

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
(AUSTIN DIVISION)**

CHRISTINA CASTILLO COMER

211 Northern Trail
Leander, Texas 78641,

Plaintiff,

v.

ROBERT SCOTT, Commissioner,
Texas Education Agency,
1701 N. Congress Avenue
Austin, Texas 78201,

In his official capacity,

and

TEXAS EDUCATION AGENCY
1701 N. Congress Avenue
Austin, Texas 78201,

Defendants.

C.A. No. _____

COMPLAINT

**(For Declaratory and Injunctive Relief for Violation of Establishment and Due Process
Clauses of the United States Constitution)**

Introduction

1. Creationism is a religious belief. Teaching creationism as science in public schools violates the Establishment Clause of the First Amendment to the United States Constitution. The Texas Education Agency ("Agency") has a policy of purported "neutrality" on teaching creationism as science in public schools. By professing "neutrality," the Agency credits

creationism as a valid scientific theory. Creationism, however, is not a valid scientific theory; it is a religious belief. The Agency's policy is not neutral at all, because it has the purpose or effect of inviting dispute about an issue—teaching creationism as science in public schools—that is forbidden by the Establishment Clause. The Agency's "neutrality" policy has the purpose or effect of endorsing religion, and violates the Establishment Clause.

2. Christina Castillo Comer was the Director of Science for the Curriculum Division of the Agency. Director Comer held her position for more than ten years, receiving numerous awards and commendations for her work. In August 2006, Director Comer's supervisor recommended that she receive an "out-of-cycle merit [pay] increase of 3%," recognizing that Director Comer "consistently exceeds the expectations for her position." (Ex. A.)

3. On November 8, 2007, the Agency fired Director Comer for contravening the Agency's unconstitutional "neutrality" policy by forwarding an email to other science educators announcing an upcoming lecture about evolution and creationism. According to the Agency's memorandum recommending that Director Comer be fired:

On October 26, 2007, Ms. Comer forwarded an email from her TEA email account to a group of people, including two external email groups, that announced a presentation on creationism and intelligent design entitled "Inside Creationism's Trojan Horse." The email states that the speaker [Barbara Forrest] is a board member of a science education organization, and the email clearly indicates that **the group opposes teaching creationism in public education.**

...

When Dr. Jackson asked Ms. Comer about this situation, she replied that she was only forwarding information. However, the forwarding of this event announcement by Ms. Comer, as the Director of Science, from her TEA email account constitutes much more than just sharing information. Ms. Comer's email implies endorsement of the speaker and **implies that TEA endorses the**

speaker's position on a subject on which the agency must remain neutral. Thus, sending this email compromises the agency's role in the TEKS revision process by creating the perception **that TEA has a biased position on a subject directly related to the science education TEKS.**

(Ex. B) (emphases added).

4. Teaching creationism in public schools violates the Establishment Clause “because it seeks to employ the symbolic and financial support of government to achieve a religious purpose.” Edwards v. Aguillard, 482 U.S. 578, 597 (1987). *See also* Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707 (M.D. Pa. 2005). Similarly, the Agency's firing of its Director of Science for not remaining “neutral” on this subject violates the Establishment Clause, because it employs the symbolic and financial support of the State of Texas to achieve a religious purpose, and so has the purpose or effect of endorsing religion. By professing “neutrality,” the Agency credits creationism as a valid scientific theory. Finally, the Agency fired Director Comer without according her due process as required by the Fourteenth Amendment—a protection especially important here because Director Comer was fired for contravening an unconstitutional policy.

Jurisdiction and Venue

5. This Court has original jurisdiction over Plaintiff's constitutional claims pursuant to 28 U.S.C. §§ 1331 and 1343, 42 U.S.C. § 1983, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

6. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b), because Defendants reside in this District, and the events giving rise to the claims occurred in this District.

Parties

7. Plaintiff Christina Castillo Comer is a resident of Leander, Texas. Until fired for contravening an unconstitutional policy, she was the Director of Science for the Curriculum Division in the Texas Education Agency in Austin. She held that position for almost ten years (since May 1998), receiving many awards and commendations for her contributions to science education in Texas.

8. Defendant Robert Scott is the Commissioner of the Texas Education Agency. He is being sued in his official capacity. He supervises Curriculum Manager Monica Martinez, who wrote the memorandum recommending the termination of Director Comer, as well as Deputy Commissioner for Statewide Programs Lizzette Reynolds and Deputy Associate Administrator for Standards and Alignment Sharon Jackson. Martinez, Reynolds, and Jackson all participated in the firing of Director Comer.

