C8-00-1613

STATE OF MINNESOTA
IN COURT OF APPEALS

Rodney LeVake,

Appellant,

v.

Independent School District #656,
Keith Dixon, Superintendent,
Dave Johnson, Principal, and
Cheryl Freund, Curriculum Director,

Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF THE ISSUES

I. WHETHER BASED ON THE RECORD AS APPLIED TO APPLICABLE LAW THE DISTRICT COURT COMMITTED ERROR IN GRANTING RESPONDENTS SUMMARY JUDGMENT THEREBY DISMISSING APPELLANT'S CLAIM PREMISED ON ALLEGED DISCRIMINATION AGAINST HIM IN TERMS OF HIS EMPLOYMENT ON THE BASIS OF HIS RELIGION.

Epperson v. State of Arkansas, 393 U.S. 97 (1968)

McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973)

Helland v. South Bend Community School Corp., 93 F.3d 327 (7th Cir. 1996)

II. WHETHER BASED ON THE RECORD AS APPLIED TO APPLICABLE LAW THE TRIAL COURT COMMITTED ERROR IN GRANTING RESPONDENTS SUMMARY JUDGMENT THEREBY DISMISSING APPELLANT'S CLAIM THAT RESPONDENTS' CONDUCT IN REASSIGNING APPELLANT FROM HIS POSITION AS BIOLOGY TEACHER VIOLATED HIS CONSTITUTIONAL RIGHT TO FREEDOM OF SPEECH.

Connick v. Myers, 461 U.S. 138 (1983)

Boring v. Buncombe County Bd. of Educ., 136 F.3d 364 (4th Cir. 1998), cert. denied, 525 U.S. 813 (1998)

Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000)

III. WHETHER BASED ON THE RECORD AS APPLIED TO APPLICABLE LAW THE TRIAL COURT COMMITTED ERROR IN GRANTING RESPONDENTS SUMMARY JUDGMENT HOLDING THAT RESPONDENTS HAD NOT INTERFERED WITH ANY RIGHTS PROTECTED BY THE DUE PROCESS CLAUSE.

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)

Boring v. Buncombe County Bd. of Educ., 136 F.3d 364 (4th Cir. 1998), cert. denied, 525 U.S. 813 (1998)

Krizek v. Bd. of Educ. of Cicero-Stickney Township High School Dist. No. 201, 713 F. Supp. 1131 (N.D. Ill. 1989)

STATEMENT OF THE FACTS

A. Introduction.

Minn. R. Civ. App. P. 128.02, subd. 1(c), requires that the "facts must be stated fairly, with complete candor, and as concisely as possible." In setting forth the facts in his brief, Appellant/Plaintiff Rodney LeVake (LeVake) has done so in a very selective and self-serving manner. LeVake's statement of facts could more aptly be labeled "argument." While it is true that the facts must be viewed most favorably to LeVake, the nonmoving party, LeVake has an obligation to provide the Court with a statement of the facts in accord with Rule 128.02, subd. 1(c). It is therefore necessary for Respondents/Defendants Independent School District #656 (School District), Keith Dixon (Dixon), Dave Johnson (Johnson) and Cheryl Freund (Freund) (jointly referred to as Defendants) to present a thorough statement of the facts.

B. LeVake's Assignment to Teach High School Biology.

LeVake is a teacher employed by the School District. (LeVake Depo., pp. 154-55; Respondent's Appendix [R.A.] 68-69.) LeVake's teaching contract provides that he can be assigned to teach any topic for which he has licensure. (R.A. 204.) Teachers are routinely assigned to teach where they are needed from year to year. (LeVake Depo., p. 95; R.A. 48.) LeVake is licensed to teach mathematics, life science and physical science. (LeVake Depo., pp. 45-46, 94; R.A. 29-30, 47.)

When LeVake was initially hired by the School District in 1984, LeVake had applied for a combined science-math position. (LeVake Depo., p. 96; R.A. 49.) LeVake was offered the tenth grade biology position during the summer of 1997 after a high school biology teacher retired. (LeVake Depo., pp. 96-97; R.A. 49-50.) Before accepting the position, LeVake

discussed the course with Ken Hubert, co-chairman of the high school science department, and Mr. Johnson, the high school principal. (LeVake Depo., p. 98; R.A. 51; Johnson Depo., pp. 16-17; R.A. 131-32.) LeVake also talked to Dave Wieber, the other co-chairman of the high school science department. (Wieber Depo., p. 9; R.A. 140.) Mr. Wieber explained to LeVake that there was a biology curriculum and that all teachers were expected to follow it. (Id.) LeVake knew what textbook would be used and he knew he would be teaching evolution. (LeVake Depo., pp. 100-01; R.A. 53-54.)

The school board has a curriculum adoption process and ultimately adopts a curriculum. (Dixon Depo., pp. 20-21; R.A. 123-24.) As adopted by the School District school board, the teaching of evolution is a required part of the tenth grade biology curriculum. (R.A. 206, 208-12.) The required textbook, "Biology: Visualizing Life," contains three chapters dealing with aspects of evolution -- Chapters 9, 10 and 11. (R.A. 217-22.) Chapter 9 must be covered by the teachers while Chapters 10 and 11 were optional. (R.A. 210.) With regard to Chapter 9, the required lab activity is the "peppered moth." (R.A. 211.)

