

First Amendment case, settlement, should put brakes on gender policy, says UT professor

4/29/2022

BY JEFF SCHMUCKER / THE BLADE

A University of Toledo law professor says a 2021 U.S. Court of Appeals ruling and a more recent \$400,000 settlement paid out by an Ohio university over a free speech case over a professor's punishment for not using a student's preferred pronouns should give UT officials pause over their own proposed gender policy.

Earlier this month, Shawnee State University reached a settlement with philosophy professor Nicholas Meriwether by agreeing to pay \$400,000 in damages as well as the undisclosed cost of his attorney's fees. Officials also agreed that Mr. Meriwether could not be mandated to use any pronouns — including if a student requests pronouns that conflict with their biological sex. A written warning issued to Mr. Meriwether in June 2018 over the matter was also rescinded.

Lee Strang, a UT law professor since 2008, said this case has been closely watched throughout the past three years, particularly in light of UT officials' proposed policy this year that, among other things, would require employees and students to use a person's preferred first name in all verbal and electronic communication.

He said the powerfully written decision to broadly protect the professor's First Amendment rights by the 6th Circuit Court of Appeals in Cincinnati, as well as the costly settlement by Shawnee State University, should give his employer and other officials in academia pause when crafting rules such as those under UT's proposed Inclusive Gender Practices policy.

"There are multiple reasons why if I'm university leadership and I'm considering a forced speech policy, why this opinion would make me really worried," he said. "One is the law, as articulated in [Meriwether v. The Trustees of Shawnee State University] is broadly protective of free speech so that makes it likely that a forced speech policy is at least going to subject you to litigation.

"Being subject to litigation by itself is negative because you have to spend time, you have the negative publicity, and the cost," he added. "In this case, you also have the settlement and attorneys fees — hundreds of thousands of dollars would be the number I'm thinking of — and so the last thing is as university leadership, do you want to go down the road and eat crow?"

Under the university's Inclusive Gender Practices policy, students, faculty, and staff could register their "Chosen First Name" online where it would be used for all their electronic records for transcripts, financial aid, payroll, and medical benefits. Their preferred first name would also appear on their UT "Rocket ID card" with their legal name printed on the back.

Employees and students could also register their preferred pronouns and whether they identify as lesbian, gay, bisexual, transgender, queer and/or questioning, intersex, and asexual. Those

who choose to do so “will be offered connection to campus resources to strengthen their sense of belonging.”

But one critique of the policy is a section that states an individual’s chosen first name must be used by employees and students “in all communications.” Mr. Strang and members of the nonprofit Foundation for Individual Rights in Education wrote to the university stating the policy amounts to an overbroad regulation of student and faculty speech that could encroach on academic freedom and how educators are allowed to conduct their classrooms.

Mr. Strang noted in February that under the policy, a similar situation to the Meriwether case involving students’ preferred names could occur at UT in law and other professional schools because faculty use last names — such as “Mr. Smith” or “Ms. Smith” — because it parallels and introduces students to the professional discourse of lawyers. For pronouns, the policy states that “All UToledo community members are strongly encouraged to use an individual’s pronouns,” but there is still ambiguity as to how the policy could be applied and no indication on what might trigger disciplinary action for students or faculty alike.

In the Shawnee State University instance, Mr. Meriwether was investigated and punished for calling a transgender student “sir” during a lecture after she raised her hand. Court documents show Mr. Meriwether didn’t know about the student’s preferred pronouns at that time. Sometime later during the same semester, he “accidentally referred to the same student using the title ‘Mr.’ before immediately correcting himself.

Based on the student's complaints, he was told he had to address the student as a woman or risk disciplinary action — even though doing so violated Meriwether’s religious beliefs. He was later found to have “created a hostile environment” by refusing to follow that directive and received a written warning.

As for UT, officials didn’t respond whether the Meriwether case would give them pause over adopting the proposed Inclusive Gender Practices policy. UT spokesman Meghan Cunningham said officials have taken no action yet on moving forward to implement the policy, adding that university officials would review comments that were collected on the university website through March 21 and consider amending the policy based on the feedback.

She said officials are also waiting for Dilip Das, the new vice president for Diversity, Equity, and Inclusion — who will be tasked with overseeing this policy — to start his new role May 2.

“We are looking forward to welcoming Dr. Dilip Das to campus next week as UToledo’s new Vice President for Diversity, Equity and Inclusion and engaging him in the review of the comments received and plans for the proposed policy moving forward,” she said.