

Do Private Texts Have First Amendment Protection?

Kate Adams v. County of Sacramento

No. 23-15970, 2024 WL 4113546, (9th Cir. 2024)

Background:

Adams became the Chief of Police for the City of Rancho Cordova in March 2020. Seven years prior, in December 2013, Adams was having a “friendly, casual text message conversation” with a co-worker. At some point Adams sent a text message saying, “Some rude racist just sent this!!” along with two images both containing racial slurs.

In 2019, Adams was informed the co-worker may have engaged in unrelated misconduct and she forwarded the allegations, along with a report, to Internal Affairs. Once the co-worker learned of Adams’ report to IA, several “anonymous” misconduct complaints tied to the text messages from 2013 were lodged against Adams and an investigation ensued.

During the investigation, the Department gave Adams a choice to either resign “and the investigation would never become public” or be terminated “and publicly mischaracterized as a racist.” Adams resigned in September 2021.

Six months later, the investigation was leaked and an article was published that exposed the text messages Adams previously sent.

Adams sued the County of Sacramento alleging (among other things) violation of her right to free speech under the First Amendment, but the District Court dismissed her First Amendment claims holding that the messages were “not a matter of public concern.” Adams appealed.

On appeal, the Ninth Circuit agreed that the text messages were not of public concern and dismissed Adams’ First Amendment claims.

When is a public employee’s speech protected?

Public employees’ First Amendment rights are narrower than the average citizen’s. The First Amendment only protects a public employee’s right to talk about important public issues when they are speaking as a private citizen, not in their official capacity.

Therefore, to succeed on a free speech claim, Adams had to show that she spoke as a private citizen on a matter of public concern.

What is “a matter of public concern”?

According to the Ninth Circuit, speech involves matters of public concern when it about a “subject of legitimate news interest [and] of value and concern to the public.” This typically includes speech about political and social issues. In making this determination, Courts evaluate the “content, form, and context” of the speech at the time it was made.

The Ninth Circuit case *Hernandez v. City of Phoenix* (2022) is a good example. In *Hernandez*, an officer was disciplined for posting memes on Facebook containing offensive content regarding Muslims. Posting the memes was found to be a violation of the department’s social media policy.

The Ninth Circuit held that the memes posted online were a matter of public concern because they referenced, and were critical of, political topics garnering media attention at the time.

Note that in *Hernandez*, although the memes were considered a matter of public concern, the officer’s speech was ultimately not protected under the First Amendment due to violating department social media policy, negatively affecting working operations, and undermining the department’s mission and values.

In another case, *Bresnahan v. City of St. Peters* (2023), the Eighth Circuit held that a satirical video shared by officers in a group text criticizing the Black Lives Matter (BLM) movement was a matter of public concern due to the widespread media coverage of BLM organizations and protests at the time the video was sent.

Adams’ situation was different, however. Although the Ninth Circuit noted that “[s]peech that addresses the topic of racism as relevant to the public can involve a matter of public concern,” Adams’ texts were not relevant to the public.

Adams’ texts, “Some rude racist just sent this!!” along with two racially offensive images, were part of a private conversation, outside of work, and in which she shared her personal opinion of

the images. Thus, the Court held “[s]omething more than discussing an offensive racial comment, communicated in a private text, is required for speech to involve a matter of public concern.”

Bottom Line:

As public employees, you have a First Amendment right to free speech, however it is limited and may not be protected if you are speaking privately and not about a matter of public concern.

Even while off-duty, sharing offensive content online or in text messages may resurface like it did for Adams (seven years later!) and generate complaints within your Department. Use your best judgment to avoid potential disciplinary action.

Stay Safe and Informed!