This curriculum is to be implemented by the teachers in the classroom. (Dixon Depo., p. 24; R.A. 124.) The School District wants to be sure that "students get the same experience from one classroom to another." (Id.) LeVake understood it was important that all biology teachers cover the same materials. (LeVake Depo., p. 107; R.A. 55.) LeVake also admits he knew Chapter 9 was one of the required chapters to be taught. (Id.) Minnesota state graduation standards also require evolution to be taught as part of high school biology. (Cheryl Freund Depo., pp. 48-49, 52-53; R.A. 105-07; Hubert Depo., p. 16; R.A. 115.)

LeVake admits that he was told and understood that the theory of evolution was part of the Minnesota standards for education.[1] (LeVake Depo., p. 64; R.A. 34.)

LeVake understood before taking the position that the tenth grade biology curriculum included the teaching of evolution. (LeVake Depo., p. 100-01; R.A. 53-54.) He also knew he had reservations regarding teaching evolution. (LeVake Depo., pp. 64, 71; R.A. 34, 36.) LeVake knew the textbook to be used in the course and knew that the text more than likely did not contain the criticisms he wanted to teach. (LeVake Depo., pp. 100-01; R.A. 53-54.) Yet, he accepted the position and did not tell Mr. Hubert, Mr. Johnson or Mr. Wieber that he had any reservations about teaching evolution when he took the position. (LeVake Depo., pp. 100-01; R.A. 53-54.)

LeVake acknowledges that evolution is the framework and foundation of modern biology. (LeVake Depo., pp. 45-48; R.A. 29-32.) In his own post-secondary formal science education at St. John's University and at Mankato State University, LeVake was taught that evolution is the accepted framework of modern biology. (Id.) However, according to LeVake, evolution is, for the most part, factually insupportable. (LeVake Depo., p. 71; R.A. 36.) LeVake's criticisms of evolution, which LeVake admits are a minority position, were never

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[1] There is no material issue of fact with regard to "what is the curriculum" as LeVake would apparently have this Court believe. There is no dispute that evolution was part of the tenth grade biology curriculum. (R.A. 206, 208-12.) The course syllabus, to which LeVake refers in his brief, is not the "curriculum." (R.A. 206.) LeVake's contention that evolution is not part of the graduation standards is not supported by the record. MCAR Rule 3501.0446 states that a student shall "demonstrate understanding of biological concepts, theories and principles." As LeVake admits, evolution is a fundamental concept of biology. (LeVake Depo., p. 48; R.A. 32.)

presented in his own formal science educational training.[2] (LeVake Depo., pp. 45-47; R.A. 29-31.) According to LeVake, there have been critiques and criticism of evolution from secular scientists. (LeVake Depo., p. 164; R.A. 75.) LeVake testified:

> And I might add, you know, critiques from secular scientists even of the theory. Like, for example, Denton is secular and not writing in a Creation standpoint Behe is the same thing, Michael Behe. . . .
>
> And Phillip Johnson as well, he's kind of a spokesman, it seems, for this kind of issue. I've gotten to read a couple of his works, but there's several scientific arguments that can be brought up, you know, that critique evolution.

(LeVake Depo., p. 164; R.A. 75.)

C. <u>LeVake's Teaching of Biology</u>.

Before he taught a chapter of the biology textbook, LeVake prepared an outline for that chapter. (R.A. 178-200.) LeVake did not prepare outlines for Chapters 9, 10 or 11. (LeVake Depo., p. 40; R.A. 28.)

LeVake does admit he skipped Chapters 10 and 11. LeVake testified at his deposition that all he had the students do with regard to Chapter 9 was the required lab on the peppered moth.[3] (LeVake Depo., p. 108; R.A. 56.) LeVake admits he knew Chapter 9 was required. (LeVake Depo., pp. 107-108; R.A. 55-56.) LeVake also omitted all references to evolution from the test form covering taxonomy. (1997 v. 1998 Test Forms; R.A. 201-03.)

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[2] LeVake also acknowledged he was not aware of any nonreligious educational institution that presents his views of biology and evolution. (LeVake Depo., p. 47; R.A. 31.)

[3] LeVake later attempted to contradict his deposition testimony with his own affidavit testimony. Under Minnesota law, such testimony is inadmissible. <u>Banbury v. Omnitrition Int'l</u>, 533 N.W.2d 876, 881 (Minn. Ct. App. 1995).

In the spring, Mr. Hubert, a co-chair of the high school science department, observed that while both he and Mr. Koehler, the other biology teacher, had already covered Chapter 9 on evolution, LeVake appeared to have skipped it. (Hubert Depo., pp. 8, 17; R.A. 113, 116.) Mr. Hubert was sure that LeVake was not teaching evolution. (Hubert Depo., p. 16; R.A. 115.) Mr. Hubert also noticed the book "Life - How Did We Get It Here? By Evolution or Creation?" in the common prep room and open on LeVake's desk.[4] (Hubert Depo., pp. 33-35; R.A. 120.)

