Disciplining Faculty in a Public Higher Education Setting: Growing Number of Jurisdictions Recognize "Academic Exception"

Insights
6.01.21

Can a public university discipline a professor for refusing to address a student by the student's preferred pronoun? If so, can the professor defend his conduct by alleging his religious beliefs prohibit him from recognizing the student's gender identity? These questions were answered in a recent decision by the United States Court of Appeals for the 6th Circuit – demonstrating a trend that is burgeoning across the country.

The Decision

In a matter of first impression, the 6th Circuit (hearing federal court cases from Ohio, Michigan, Kentucky, and Tennessee) delivered warning shots to public colleges and universities who wish to implement seemingly innocent gender-identity policies. Specifically, in *Meriwether v. Hartop*, Shawnee State University implemented an anti-discrimination policy which required professors to address students by the students' preferred pronouns. This policy applied regardless of the professor's views on the subject.

Professor Nicholas Meriwether, a Shawnee State philosophy professor and devout Christian, refused to abide by the policy. He asserted that his religious beliefs did not allow him to address students by pronouns that he did not believe were true. Particularly, he believed that "God created human beings as either male or female, that this sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires." A student in Meriwether's class, Jane Doe, appeared as male but identified and requested to be addressed as female. Meriwether refused to address the student by using feminine pronouns, instead referring to Doe by last name only while referring to all other students by "Mr." or "Mrs."

Following several complaints by Doe, Shawnee State gave Meriwether two options for referring to students: (1) stop using sex-based pronouns, or (2) refer to Doe as female. Meriwether did not comply. The University then conducted a Title IX investigation, concluding that "because Doe perceives them self as a female, and because Meriwether has refused to recognize that identity by using female pronouns, Meriwether engaged in discrimination and created a hostile environment." However, as the 6th Circuit noted, the report did not mention Meriwether's request for an accommodation based on his religion. As a result of the Title IX report, the University placed a written warning in Meriwether's personnel file.

After receiving the discipline, Meriwether filed suit in the U.S. District Court for the Southern District of Ohio, alleging that the University's application of its gender-identity policy violated his rights to free speech and free exercise under the First Amendment. The district court rejected this argument, holding that the manner in which Meriwether addressed transgendered students was not protected under the First Amendment. The 6th Circuit disagreed and reversed the district court's decision.

The "Academic" Exception

Generally, the Free Speech Clause applies at public colleges and universities. And given the Supreme Court's well-known analysis in *Tinker v. Des Moines Independent Community School District*, the 6th Circuit stated, "the state may not act as though professors or students shed their constitutional rights to freedom of speech or expression at the university gate."

Like all other rights guaranteed by the Constitution, however, the right to freedom of speech or expression is not unlimited. For example, in *Garcetti v. Ceballos*, the Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." In other words, public employees can be disciplined for statements made pursuant to their official duties. The Court reasoned that when public employees speak out, "they can express views that contravene governmental policies or impair the proper performance of governmental functions." However, the Court declined to address whether this rule would apply in situations involving speech related to scholarship or teaching.

In his dissent, Justice David Souter warned that *Garcetti's* holding could stretch far enough to destroy First Amendment protection of academic freedom in public colleges and universities: "This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor," and he feared that merely teaching an unpopular or controversial subject may lead to discipline because the very act of teaching involves speaking and writing "pursuant to official duties."

In addressing Meriwether's Free Speech claim, the 6th Circuit held that *Garcetti* does not apply to "professors at public universities when engaged in core academic functions, such as teaching and scholarship." In reaching this conclusion, the court warned that if the *Garcetti* rule applied to college professors, universities could compel uniformity of thought: "If professors lacked free-speech protections when teaching, a university would wield alarming power to compel ideological conformity. A university president could require a pacifist to declare that war is just, a civil rights icon to condemn the Freedom Riders, a believer to deny the existence of God, or a Soviet émigré to address his students as 'comrades.'" Thus, the 6th Circuit concluded that the *Garcetti* rule is inapplicable in the university classroom setting.

This result does not render professors immune from punishment based on their speech. Rather, courts in the 6th Circuit (again, in Ohio, Michigan, Kentucky, and Tennessee) will apply the test developed by the Supreme Court in its *Pickering v. Board of Education* and *Connick v. Myers*

developed by the Supreme Court in its *Pickering v. Board of Education* and *Connick v. Myers* decisions. Under this analysis, an employee's speech is protected if (1) the speech relates to a matter of public concern, and (2) the employee's First Amendment interest outweighs the government's need for efficiency as an employer.

What Does This Mean for Public Colleges and Universities?

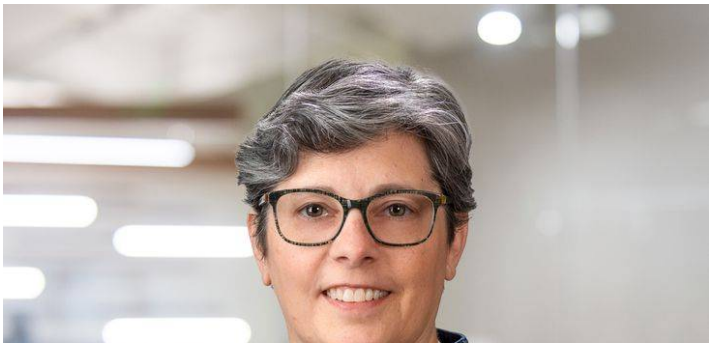
While the ruling sets precedent in the 6th Circuit, the court followed the 4th, 5th, and 9th circuits in concluding that *Garcetti* does not apply to the teaching and academic writing that are performed pursuant to a professor's official duties. We expect other circuits to follow this trend. To the extent that other circuits rule differently (or more narrowly), the issue would likely require eventual clarification by the Supreme Court.

With discipline potentially out of reach, public colleges and universities will undoubtedly struggle with achieving Title IX and other anti-discrimination or harassment legal compliance in situations involving allegations against professors in the context of scholarship and teaching. The effectiveness in navigating conflicts between faculty's First Amendment rights and student's (or other staff) rights under various federal and state anti-discrimination and harassment laws will boil down to the college or university demonstrating that the First Amendment is outweighed by its need to comply with legal requirements.

While not insurmountable, this obstacle will require close attention to developing investigations in a manner that captures adequate detail and context to justify the balancing of these interests. Further, colleges and universities should pay particular attention to their anti-discrimination and harassment policies, which should reflect a recognition of First Amendment considerations when allegations involve faculty in the teaching and scholarship context. Undoubtedly, the distinctions between what is protected free speech or expression and a prohibited hostile environment will be fact-specific, involve more intensive investigations, and require careful and thoughtful examination.

Should you have questions about compliance matters in this area, you should contact your Fisher Phillips lawyer, the authors of this article, or any member of our Education Practice Group. To ensure you stay up to speed with the latest developments, make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information.

Related People



Sarah Moore
Of Counsel
440.740.2145
Email

Service Focus

Litigation and Trials

Employment Discrimination and Harassment

Industry Focus

Education