9. The Agency was created by Sections 7.001-010, Tex. Educ. Code Ann. Headed by a Commissioner (currently, Defendant Scott) who is appointed by the Governor of Texas, the Agency and the Commissioner, *inter alia*, develop and manage the statewide curriculum, and administer the statewide assessment program. *See generally* Tex. Educ. Code Ann. §§ 7.021, 7.055. *See also* Texas Education Agency Mission and Responsibilities. (Ex. C.)

Background

A. Director Comer's Responsibilities at the Texas Education Agency

10. As the Director of Science for the Curriculum Division, Director Comer:

- * directed the K-12 science program including curricular issues involving assessment, textbook adoption, professional development, professional outreach to school boards, administrators, organizations, and teacher groups;

- * provided technical assistance to over 1200 school districts and charter schools, over 12,000 science teachers K-12, and over four million students;
- * provided oral and written science presentations at the national, state and regional levels;
- * wrote and directed grant programs for science instruction; and,
- * managed various programs for the state including the Presidential Awardees for Excellence in Mathematics and Science Teaching program and the National Youth Science Camp program for outstanding science seniors.

11. Director Comer has worked in the field of science education for more than 30 years. Before joining the Agency, Director Comer worked as a Science Mentor Teacher, Urban Systemic Initiative (1996-1998), a Science Teacher in the San Antonio Independent School District (1972-1995), a high school administrator in the Burbank High School in San Antonio (1995-1996), a Texas Science Standards Writer (1995-1998), and Science Teacher Consultant for the American Association for the Advancement of Science (1992-1995).

B. Recognition of Director Comer's Outstanding Contributions to Science Education in Texas

12. Over the years Director Comer has received many awards, including:

- * Outstanding Service to Texas Science Teachers November 2007
Science Teachers Association of Texas
- * Distinguished Service Award November 2007
Texas Science Education Leadership Association
- * Outstanding Service Award September 2007
University of Texas Medical Branch
- * Outstanding Service Award September 2006
University of Texas Medical Branch
- * Excellence in Elementary Science Rebecca Sparks Award 2006

Texas Council of Elementary Science

*	Distinguished Service in Recognition of Exemplary Leadership, Dedication and Commitment Texas Regional Collaboratives	2005
*	Recognition of Outstanding Dedication and Support of Texas Teachers San Antonio, Texas	2004
*	Friend of TESTA Promoting Earth Science Award Texas Earth Science Teachers Association	1999
*	Outstanding Contribution to Science K-12 Award University of Texas Arlington	1999
*	Outstanding Achievement Award Metropolitan Association of Teachers of Science, Houston	1998
*	Exemplary Achievement in Science Award Texas Science Hall of Fame	1998
*	Outstanding Leadership in Science Award Texas Statewide Systemic Initiative	1996
*	Phi Delta Kappa San Antonio, Texas	1995
*	Outstanding Service in Science Education Texas State Senate, Frank Madia	1993

C. The Theory of Evolution

13. “‘Evolution’ is defined as ‘the theory that the various types of animals and plants have their origin in other preexisting types, the distinguishable differences being due to modifications in successive generations.’” Aguillard, 482 U.S. at 599 (Powell, J., concurring) (quoting Webster’s Third New International Dictionary 789 (unabridged ed. 1981)).

14. The National Academy of Sciences summarizes the theory of evolution as follows: “Biological evolution concerns changes in living things during the history of life on

earth. It explains that living things share common ancestors. Over time, evolutionary change gives rise to new species. Darwin called this process ‘descent with modification,’ and it remains a good definition of biological evolution today.” Science and Creationism: A View from the National Academy of Sciences 27 (2d ed. 1999).

15. In science, the term “theory” has a distinct meaning and does not suggest uncertainty, doubt or speculation. The National Academy of Sciences defines a scientific theory as “a well-substantiated explanation of some aspect of the natural world that can incorporate facts, laws, inferences and tested hypotheses.” Science and Creationism 2. In addition to the theory of evolution, other examples of a scientific theory include the germ theory of diseases, the heliocentric theory of the solar system, atomic theory (the basis of the periodic table of the elements), the theory of plate tectonics, and the theory of gravity. These scientific theories integrate and explain such a wide range of data that they are considered crowning achievements of their respective fields.

16. According to the National Academy of Sciences, “evolution is one of the strongest and most useful scientific theories we have,” and “[t]he scientific consensus around evolution is overwhelming.” Science and Creationism 2, 28.

