



March 26, 2012

By Email  
Mr. Shailen P. Bhatt  
Secretary  
Department of Transportaton  
800 Bay Road  
Dover, Delaware 19901

Re: Tom Drummond

Dear Secretary Bhatt:

We have been contacted by Delaware AFSCME because of recent action by DelDOT disciplining a DelDOT employee, Tom Drummond, for having a confederate flag license plate on his personal vehicle while it was parked in a DelDOT lot. According to the DelDOT manager who reprimanded and suspended Mr. Drummond, the license plate was “inappropriate.” (See the March 12, 2012 letter from DelDOT’s Manager of North District Operations to Mr. Drummond.) That is not a constitutionally permissible basis for the government to discipline an employee.

Several federal courts have addressed this precise issue. In one case where a government employee was fired because he regularly parked his truck bearing a Confederate Flag license plate in the employee parking lot, the court found that his “display of a Confederate Flag license plate on the front of his personal vehicle is speech protected under the First Amendment,” *Carpenter v. City of Tampa*, 2005 WL 1463206, \*3 (M.D. Fla. 2005), and that he had been wrongfully terminated.

Tampa escaped financial liability because the firing was not based on Tampa policy, and was the act solely of officials who did not have policy making authority. In contrast, DelDOT’s March 12, 2012 letter instructing Mr. Drummond to remove the Confederate Flag plate from his vehicle said the plate was in violation of state policies. If DelDOT policy prohibits display of a Confederate Flag, it violates the United States Constitution.

Flags and other symbols are entitled to First Amendment protection as variants of speech. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 404–06, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (finding conviction for flag desecration is inconsistent with the First Amendment. Displaying a flag or flag ornament is quintessential political speech, and such speech is deserving of the highest constitutional protection. *See American Legion Post 7 v City of Durham*, 239 F.3d 601, 607 (4<sup>th</sup> Cir. 2001) (“Flags, especially flags of a political sort, enjoy an honored position in the First Amendment hierarchy.”). That people might find particular speech disturbing is immaterial. “[A] function of free speech under our

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
of DELAWARE  
100 W 10TH ST, SUITE 603  
WILMINGTON, DE 19801  
T/302-654-5326  
F/302-654-3689  
WWW.ACLU-DE.ORG

NORMAN M MONHAIT  
PRESIDENT

KATHLEEN M MacRAE  
EXECUTIVE DIRECTOR

RICHARD H MORSE  
LEGAL DIRECTOR

system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

The March 12, 2012 letter from DelDOT, and a later letter dated March 19, 2012 both refer to “the State’s Harassment Policy.” No one can deny the importance of preventing workplace harassment. policy. But that goal does not override the right of free speech enshrined in the First Amendment and the Delaware Constitution. “There is no categorical ‘harassment exception’ to the First Amendment’s free speech clause.” *Saxe v. State College Area School District*, 240 F.3d 200, 204 (2001).<sup>1</sup> Thus, in another case involving a Confederate battle flag vanity license plate on a government employee’s truck, the court voided the government prohibition, notwithstanding the argument that the flag plate wasn’t protected by the First Amendment because it was discriminatory conduct in the form of a hostile work environment. *Erickson v City of Topeka*, 209 F.Supp.2d 1131 (2002).

Americans do not lose their right to free speech when they become government employees. As the federal Court of Appeals for this part of the country has ruled, “Public employers cannot silence their employees simply because they disapprove of the content of their speech.” *Baldassare v. State of N.J.*, 250 F.3d 188, 194 (3d Cir. 2001), citing *Rankin v. McPherson*, 483 U.S. 378, 384 (1987). The “state cannot lawfully discharge an employee for reasons that infringe upon that employee’s constitutionally protected interest in freedom of speech.” *Feldman v. Phila. Hous. Auth.*, 43 F.3d 823, 829 (3d Cir. 1994).

While there are circumstances where the state may regulate the speech of its employees on public issues, it may only do so when its interest “as an employer[] in promoting the efficiency of the public services it performs through its employees.” outweighs the employee’s First Amendment rights to comment on

---

<sup>1</sup> Whether merely driving a vehicle bearing a Confederate Flag license plate can amount to workplace harassment is doubtful, at most. *See, e.g., Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986)(recognizing that abusive and discriminatory conduct creates a “hostile environment” prohibited by Title VII of the Civil Rights Act of 1964 when harassment is so severe or pervasive as “to alter the conditions of the victim’s employment and create an abusive working environment”); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998) (“Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment-an environment that a reasonable person would find hostile or abusive-is beyond Title VII’s purview.”).

matters of public interest.” *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). The government has a very high burden in that regard.

The type of situation where the effect on government operation may be found to outweigh the free speech concern is illustrated by *Sprague v. Fitzpatrick*, 546 F. 2d 560 (3d Cir. 1976)), *cert. denied*, 431 U.S. 937 (1977). In *Sprague*, the District Attorney of Philadelphia fired his First Assistant after he sharply criticized the truth of public statements made by the District Attorney. The appeals court ruled against the employee because he was the District Attorney’s “alter ego” and his comments had “totally precluded any future working relationship between” the two men. *Id.* at 565. The court cited *Pickering’s* recognition of the “significantly different considerations” involved when the relationship between superior and subordinate is of a “personal and intimate nature” as opposed to other situations. *Id.* at 564. Mr. Hammonds’ keeping a vanity plate on his truck is hardly akin to the *Sprague* plaintiff’s public criticism of his boss and *alter ego*.

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
of DELAWARE

March 26, 2012  
Page | 3

The weakness of the government’s position in this matter is underlined by the fact that in its discussions with AFSCME it was compelled to rely on a case where the First Amendment did not apply because the employer was a private company, *Dixon v. Coburg Dairy, Inc.*, 330 F.3d 250 (4th Cir.2003) vacated on other grounds by 369 F.3d 811 (4th Cir. May 25, 2005) (en banc). As far as the law applicable to a state government goes, the court recognized that the plaintiff “has a constitutionally protected right to fly the Confederate battle flag from his home, car, or truck.” *Id.* at 262. The government does more harm than good when it transgresses on basic constitutional rights and disciplines an employee for displaying a Confederate flag vanity plate on his personal vehicle. “In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. .... Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.” *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J. dissenting).

By contacting the ACLU of Delaware, AFSCME was not endorsing (or rejecting) the content of Mr. Drummond’s speech. It was standing up for the free speech rights of DelDOT employees. We respectfully urge you to do the same.

Sincerely yours,



Richard H. Morse

cc: Mr. Tom Stafford  
Mr. Michael A. Begatto