Mr. Hubert asked LeVake how he was going to handle the topic of evolution. (LeVake Depo., p. 64; R.A. 34.) LeVake told Hubert he could not teach evolution. (Id.) LeVake described his conversation with Hubert as follows:

> Q. Okay. And what conversation did you have with him [Mr. Hubert]?
>
> A. Well, the essence of the conversation was is that he asked me how I was going to handle the topic of evolution. His concern was it's kind of -- he wanted to be in line with the Minnesota stands [sic] for education and the federal goals 2000 things and they -- these particular standards had indicated that the student needs to have kind of a working knowledge of evolution and he wanted to know how I was going to handle that.
>
> Q. Okay. What did you tell him?

[4] It is interesting to note that this publication, which is published by Watchtower Bible and Tract Society, contained a section on the peppered moth, a lab LeVake says he covered. (R.A. 223-26.) The publication states that the peppered moth is "an excellent demonstration of the function of camouflage, but, since it begins and ends with moths and no new species is formed, it is quite irrelevant as evidence for evolution. The inaccurate claim that the peppered moth is evolving is similar to several other examples. . . . The message once again confirmed by mutations is the formula of Genesis chapter 1: Living things reproduce only 'according to their kinds.'" (R.A. 226.)

> A. Well, it was a -- it was about a half hour discussion <u>but in essence I said to him I can't teach evolution. That's what I told him</u>.

(LeVake Depo., p. 64; R.A. 34; emphasis added.) Hubert recalled that LeVake told him he "will not teach something that's not true" and he would "rather go back to farming before he would ever do that." LeVake told Mr. Hubert he was not willing to teach evolution or biology the way it is in the graduation standards. (Hubert Depo., p. 26; R.A. 117.)

LeVake has subsequently offered as his explanation for his failure to teach the theory of evolution that the school year was short and that he did not have time to cover those chapters. (LeVake Depo., p. 116; R.A. 57.) LeVake later admitted that even though the school year was shortened by a month, each class period had been lengthened so that the seat time was almost identical to a regular school year. (<u>Id.</u>) The other biology teachers covered at least the required Chapter 9. (Hubert Depo., pp. 17-18; R.A. 116.)

Fatal to LeVake's explanation is testimony from those in his class who have stated that at the beginning of the school year LeVake told the students he would not cover the chapters devoted to evolution. (R.A. 155, 157.) Mr. Penbrooks, a special education paraprofessional aide, had the duty of taking notes in LeVake's class for a handicapped special education student. (R.A. 155.) He recalls that LeVake told the class he would not cover human reproduction, because that was covered in another class the students were going to take, and that he was not going to cover the theory of evolution. According to Mr. Penbrooks, LeVake

told the class he was "strongly against the theory of evolution" and had "strong beliefs that conflicted with evolution."[5] (R.A. 156.)

D. <u>Hubert's Concerns Voiced to School District and Decision to Reassign</u>.

Based on his conversation with LeVake, Mr. Hubert, as the co-chair of the high school science department, approached Mr. Johnson, the high school principal, about his concerns that LeVake was not teaching the School District's biology curriculum. (Hubert Depo., pp. 16, 26; R.A. 115, 117.) He also informed Ms. Freund, the executive director for educational support services for the School District, of his concerns. (Freund Depo., pp. 9, 23; R.A. 99, 100.) Ms. Freund was responsible for School District curriculum.[6] (Freund Depo., pp. 9-10; R.A. 99.)

LeVake, Mr. Hubert, Ms. Freund and Mr. Johnson met on April 1, 1998. (Freund Depo., p. 34; R.A. 103.) The purpose of the meeting was to discuss the School District's expectations of the teaching of the biology curriculum and how LeVake was teaching evolution to his biology classes. (Freund Depo., p. 35; R.A. 103; Johnson Depo., p. 26; R.A. 133.) Mr. Johnson told LeVake he was concerned that LeVake was avoiding the subject of evolution and was not teaching the concept as required by the curriculum. (Johnson Depo., p. 26; R.A. 133.)

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[5] LeVake denied in an affidavit that he told the class that he had strong beliefs that conflicted with evolution. He does not specifically deny that he told the class he was not going to cover the theory of evolution. He does state cryptically that "it is not unlikely I told my class we would not cover at least two of the three chapters on evolution." (R.A. 302.)

[6] Generally Ms. Freund is not involved in deciding who teaches which classes. (Freund Depo., p. 10; R.A. 99.)

LeVake did not deny he was avoiding the subject of evolution with his students. (Johnson Depo., pp. 27-28; R.A. 133.) Ms. Freund recalled that LeVake stated he was teaching the weaknesses of the theory. (Freund Depo., p. 35; R.A. 103.) LeVake expressed his concerns about the theory of evolution itself. (Johnson Depo., p. 28; R.A. 133.) Ms. Freund stated LeVake talked about the moth and presented a series of theories which he felt refuted evolution. (Freund Depo., pp. 35-36; R.A. 103.) LeVake told Mr. Hubert, Ms. Freund and Mr. Johnson that he enjoyed reading as much as possible on the weaknesses of evolution, that evolution was not a viable concept, that he had difficulty with the theory, that there were many students who were appreciative of knowing that they did not have to learn about evolution and he was teaching the weaknesses of evolution because that is what inspired him. (Freund Depo., pp. 37-40; R.A. 104; Hubert Depo., p. 26; R.A. 117.) At that meeting, LeVake also mentioned there was a shortened school year and he was not able to get all the curriculum in. (Johnson Depo., pp. 26-27; R.A. 133.)

LeVake states that he never discussed his religious beliefs with Mr. Johnson or Ms. Freund. (LeVake Depo., p. 137; R.A. 62.) He merely presumes Mr. Hubert knew of his beliefs because he gave Mr. Hubert a pamphlet. (Id.) Ms. Freund did ask LeVake if he mentioned the Bible or God in his class. LeVake acknowledges that Ms. Freund properly asked such questions to ensure that he was not discussing religion in class or trying to convert the students to his way of thinking. (LeVake Depo., pp. 140-41; R.A. 63-64.) LeVake understood the reason for her questions and that they were appropriate. (Id.)

LeVake, Mr. Johnson, Ms. Freund and Mr. Hubert met again on April 7, 1998, with the rest of the members of the science department. (LeVake Depo., p. 141; R.A. 64.) LeVake

recalled that there was no discussion of religion at this meeting. (LeVake Depo., p. 143; R.A. 65.) At that meeting, the science department members affirmed that evolution was a basic tenet of biology and part of the course curriculum for the tenth grade course. (Freund Depo., pp. 48-49; R.A. 105-06; Johnson Depo., pp. 34-36; R.A. 135.) The staff also emphasized that teaching evolution was also part of the state graduation standards, the National Standards of the Teachers Association and the National Science Frameworks and thus required to be taught. (Id.) Concern was expressed about teaching pseudoscience. (Id.)

LeVake again told the group that he had concerns about teaching the theory of evolution and was adamant that he wanted to teach what he perceived as its weaknesses. (Freund Depo., p. 49; R.A. 106.) Mr. Johnson then asked LeVake to write a position paper outlining how he would balance the teaching of evolution with his "hobby" of reading materials on the weaknesses of the theory. (Johnson Depo., pp. 35-36; R.A. 135.) No decision was made at that time to reassign LeVake. (Johnson Depo., p. 37; R.A. 136.)

LeVake did prepare a position paper outlining his position on teaching evolution. (R.A. 171.) In his paper, LeVake states that the "process of evolution itself is not only impossible from a biochemical, anatomical, and physiological standpoint, but the theory of evolution has no evidence to show that it actually occurred." (R.A. 173.) According to LeVake, "[t]he complexity of life that we see around us is a testimony that evolution, as it is currently handled in our text, is impossible." (Id.) LeVake further states that he "will teach, should the department decide that it is appropriate, the theory of evolution." (R.A. 176.) He also states, however, that he will "accompany that treatment of evolution with an honest look at the difficulties and inconsistencies of the theory . . ." (Id.)

LeVake admits that if he teaches the students evolution and also teaches them it is impossible and factually unsupportable that he would be discrediting evolution. (LeVake Depo., pp. 71-72; R.A. 36-37.) According to LeVake, it would then be up to each student to "fill in the blank." (LeVake Depo., pp. 72-73; R.A. 37-38.)

The responsibility for the decision to have LeVake reassigned rested with Johnson, the high school principal. (Dixon Depo., p. 16; R.A. 122, 169.) After reading LeVake's position paper, Mr. Johnson states that it was clear that "Rod [LeVake] was not going to be able to hold back from teaching, spending a lot of time or putting undue emphasis on the inconsistencies" of evolution. (Johnson Depo. p. 58; R.A. 137.) LeVake was reassigned to teach ninth grade introduction to physical science.[7] (LeVake Depo., pp. 154-55; R.A. 68-69.)

Both Ms. Freund and Mr. Johnson testified that "everything taken in total" led to the decision. (Freund Depo., p. 63; R.A. 108; Johnson Depo., p. 58-59; R.A. 137.) Ms. Freund testified:

> Q. What was that information?
>
> A. Mr. Kahler who taught with him at the same time told me that Mr. LeVake had been crossing out words on the tests, not showing film strips and that he had concerns about whether or not Mr. LeVake was following the curriculum, because he taught right next to him. They almost taught in tandem, and he had concerns about that.
>
> Q. Any other information that you took into account in making your decision?
>
> A. Mr. LeVake's statements at the April 1st meeting.

[7] Although Mr. Johnson was solely vested with authority to make this decision, he states he made the decision jointly with Ms. Freund. (Johnson Depo., p. 65; R.A. 138.)

Q. Which statements in particular?

A. Saying that he had real problems with the curriculum, particularly evolution, and that he wanted to spend a lot of time on the weaknesses and the critique of the theory.

Q. Anything else?

A. And then his reiteration again at the April 7th meeting, and then his position paper reaffirmed "all of that."

. . .

Q. Was that significant [the position paper] to you in arriving at a decision about reassigning Rod LeVake?

A. What concerned me was that he made the statement, "Should the department decide that it's appropriate."

Q. Why did that concern you?

A. Because it's a qualifier, and he already heard that the department thought it was appropriate.

Q. So, that phrase gave you some concern?

A. Yes.

(Freund Depo., pp. 64, 69; R.A. 108, 110.) Ms. Freund and Mr. Johnson never discussed LeVake's religious beliefs in making the decision to reassign LeVake. (Johnson Depo., pp. 66-68; R.A. 138.) Mr. Johnson recalled that both he and Ms. Freund felt LeVake was a good teacher but he was not teaching the curriculum in the way that the textbook and the curriculum presented it. (Johnson Depo., pp. 66-67; R.A. 138.)

Ms. Freund wrote a memorandum about the decision to reassign LeVake to the members of the school board. (R.A. 167.) In that memorandum, Ms. Freund stated that Mr. Hubert contacted her and stated that the science department suspected that LeVake was not

following the biology curriculum agreed upon and believed that he was reluctant to teach evolution as presented in the textbook. Ms. Freund related that LeVake asserted at the April 1st meeting that he did not regard evolution to be a viable scientific concept because he believed it could not be proven. (R.A. 167.) Ms. Freund further related that, at the April 7th meeting, members of the science department affirmed the importance of teaching evolution. Ms. Freund stated that the participants at the April 28th meeting had determined that:

- The School District is responsible for ensuring that the School District's prescribed curriculum is taught.
- Evolution is a central, unifying concept of the School District's prescribed biology curriculum.
- The School District has the managerial right to assign teachers to teaching positions according to licensure.
- Positions other than biology for which LeVake is qualified were available within the School District.

(R.A. 168.) The memo concludes that the participants agreed that LeVake should be reassigned according to his licensure. (Id.)

Mr. Johnson states that the reason for asking LeVake to write a position paper was that he was trying to keep an open mind on the issue. Mr. Johnson recognized that science is an area of inquiry and that one is always looking for new information and a new perspective on things. Mr. Johnson wanted to see how LeVake was going to balance the teaching of evolution with his stated hobby of looking at the inconsistencies in the theory. (Johnson Depo., p. 36; R.A. 135.) From a reading of LeVake's position paper, Mr. Johnson was concerned not only with the amount of time that would be spent teaching evolution's inconsistencies as opposed to the theory itself, but Mr. Johnson was concerned with the "spin

or the emphasis or the importance" placed on the inconsistencies of the theory. Mr. Johnson was concerned that the theory of evolution was not going to receive adequate treatment as a unifying concept versus an emphasis placed on its purported inconsistencies. (Johnson Depo., pp. 57-58; R.A. 137.) Ms. Freund likewise stated that the position paper highlighted her concerns that LeVake's emphasis would be on evolution's weaknesses. (Freund Depo., pp. 71-72; R.A. 110.)

LeVake asked for the School District's superintendent, Mr. Dixon, to review Mr. Johnson's decision to reassign him. (LeVake Depo., pp. 155-56; R.A. 69-70.) Dixon had the authority to overrule Johnson's decision. (Dixon Depo., p. 26; R.A. 125.) After reviewing LeVake's position paper, talking to the School District's attorneys and meeting with LeVake, Mr. Johnson and Ms. Freund, Mr. Dixon upheld Mr. Johnson's decision to reassign LeVake. (Dixon Depo., pp. 22, 26; R.A. 124, 125.) Ms. Freund told Mr. Dixon that the concern was that LeVake was not teaching the prescribed curriculum in the manner that was the intent of the board of education. (Dixon Depo., p. 19; R.A. 123.)

In his letter to LeVake affirming the reassignment decision, Mr. Dixon concurred that it was appropriate to reassign LeVake because LeVake clearly had demonstrated he could not teach the prescribed curriculum. (Dixon Depo., pp. 29-32; R.A. 126, 169.) Mr. Dixon stated as follows:

> You asserted to me that you believe that you can teach the prescribed curriculum. However, in your explanation, you continue to justify why it is appropriate not to follow the curriculum by pointing out the "discrepancies" that you believe exist. These "discrepancies" appear to be an itemization of your disagreement with the curriculum.

> You suggest that these "discrepancies" can be passed on to students as "teaching them to think for themselves." Your explanation compels me to believe that you fundamentally differ with the commonly held principles of the curriculum as outlined. You have expressed not only fundamental and extensive conflicts with the curriculum, but more importantly, have made it clear that you cannot teach the curriculum. Rather, you propose to use the curriculum as a basis for pointing out and discussing both the extent of your disagreement with the curriculum and why it is that the curriculum is incorrect. Such an approach cannot be said to constitute teaching the Board of Education's approved curriculum. While you may be personally intrigued by the discrepancies which you perceive and want to pursue them on your own, the classroom is not the appropriate forum in which to do so.
>
> In a public school system, the prescribed curriculum is the responsibility of the Board of Education. And, while curriculum development involves the staff, ultimately the Board has the responsibility for adopting the curriculum.
>
> Therefore, I am in support of Mr. Dave Johnson's re-assignment for you.

(R.A. 169-70.)

From what Mr. Dixon heard from LeVake, Mr. Dixon did not conclude that LeVake's religious beliefs were what conflicted with his teaching evolution. (Dixon Depo., p. 32; R.A. 126.) Mr. Dixon testified:

> Q. From what you had heard, had you heard anything about Mr. LeVake's religious beliefs that caused you to think that they would somehow be in conflict with him teaching about evolution in biology class?
>
> A. Religious beliefs, no.
>
> Q. How about his world view or his philosophy?
>
> A. Only what he stated when he talked to me himself.
>
> Q. And what was that?

> A. I have a sense from Mr. LeVake, what I heard is that there are certain -- there are different ways in which the concept of life on earth comes to be or however you want to say that, that what I heard from him is that there were certain parts of the evolution theory that, as he taught it, he wanted to show that it didn't line up or link or whatever, and that what I heard from him is sort of how I do that is trying to show the contradictions that exist in this particular theory. That's what I heard from him. I think I stated that in my response to him.

(Dixon Depo., p. 32; R.A. 126.) Mr. Dixon further testified that it did occur to him that LeVake's view was related to LeVake's religious beliefs but that was not Mr. Dixon's issue. (Dixon Depo., p. 33; R.A. 127.) The problem was not with any religious views LeVake may hold but the fact that he was not teaching the curriculum that was required. (Wieber Depo., p. 20; R.A. 141; Freund Depo., p. 71; R.A. 110.)

E. <u>The Aftermath of Reassignment</u>.

LeVake knew that the assignment of teachers is a discretionary decision within the sole province of the School District. (LeVake Depo., p. 100; R.A. 53.) LeVake acknowledges it was not a demotion to teach one class, be assigned to another and then reassigned to the former. (<u>Id.</u>, 95-96; R.A. 48-49.) LeVake has no information that Mr. Dixon, Mr. Johnson or Ms. Freund acted in any way outside of their official positions with the School District. (LeVake Depo., p. 188; R.A. 86.) LeVake has admitted that he has no information that only nonreligious teachers were allowed to teach biology by the School District. (LeVake Depo., p. 75; R.A. 40.) He cannot identify a single School District employee who he believes was treated differently because of their religious beliefs. (<u>Id.</u>)

LeVake admits that he has not sustained any personal monetary loss, nor any loss of benefits nor has he lost any seniority by his reassignment. (LeVake Depo., p. 169; R.A. 80.)

There have been no changes to his teaching contract. He further admits that no one in the department has treated him differently because of his reassignment. (Id., p. 170; R.A. 81.) LeVake has withdrawn his claims of impairment of reputation and disparate treatment by other staff. (LeVake Depo., pp. 178, 187; R.A. 83, 85.) LeVake admits that he has received no medical or psychological care for any injuries relating to his reassignment and he has sustained no permanent damages. (Id., pp. 183, 187; R.A. 84-85.) He further admits he has not lost any earning capacity. (Id.)

STATEMENT OF THE CASE

LeVake acknowledges he is still practicing his religion of choice. (LeVake Depo., p. 187; R.A. 85) LeVake's sole intention in bringing this lawsuit is to "have my biology teaching job back," including the right to teach what he feels to be the criticisms of the theory of evolution. (LeVake Depo., pp. 167-68; R.A. 78-79.) LeVake, in his complaint, asserts multiple violations of his First Amendment rights. (A. 1.) All claims are based on his reassignment from teaching tenth grade biology to ninth grade natural science. (Id.) LeVake in his complaint alleged:

> • Defendants' actions violated LeVake's right to the free exercise of religion by placing undue burden on his exercise of his religion and by discriminating against him in terms of his employment on the basis of his religion.

(Complaint, ¶ 32; A. 6.)

> • Defendants' actions violated the establishment clause because requiring him to teach evolution requires him to subscribe to "certain religious or philosophical beliefs."

(Complaint, ¶ 33; A. 6.)

- Defendants' conduct in removing LeVake from his position as biology teacher because of his views on the theory of evolution, and particularly his past expression of those views, violated his constitutional right to freedom of speech.

(Complaint, ¶ 35; A. 7.)

- Defendants' conduct in removing LeVake from his position as biology teacher because of his views on the theory of evolution, his past expression of those views and his wish to express those views in the future violated his right to academic freedom.

(Complaint ¶ 37; A. 7.)

- Defendants' conduct in removing LeVake from his position as biology teacher because of his views on the theory of evolution and his past expression of those views violated LeVake's right to free speech as guaranteed by Article 1, Section 3 of the Minnesota Constitution.

(Complaint ¶ 39; A. 8.)

- Defendants' conduct in removing LeVake from his position as biology teacher was based on LeVake's religious beliefs and/or Defendants' perception of LeVake's religious beliefs and Defendants' conduct violated LeVake's right of freedom of conscience as guaranteed by Article 1, Section 16 of the Minnesota Constitution.

(Complaint ¶ 41; A. 8.)

- Defendants' conduct in removing LeVake from his position as biology teacher was arbitrary, capricious, unreasonable, discriminatory and unlawful and deprived LeVake of or interfered with his rights as protected by the due process clauses of the U.S. Constitution and Article 1, Section 7 of the Minnesota Constitution.

(Complaint ¶ 43; A. 8-9.)

The School District brought a motion for summary judgment asserting that Defendants' decision to reassign LeVake did not violate LeVake's constitutional rights. In addition, the School District sought summary judgment, on the alternative ground, of entitlement to qualified immunity. (R.A. 1.) By order dated July 20, 2000, the trial court granted Defendants' motion for summary judgment. (Id.)

With regard to LeVake's claim that his First Amendment rights regarding free exercise of religion have been violated, the district court concluded that LeVake failed to adduce any specific disputed facts to justify finding that Defendants reassigned him based, even in part, upon their attitudes toward his religious beliefs and their preconceptions of how those beliefs affected him as a biology teacher. (R.A. 15.) LeVake's establishment claim was found to suffer from the same infirmity that afflicted his free exercise claim. (R.A. 17.)

The trial court then went on to analyze LeVake's freedom of conscience claim under the Minnesota Constitution. The trial court found that LeVake did not assert that his reassignment affected his church attendance, personal religious practices or ability to discuss religious topics in any way. Because no burden on religion has been demonstrated, "there is no need to ask whether Plaintiff's reassignment was the least restrictive means for the District to assuage its concerns about the biology curriculum." (R.A. 18.)

With regard to LeVake's claim that Defendants violated his First Amendment right to free speech by removing him from the biology position based on his views on evolution and his past expression of those views, the trial court found they were not violated. (R.A. 19.) The trial court stated:

> In the District's 10th grade biology curriculum, one of those lessons is evolution. When Plaintiff is standing before his

> students in the classroom, he is not in the position of a citizen on the public square with a right freely to express his opinion as he sees fit. Rather, he is acting as an employee of the school charged with teaching the prescribed curriculum and is in a location which the District has reserved for the purpose of teaching students the prescribed curriculum. To rule that Plaintiff has a free speech right to teach the curriculum as he sees fit would be literally to make a federal case out of every dispute between a teacher and his superiors. This the Court will not do.

(R.A. 20.) As to LeVake's claim of state free speech rights pursuant to Article 1, Section 3 of the Minnesota Constitution, the trial court noted that that section does not offer more expansive protection of speech than does the First Amendment of the federal Constitution. (R.A. 20.)

The district court denied LeVake's academic freedom claim holding that LeVake has no constitutional right to teach his proposed criticisms of evolutionary theory. The School District has the right to control the science curriculum. (R.A. 21.)

Finally, as to LeVake's due process claim, the district court noted that while LeVake does have a property interest in his employment at the high school because he is a tenured public school teacher, the fact is that LeVake still has employment at the School District. He has suffered no loss of pay, earning capacity, benefits or seniority. He was merely shifted to a different teaching post, an event which his contract with the School District contemplates and expressly allows. (R.A. 22.) The trial court concluded LeVake had no claim for violation of a liberty interest. (Id.)

Because the trial court granted summary judgment dismissing all of LeVake's claims, it found it unnecessary to consider the applicability of the qualified immunity defense. (R.A. 23.)

LeVake has appealed the final judgment to this Court and the School District has filed a notice of review with regard to the qualified immunity issue. (R.A. 303.)

ARGUMENT

THE GRANT OF SUMMARY JUDGMENT TO THE SCHOOL DISTRICT SHOULD BE AFFIRMED.

A. Standard of Review.

On appeal from a grant of summary judgment, this Court reviews the record to determine whether there are any genuine issues of material fact and whether the district court erred in applying the law. Offerdahl v. University of Minnesota Hosps. and Clinics, 426 N.W.2d 425, 427 (Minn. 1988). The Minnesota Supreme Court has held that a district court's grant of a motion for summary judgment will not be disturbed

> when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.

DLH, Inc. v. Russ, 566 N.W.2d 60, 71 (Minn. 1997).

A material fact is one that will affect the outcome or result of the case depending on how it is resolved. Zappa v. Fahey, 310 Minn. 555, 245 N.W.2d 258, 259 (1976). Self-serving affidavits offered to contradict earlier damaging testimony or which contain no fact but mere conclusory statements are insufficient to defeat summary judgment. Banbury v. Omnitrition Int'l, Inc., 533 N.W.2d 876, 881 (Minn. Ct. App. 1995).

B. No Violation of First Amendment Freedom of Religion Claim.

1. District Court's Ruling.

LeVake, in his brief, states that there are material issues of fact as to his "free exercise claim." (Appellant's Brief, p. 15.) However, LeVake never gives the Court any understanding of what his claim may be. The First Amendment to the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or bridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The prohibition of the First Amendment against laws respecting an establishment of religion or prohibiting the free exercise thereof mandates government neutrality between one religion and another religion, and between religion and nonreligion. Epperson v. State of Arkansas, 393 U.S. 97, 104 (1968).