17. The American Association for the Advancement of Science states: “The contemporary theory of biological evolution is one of the most robust products of scientific inquiry. It is the foundation for research in many areas of biology as well as an essential element of science education.” AAAS Board Resolution on Intelligent Design Theory. (Ex. D.)

18. In Kitzmiller, the court relied on unrebutted expert testimony that “evolution, including common descent and natural selection, is ‘overwhelmingly accepted’ by the scientific community and that every major scientific association agrees.” 400 F. Supp. 2d at 743.

19. In Selman v. Cobb County School District, the court observed that “evolution is more than a *theory* of origin in the context of science. To the contrary, evolution is the dominant scientific theory of origin accepted by the majority of scientists.” 390 F. Supp. 2d 1286, 1309 (D. Ga.) (emphasis in original), *vacated and remanded on other grounds*, 449 F.2d 1320 (11th Cir. 2005).

20. The Texas Academy of Science describes the theory of evolution as “the primary unifying cognitive framework in the biological sciences.” Position Against the Inclusion of Creationism and Intelligent Design Concepts in the Science Curricula in Texas Schools. (Ex. E.)

21. According to the Science Teachers Association of Texas, “[t]here is no longer a debate among scientists about whether evolution has taken place.” Thus, “[i]f evolution is not taught properly, students will not achieve the level of scientific literacy needed for science-related careers and life in a society where understanding of the core concepts of science is critical.” STAT Position Statement on Evolution. (Ex. F.)

D. Creationism

22. While the theory of evolution is overwhelmingly accepted in the scientific community, it has been “historically opposed by religious denominations” which perceive that it contradicts their religious doctrines about the origin and development of life. Aguillard, 482 U.S. at 582.

23. “Too often, evolution has not been emphasized in science curricula and classrooms in a manner commensurate with its importance because of official policies, intimidation of science teachers, and the general public’s misunderstanding of the term ‘theory.’ Teachers are also being pressured to introduce nonscientific views, including ‘creationism,’ ‘intelligent design,’ ‘initial complexity,’ and ‘abrupt appearance,’ which are not supported by

evidence and have no legitimate place in the science curriculum.” STAT Position Statement on Evolution. (Ex. F.)

24. Opponents of evolutionary theory repeatedly have attempted to forbid, limit or otherwise undermine the teaching of the theory of evolution in the public schools. Challenges have included laws or policies prohibiting the teaching of evolution; requiring teachers to make statements or disclaimers questioning the validity of the theory of evolution; and requiring science teachers to present anti-evolutionary views, including religious views not based on scientific evidence such as creationism or “intelligent design.” *See generally* McLean v. Ark. Bd. of Educ., 529 F. Supp. 1255, 1258-60 (E.D. Ark. 1982) (discussing the history of Fundamentalism, evolution, and creationism in the United States and observing that “the creationist organizations consider the introduction of creation science into the public schools [as] part of their ministry”).

25. In Kitzmiller, the court ruled that intelligent design is “creationism re-labeled.” 400 F. Supp. 2d at 722. The court held that the Dover School Board violated the Establishment Clause by requiring teachers to read a statement in the ninth grade biology class that “Darwin’s Theory . . . is not a fact,” that “Intelligent Design is an explanation of the origin of life that differs from Darwin’s view,” and that a reference book “is available for students who might be interested in gaining an understanding of what Intelligent Design actually involves.” Id. at 761.

26. The court in Kitzmiller also described the jurisprudential history of attempts to insert creationism into public school curricula. *See* 400 F. Supp. 2d 711-12. In 1925, the criminal prosecution of a public school teacher for teaching about evolution in violation of a Tennessee statute culminated in the famous “monkey trial.” Scopes v. State, 154 Tenn. 105 (1927). Forty-one years later, the Supreme Court of the United States struck down an Arkansas

statute prohibiting the teaching of evolution. Epperson v. Arkansas, 393 U.S. 97 (1968). In 1987, the Court ruled that a Louisiana statute requiring public schools to teach creationism along with evolution (the “Balanced Treatment for Creation-Science and Evolution-Science Act”) violated the Establishment Clause. Aguillard, 482 U.S. at 596-97. The statute had the “purpose of discrediting evolution by counterbalancing its teaching at every turn with the teaching of creationism.” Id. at 589. The belief that a supernatural creator is responsible for the creation of humankind is a religious viewpoint. Id. at 591. The statute was “designed *either* to promote the theory of creation science that embodies a particular religious tenet *or* to prohibit the teaching of a scientific theory disfavored by certain religious sects.” Id. at 593. “Out of many possible science subjects taught in the public schools, the legislature chose to affect the teaching of the one scientific theory that historically has been opposed by certain religious sects.” Id. Thus, the Court held that the statute “violates the Establishment Clause of the First Amendment because it seeks to employ the symbolic and financial support of government to achieve a religious purpose.” Id. at 597.

