what degree does the U.S. government have a hand in professional football? What if instead of the NFL, this was a college football player? What if this was a state college, say here at UCF?

For discussion, let's presume this is entirely between a private employer and a citizen-employee (as opposed to a college student at a state school.) Can the employer interfere with the employee's speech on a matter of politics?

Take it a step further: Could the employer tell the employee not to place a political bumper sticker on their car? Not to write a Bible verse such as John 3:16 under their eyes?

But are the football players endorsing a particular candidate while taking a knee? Haven't they said they are protesting police violence, and is that message constrained to a particular party?

So is this more of a belief, the belief in bodily autonomy, of personal agency, of safety, and coming back full circle, a request for liberty and justice for all?

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