The record stands undisputed that LeVake continues to practice his religion of choice and to belong to his religion of choice. LeVake makes no claim that Defendants presented him with some sort of quid pro quo whereby he was to alter his religious practices or to limit expression of his religious beliefs in order to retain the biology teaching position. Rather, as the district court concluded, LeVake's claim boils down to an assertion that Defendants were aware of his religious beliefs and improperly considered his religious beliefs to reach a conclusion that he had a conflict between his beliefs and the theory of evolution that would prevent him from being an effective biology teacher. Therefore, according to LeVake, Defendants penalized him for his religious beliefs because of their assumptions about those beliefs. The Defendants deny this and assert that they reassigned LeVake because it was apparent to them that LeVake did not and would not teach the School District's established

biology curriculum. (R.A. 12-13.) The district court granted the Defendants' motion for summary judgment on LeVake's § 1983 freedom of religion claim because it concluded that LeVake had not responded to the motion with evidence sufficient to allow a factfinder to conclude that the School District reassigned him because of his religion. (R.A. 13.)

2. Analysis.

Before the district court, LeVake offered no framework under which his claim of religious discrimination was to be analyzed. On appeal, he argues his claim is "akin to an employment discrimination claim and standards enunciated by courts in that context" are applicable here. (Appellant's Brief, p. 16.) After so asserting, LeVake does not offer to this Court any analysis premised on that framework. LeVake just argues, in a rather haphazard manner, that in his view there are material issues of fact. Defendants suggest that applying the employment discrimination framework to the material facts of record clearly shows the district court was correct in granting Defendants summary judgment.

LeVake could offer direct proof of discriminatory intent or he could rely on the indirect, burden-shifting approach of McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). Helland v. South Bend Community School Corp., 93 F.3d 327, 329 (7th Cir. 1996). LeVake admits he has no direct evidence of intentional discrimination. He therefore opts for the McDonnell-Douglas approach. (Appellant's Brief, pp. 16-17.) Under the McDonnell-Douglas framework, the plaintiff first must establish by a preponderance of the evidence a prima facie case of discrimination, which creates a presumption that the employer unlawfully discriminated against the plaintiff. The burden then shifts to the employer to produce evidence which, if taken as true, would permit the conclusion that it had a legitimate nondiscriminatory

reason for its challenged employment action. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993). If the employer meets this burden, the plaintiff then must prove by a preponderance of the evidence that "the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

a. No Prima Facie Case.

To establish a prima facie case, LeVake must show: (a) a protected class membership; (b) qualifications; and (c) an adverse employment action from which similarly situated employees were exempt. Sigurdson v. Isanti County, 386 N.W.2d 715, 720 (Minn. 1986). When one's claim is disparate treatment, to establish a prima facie case the plaintiff must establish that his job performance was satisfactory and that direct or indirect evidence exists to support a reasonable inference of a discriminatory discharge. McIntyre-Handy v. West Telemarketing Corp., 97 F. Supp.2d 718, 729 (E.D. Va. 2000).

Here LeVake's job performance as a tenth grade biology teacher was not satisfactory. He refused to teach the curriculum as established by the School District and insists he can teach the curriculum as he sees fit.

LeVake also did not present evidence of an adverse employment action from which similarly situated teachers were exempt. See Donahue v. Schwegman, Lundberg, Woessner & Kluth, P.A., 586 N.W.2d 811, 816 (Minn. Ct. App. 1998). LeVake has admitted that he has no information that one's religious beliefs determine whether one teaches biology for the School District. (LeVake Depo., p. 75; R.A. 40.) All teachers, regardless of religion, are expected to

teach the curriculum. LeVake cannot identify a single School District employee who he believes was treated differently because of their religious beliefs. (Id., p. 75; R.A. 40.)

LeVake admits that he has not sustained any personal monetary loss, any loss of benefits, nor has he lost any seniority by his reassignment. (LeVake Depo., p. 169; R.A. 80.) There have been no changes to his teaching contract. He further admits that no one in the department has treated him differently because of his reassignment. (Id., p. 170; R.A. 81.) LeVake acknowledges he is still practicing his religion of choice. (Id. at 187; R.A. 85.) As the Seventh Circuit has held, "not everything that makes an employee unhappy is an actionable adverse action." Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996). Accordingly, LeVake has failed to establish a prima facie case.

b. School District Had a Legitimate Nondiscriminatory Reason for Its Actions Which LeVake Failed to Rebut.

Even if the Court were to find that LeVake presented a prima facie case, the record reflects that the School District presented a legitimate nondiscriminatory reason for its actions. LeVake was reassigned because he did not and would not teach the School District's established biology curriculum. The burden then shifted back to LeVake, who must establish that the School District's reasons for reassigning him are pretextual. A plaintiff can survive summary judgment on the pretext prong only where the plaintiff can show the employer's articulated legitimate reason is unworthy of belief. