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Dear Ms. XXX,

Thank you for contacting the American Civil Liberties Union of Utah. Because your situation raises important constitutional issues, we provide this advice letter, which you may share as is appropriate. Below is a basic framework of the law as it relates to display of the flag and public employee free speech rights.

Flag Desecration/Abuse of the Flag.

It is my understanding that there is some question about whether the DRAC flag hanging inside your cubicle constitutes desecration of the flag or violates Utah Code Annotated section 76-9-601, Abuse of the Flag. Both of these are untenable arguments. First, the DRAC flag is not, and never has been, a United States flag. Therefore, any federal guidelines for treatment of the flag and the Utah statute do not apply. Second, Utah's Abuse of the Flag statute is an unconstitutional limitation on speech, and is unenforceable. Even if the DRAC flag were an altered United States flag, its display would be considered protected, symbolic speech, which cannot be limited as the Utah statute purports to do.

Public Employee Speech.

It is our belief that requiring removal of the DRAC flag would likely amount to an unconstitutional restriction on your free speech rights. As a government employee, you should not be asked to relinquish your First Amendment rights at the workplace. While it is true that certain restraints may be imposed on government employee speech, there is nothing in the situation you describe that would require these types of restrictions.

Generally, government employees have a right to speak on matters of public concern, or matters of interest to the general population, even if only communicated to a single individual. This right must be balanced against the government employer's right to protect its legitimate interests in performing its mission. Accordingly, in *Pickering v. Board of Ed. of Township High School Dist. 205*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), a balancing test was adopted. Under this test, courts balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568, 88 S.Ct. 1731.

Under the balancing test described above, government employees may reasonably display items amounting to symbolic speech in their workspaces. While employees have this right, the government nevertheless has a clear interest in controlling employee speech that is posted on the state's walls. This is, in part, because materials posted on corridors or outside

cubicles might be interpreted as representing the views of the government, rather than of the employee who posted the item at issue. This concern is inapplicable, however, when material is posted within employees' workspaces or cubicles, in an area that the public does not have access to and does not enter. Because in your case the DRAC flag is within your individual workspace, and could not reasonably be construed as government speech, it would be unreasonable to require you to remove it.

Offensive Speech.

The ACLU of Utah is not familiar with the Utah Department of Health's internal policies regarding work environment or hostile work environment, and this letter is not intended to provide you advice about disciplinary action that may or may not be taken in light of those policies. However, it is important to note that the DRAC flag is a form of symbolic speech and does not constitute expressive activity intended to demean or degrade co-workers, and thereby interfere with the work environment.

Additionally, courts have held that a co-worker's reaction to another's symbolic speech in the workplace should not be determinative in decisions about the reasonableness of the speech. Offense taken by a co-worker who supports the United States military or is otherwise patriotic is not a sufficient disturbance to justify required removal of the flag. Indeed, in cases discussing symbolic speech during times of war, courts have rejected that kind of reaction by a listener or an observer as sufficient grounds to force the speaker to be silent.

Conclusion.

I hope the above provides you with a useful framework to use in working toward resolution of the issue you described. If I can be of further help, please call me at 801.521.9862, ext. 103.

Yours,

Margaret Plane
Staff Attorney