Court Rejects First Amendment Challenge to University Diversity and Inclusion Policies

BY ROBERT G. YOUNG • SEPTEMBER 25, 2019

On September 5, 2019, a federal district court in Ohio decided that a professor could not state a claim for relief under the First Amendment by arguing that the sexual harassment and reporting of sexual assault policies ("Policies") of Shawnee State University abridged his freedom of speech. The Policies at issue recognized gender identity as a protected status, and one of the Policies specifically provided that an individual's gender identity "can be the same or different than the sex assigned at birth." The professor, an evangelical Christian, argued that it violated his sincerely held religious beliefs, and thus his First Amendment rights to free speech, to be required (as he interpreted the Policies) to address students using pronouns of their gender identity when such pronouns did not match their biological gender at birth.

The Court rejected the professor's argument. Most notably, the Court decided that the professor's speech did not qualify for First Amendment protection because it had occurred in the context of his employment. The Court noted that the speech (that is, the pronouns with which he had to address students) occurred only in the context of his classes and that the only audience was the other students in those classes. The Court further reasoned that, in this context, the professor's speech did not implicate broader societal concerns or otherwise convey any beliefs about gender identity, such as would be required to invoke the protections of the First Amendment.

Client Tip: This case reaffirms that institutions may adopt, and enforce, carefully written diversity and inclusion policies without infringing on the constitutional rights of staff.

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