27. The current Texas statewide assessment standards require that students learn the theory of evolution. *See* 19 Tex. Admin. Code § 119.43(b)(1), (c)(7).

28. Nevertheless, upon information and belief, “[s]tarting this summer, the [Texas] state education board will determine the curriculum for the next decade and decide whether the ‘strengths and weaknesses’ of evolution should be taught” in public schools. Laura Beil, Opponents of Evolution Are Adopting New Strategy, N.Y. Times, June 4, 2008, at A14. (Ex. G.)

E. Defendants’ Firing of Director Comer

29. On Friday, October 26, 2007, Director Comer read an email dated October 23 from Glenn Branch, Deputy Director of the National Center for Science Education (“Branch

email”) (Ex. H). The subject of the Branch email was “Barbara Forrest in Austin 11/2.” The email read:

Dear Austin-area friends of NCSE,

I thought you might like to know that Barbara Forrest will be speaking on “Inside Creationism’s Trojan Horse” in Austin on November 2, 2007. Her talk, sponsored by the Center for Inquiry Austin, begins at 7:00 p.m. in the Monarch Event Center, Suite 3100, 6406 North IH-35 in Austin. The cost is \$6; free to friends of the Center.

In her talk, Forrest will provide a detailed report on her expert testimony in the *Kitzmiller v. Dover School Board* trial as well as an overview of the history of the “intelligent design” movement. Forrest is a Professor of Philosophy in the Department of History and Political Science at Southeastern Louisiana University; she is also a member of NCSE’s board of directors.

For further details, visit:

http://www.centerforinquiry.net/austin/events/barbara_forrest_insider_creationisms_trojan_horse_lecture/

Sincerely,

Glenn Branch
Deputy Director
National Center for Science Education, Inc.

...

30. Director Comer “googled” Dr. Forrest and found that her credentials appeared impressive. Because Director Comer thought that Dr. Forrest’s comments about the *Kitzmiller* trial might be interesting to science educators, she forwarded the Branch email to two listservs: STATBOD@googlegroups.com, which is the private listserv of the officers of Science Teachers Association of Texas, and texasearth@googlegroups.com, most of whom are local geo-science educators.

31. Director Comer also forwarded the Branch email to seven individuals: Kamil Jbeily, Executive Director of the Texas Regional Collaboratives at UT; Carol Fletcher, Assistant Director and R&D Coordinator of the Texas Regional Collaboratives at UT; Kevin Fisher, Past President of the Science Teachers Association of Texas; Gina Day, then Director of Student Support Initiatives at TEA; Julie Harris-Lawrence, Director of Math and Science Partnerships at TEA; Irene Pickhardt, Assistant Director of Science for the Curriculum Division at TEA; and, Barbara ten Brink, Elementary Science Specialist at Austin Independent School District and Past President of the Science Teachers Association of Texas.

32. Director Comer forwarded the Branch email only to science educators in the Austin area, a total of about 36 people. She sent her forwarding email at 9:49 a.m. on October 26. The only comment on her forwarding email was “FYI.” (Ex. I.)

33. Later that same morning, Director Comer was pulled out of a meeting by Sharon Jackson, Deputy Associate Commissioner for Standards and Alignment. Jackson brought Director Comer into Jackson’s office.

34. Deputy Associate Commissioner Jackson then handed Director Comer a hard copy of an email from Deputy Commissioner Lizzette Reynolds, Statewide Policy and Programs, to Jackson.

35. In this email, Deputy Commissioner Reynolds asserted in substance that Director Comer’s forwarding of the Branch email was an offense worthy of termination or at least reassignment of her duties, that Director Comer must immediately issue a disclaimer, and that she was not allowed to express opinions on this subject.

36. Director Comer orally responded to Deputy Associate Commissioner Jackson in words to the effect of asking: “Is she firing me over creationism?” Deputy Associate

Commissioner Jackson responded in words to the effect: “Just keep reading the email.” After reading more of the email, Director Comer responded that she had only written “FYI” on her forwarding email, that she had not expressed a personal opinion about creationism in her forwarding of the Branch email, and that she forwarded the Branch email only to local individuals, not to the official TEA listserv.

37. Deputy Associate Commissioner Jackson ordered Director Comer to draft and send a disclaimer.

38. Director Comer left immediately to draft the disclaimer. Director Comer sent three drafts of her disclaimer email to Deputy Associate Commissioner Jackson for her review and approval. (Exs. J, K & L.)

39. At 1:33 p.m. that same day, Director Comer sent an email to everyone to whom she had forwarded the Branch email, stating: “Please disregard the previous email with the subject title ‘Barbara Forrest...’; it was sent in error. This email does not represent the position of the Texas Education Agency.” (Ex. M.) Both Deputy Associate Commissioner Jackson and Deputy Commissioner Reynolds reviewed and approved this disclaimer. (Ex. N.)

40. Director Comer was out of the office on personal matters the following week (October 28-November 2), plus the first two days of the next week (November 5-6). She had no contact with Martinez, Jackson, or Reynolds during that time.

41. When Director Comer returned to the office on Wednesday, November 7, she found that she was locked out of her computer. Thinking she had made an error in attempting to log in, she left to attend a 9:00 a.m. meeting of the Curriculum Division.

42. At the conclusion of the Curriculum Division meeting, Tom Shindell, Director for Organizational Development, instructed Director Comer to meet with him in his office.

43. Director Comer met with Shindell and Curriculum Manager Monica Martinez in Shindell's office. Shindell said, "we are here to discuss your termination."

44. Shindell handed Director Comer two documents. One was a memorandum dated November 5, 2007, from Martinez through Jackson to Susan Barnes, Associate Commissioner for Standards and Programs, Re: "Proposed Disciplinary Action." (Ex. B) ("Termination Memo").

45. The Termination Memo reads in pertinent part:

On October 26, 2007, Ms. Comer forwarded an email from her TEA email account to a group of people, including two external email groups, that announced a presentation on creationism and intelligent design entitled "Inside Creationism's Trojan Horse." The email states that the speaker [Barbara Forrest] is a board member of a science education organization, and the email clearly indicates that **the group opposes teaching creationism in public education.**

...

When Dr. Jackson asked Ms. Comer about this situation, she replied that she was only forwarding information. However, the forwarding of this event announcement by Ms. Comer, as the Director of Science, from her TEA email account constitutes much more than just sharing information. Ms. Comer's email implies endorsement of the speaker and **implies that TEA endorses the speaker's position on a subject on which the agency must remain neutral.** Thus, sending this email compromises the agency's role in the TEKS revision process by creating the perception **that TEA has a biased position on a subject directly related to the science education TEKS.**

(emphases added).

46. Shindell told Director Comer that she had until noon the following day to resign; otherwise she would be fired. Shindell informed Director Comer that she was on administrative leave and that she could not speak to anyone at the Agency or any other entity. Neither Shindell

nor Jackson (nor anyone else) informed Director Comer of any right to appeal her termination as required by Texas Operating Procedures 07-08(2), either during this meeting or at any other time.

47. Shindell then walked Director Comer to her office and asked for her badge.

48. Given the “choice” to quit or be fired, Director Comer resigned.

49. The following day, November 8, Director Comer went to Shindell’s office where they printed out the resignation letter that she had typed on her laptop (but was unable to print because the laptop had been encrypted). (Ex. O.)

50. Director Comer was never informed of her right to appeal her termination pursuant to Texas Operating Procedures 07-08(2), nor was she given an opportunity to respond to the accusations and assertions in the Termination Memo.

51. Upon information and belief, the Agency’s firing of Director Comer received widespread publicity, locally, statewide, nationally, and internationally.

52. On December 10, 2007, 121 Ph.D.-holding professors of biology at various Texas universities—including the University of Texas, Baylor University, Rice University, Texas A&M, Texas State University, the University of Houston, Texas Tech University and the University of North Texas—wrote an open letter to Robert Scott, Commissioner of the Texas Education Agency, criticizing the firing of Director Comer. (Ex. P.) These professors criticized the unconstitutional policy, referenced in the Termination Memo, that evolution and intelligent design are “subject[s] on which the agency must remain neutral”:

It is inappropriate to expect the TEA’s director of science curriculum to “remain neutral” on this subject, any more than astronomy teachers should “remain neutral” about whether the Earth goes around the sun. In the world of science, evolution is equally well-supported and accepted as heliocentrism [the theory

that the sun is the center of our solar system]. Far from remaining neutral, it is the clear duty of the science staff at TEA and all other Texas educators to speak out unequivocally: evolution is a central pillar in any modern science education, while “intelligent design” is a religious idea that deserves no place in the science classroom at all.

(Ex. P.)

COUNT ONE

(Violation of the Establishment Clause of the First Amendment to the United States Constitution: Declaratory Relief That TEA’s “Neutrality” Policy Regarding Creationism Is Unconstitutional)

53. The allegations of paragraphs 1-52 are incorporated by reference.

54. Evolution is “the dominant scientific theory of origin accepted by the majority of scientists.” Selman, 390 F. Supp. 2d at 1309. Creationism’s reliance on a supernatural designer “remove[s] creationism from the realm of science and ma[kes] it a religious proposition.” Kitzmiller, 400 F. Supp. 2d at 720 (citing Aguillard, 482 U.S. at 591-92, and McLean, 529 F. Supp. at 1265-66). Under the Supreme Court’s decision in Aguillard, teaching creationism in public schools violates the Establishment Clause.

55. The Termination Memo reads in pertinent part:

On October 26, 2007, Ms. Comer forwarded an email from her TEA email account to a group of people, including two external email groups, that announced a presentation on creationism and intelligent design entitled “Inside Creationism’s Trojan Horse.” The email states that the speaker [Barbara Forrest] is a board member of a science education organization, and the email clearly indicates that **the group opposes teaching creationism in public education.**

...

When Dr. Jackson asked Ms. Comer about this situation, she replied that she was only forwarding information. However, the

forwarding of this event announcement by Ms. Comer, as the Director of Science, from her TEA email account constitutes much more than just sharing information. Ms. Comer's email implies endorsement of the speaker and **implies that TEA endorses the speaker's position on a subject on which the agency must remain neutral.** Thus, sending this email compromises the agency's role in the TEKS revision process by creating the perception **that TEA has a biased position on a subject directly related to the science education TEKS.**

(Ex. B.) (emphases added).

56. Under Aguillard, the “subject on which the Agency must remain neutral”—the “teaching [of] creationism in public education”—is a subject on which the Agency may not, without violating the Establishment Clause, have, express, or impose a so-called “neutral” position.

57. By professing “neutrality,” the Agency unconstitutionally credits creationism, a religious belief, as a valid scientific theory. The Agency's policy is not neutral at all, because it has the purpose or effect of inviting dispute about whether to teach creationism as science in public schools, despite the fact that the Establishment Clause prohibits the teaching of creationism as science in public schools. The Agency's “neutrality” policy violates the Establishment Clause of the First Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment, because it has the purpose or effect of endorsing religion.

COUNT TWO

(Violation of the Establishment Clause of the First Amendment to the United States Constitution: Termination of Director Comer)

58. The allegations of paragraphs 1-52 are incorporated by reference.

59. The actions of Defendants set forth in paragraphs 1-52 above entitle Director Comer to relief under 42 U.S.C. § 1983. Defendants, acting under color of law, deprived Director Comer of her constitutional rights under the Establishment Clause by firing her for contravening an unconstitutional policy.

60. Specifically, the Agency fired her for violating the Agency's unconstitutional policy of "neutrality" by forwarding an "email [that] clearly indicates that the group [of which the speaker is a board member] opposes teaching creationism in public education." Director Comer's termination pursuant to the Termination Memo violates the Establishment Clause of the First Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment, because it has the purpose or effect of endorsing religion.

COUNT THREE

(Violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution)

61. The allegations of paragraphs 1-52 are incorporated by reference.

62. The actions of Defendants set forth in paragraphs 1-52 entitle Director Comer to relief under 42 U.S.C. § 1983 because Defendants, acting under color of law, deprived Director Comer of her Fourteenth Amendment due process rights by firing her without affording her the rights to which she was entitled under Texas Operating Procedures 07-08(2).

PRAYER FOR RELIEF

WHEREFORE, having been fired for contravening an unconstitutional policy, Plaintiff respectfully requests that the Court issue the following:

a. a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 that any policy or practice of the Texas Education Agency of being “neutral” on the subject of the teaching of creationism in Texas public schools violates the Establishment Clause;

b. a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. § 1983 that the firing of Director Comer by the Texas Education Agency for sending an email and thereby contravening the Agency’s unconstitutional “neutrality” policy violates the Establishment Clause;

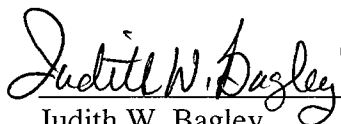
c. an injunction requiring the offer to Plaintiff of reinstatement into her former position as Director of Science, Curriculum Division, Texas Education Agency;

d. an injunction against the Agency’s having, expressing, or imposing through any means, a policy of “neutrality” with respect to the teaching of creationism in the Texas public schools, or a policy that expressly or implicitly equates evolution and creationism, or that in any way credits creationism as a valid scientific theory;

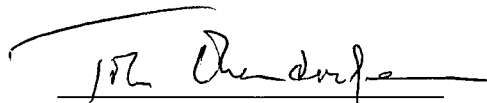
e. an order awarding Plaintiff the costs incurred in this litigation, including attorneys’ fees pursuant to 42 U.S.C. § 1988; and,

f. any other relief the Court deems just and proper.

Respectfully submitted,

 (by permission
A. Bell)

Judith W. Bagley
Patton Boggs LLP
2001 Ross Avenue
Suite 3000
Dallas, TX 75201
214-758-1500



Douglas B. Mishkin (*pro hac vice* pending)
John L. Oberdorfer (*pro hac vice* pending)
Pamela S. Richardson (*pro hac vice* pending)
Patton Boggs LLP
2550 M Street, N.W.
Washington, DC 20037
202-457-6000

June 30, 2008

Exhibit A

MEMORANDUM

TO: Human Resources

THRU: Adam Jones

THRU: Susan Barnes *B*

THRU: Sharon Jackson *W*

FROM: George R. Rislov *GR*

SUBJ: Out-of Cycle Merit Recommendation for Christina Comer

DATE: August 28, 2006

Chris Comer consistently exceeds the expectations for her position. Over the past year she has provided significant assistance and guidance to the Director of Mathematics as she moved from the position of Asst. Math Director to Director. Ms. Comer has also collaborated with other divisions on the successful implementation of many projects related to the science initiative. She has been an integral part of the development of the new Texas Science Diagnostic System. She has worked with SBEC on certification related issues including providing support in the Master Science Teacher certification exam. Additionally, Ms. Comer continues to work very well with the Student Assessment Division. Changes in the organization of the division earlier this year led to her being passed over when she was eligible for her merit increase in May.

Please consider this recommendation on behalf of Ms. Comer for an out-of-cycle merit increase of 3%.

Attachment-Personnel Action Form

2006 SEP 11 10:00 AM

2006 SEP 11 10:00 AM

HUMAN RESOURCES

Exhibit B



TEXAS EDUCATION AGENCY

1701 North Congress Ave. ★ Austin, Texas 78701-1494 ★ 512/463-9734 ★ FAX: 512/463-9838 ★ <http://www.tea.state.tx.us>

Robert Scott
Commissioner

MEMORANDUM

TO: Susan Barnes

THROUGH: Sharon Jackson *[Signature]*

FROM: Monica Martinez *[Signature]*

DATE: November 5, 2007

RE: Proposed Disciplinary Action

HUMAN RESOURCES
11/6 PM 4:08
TEA - Education Department

In accordance with OP 07-08, *Employee Disciplinary Actions and Complaint Procedures*, I propose to terminate the employment of Chris Castillo-Corner due to misconduct and insubordination. Ms. Comer has engaged in a series of incidents evidencing a serious lack of good judgment and failure to follow agency policies and supervisory directives.

Ms. Comer is employed as the Director of Science in a Manager III level position. As the Director of Science, Ms. Comer should understand that it is her job to explain law and rule regarding the science Texas Essential Knowledge and Skills (TEKS), but not cross the line into providing guidance or opinions about instructional methodology or any other matters about which we have no statutory authority. It is crucial for Ms. Comer to exercise good judgment and the utmost care when sharing information regarding science education in Texas whether orally or in writing. It is also essential that Ms. Comer support the integrity of the upcoming TEKS development and revision process and ensure that it does not appear in any way that she is advocating for any given position or stance. Ms. Comer should be well aware of her role in the TEKS revision process and the need to maintain neutrality based on the guidance provided by agency management and division procedures as well as numerous meetings and discussions on this topic.

The following summarizes Ms. Comer's recent history of performance problems and the incidents giving rise to this proposed action. On February 23, 2007 Ms. Comer was given a Letter of Counseling due to concerns about her involvement with work outside the agency and failure to follow supervisory directives. The Letter of Counseling included the following directives:

- You are not to attend or present at any meeting or conference, whether on your own time or on agency time, in which you represent the agency, attend as the Director of Science, or present on a science related topic unless you have obtained the appropriate prior approval.

- You are not to travel in-state or out-of-state to represent the agency as the Director of Science, whether on your own time or on agency time, unless you have obtained prior approval.
- When making any presentations, you are to obtain approval on the content prior to the presentation.
- You are not to communicate in writing or otherwise with anyone outside the agency in any way that might compromise the transparency and/or integrity of the upcoming TEKS development and revision process.

On October 9, 2007, it was reported that Ms. Comer stood up in front of the Texas Regional Collaboratives Science Directors, who represent educators from all over the state, and said that Robert Scott was only Acting Commissioner and that there was no real leadership at the agency. This comment demonstrates a serious lack of judgment and constitutes misconduct as defined in OP 07-08, Section 8(a)(4).

(4) Misconduct - Improper, unacceptable, and/or unlawful behavior. Some examples of misconduct include:

- (p) Conduct that negatively impacts TEA.

On October 26, 2007, Ms. Comer forwarded an email from her TEA email account to a group of people, including two external email groups, that announced a presentation on creationism and intelligent design entitled "Inside Creationism's Trojan Horse". The email states that the speaker is a board member of a science education organization, and the email clearly indicates that the group opposes teaching creationism in public education. Sending this email not only demonstrates a serious lack of good judgment, it also violates the directive Ms. Comer was given not to communicate in writing or otherwise with anyone outside the agency in any way that might compromise the integrity of the TEKS development and revision process. This constitutes misconduct in violation of OP 07-08, Section 8(a)(4)(p) as well as insubordination as defined by OP 07-08, Section 8(a)(3).

(3) Insubordination - Failure to follow a directive given by a supervisor or other agency representative who possesses the authority to give the directive; use of language or conduct that shows disrespect towards one's supervisor(s); acting outside the scope of one's authority.

When Dr. Jackson asked Ms. Comer about this situation, she replied that she was only forwarding information. However, the forwarding of this event announcement by Ms. Comer, as the Director of Science, from her TEA email account constitutes much more than just sharing information. Ms. Comer's email implies endorsement of the speaker and implies that TEA endorses the speaker's position on a subject on which the agency must remain neutral. Thus, sending this email compromises the agency's role in the TEKS revision process by creating the perception that TEA has a biased position on a subject directly related to the science education TEKS.

Ms. Comer's forwarding of this email not only violates an established directive, as stated above, it directly conflicts with her responsibilities as the Director of Science. In addition, Ms. Comer's

assertion that she sent the email innocently is itself unacceptable, as it indicates that she lacks an adequate understanding of TEA's role in the TEKS process and her appropriate role as the Director of Science.

On October 29, 2007 Ms. Comer attended a meeting at the Courtyard Marriot without submitting an off-site activity form or obtaining approval to attend the meeting. This violates the directive Ms. Comer was given not to travel in-state or out-of-state to represent the agency as the Director of Science, whether on her own time or on agency time, unless she obtained prior approval. This also constitutes insubordination pursuant to the TEA OP 07-08.

On August 14, 2007, Ms. Comer sent me an email stating that she had given a "verbal report sans slideshow" at a Texas Science Educational Leadership Association meeting. Ms. Comer said they wanted to post the presentation on their website and she was requesting approval of a PowerPoint presentation after the fact. Ms. Comer did not obtain prior approval to present at this meeting which violates the directives specified in the Letter of Counseling to obtain prior approval to make a presentation and prior approval on the content of the presentation. The fact that the presentation was made without back up slides does not exempt Ms. Comer from this directive. This also constitutes insubordination pursuant to the TEA OP 07-08.

Additionally, the PowerPoint slides submitted to me for approval after the fact include information about the SBOE TEKS review process for science that had not yet been confirmed by the SBOE and was therefore inappropriate to share. The slides also include comments on policy implications that are inappropriate for Ms. Comer to make. In addition, the presentation includes information on conceptual chemistry and physics courses, the inclusion of which could be viewed as Ms. Comer and/or the agency advocating for this teaching methodology. This demonstrates extreme lack of good judgment with respect to determining which information is and is not appropriate to share, and a lack of understanding of the impropriety of including such information in a presentation. The fact that Ms. Comer gave a presentation that included inappropriate content demonstrates that she lacks an adequate understanding of her appropriate role as Science Director.

Based on the reasons set forth above, I request that you approve this recommendation for the termination of Ms. Comer's employment. This action is necessary due to Ms. Comer's repeated incidents of insubordination, the seriousness of her misconduct, and the extent to which she has demonstrated poor judgment.

☒ Approved ☐ Disapproved Date: Nov. 5, 2007



Susan Barnes

Associate Commissioner for Standards and Programs

Attachments: Letter of Counseling
Email from Chris Comer dated 10-26-07
Email from Chris Comer dated 8-14-07

Cc: Tom Shindell
Harvester Pope

Exhibit C

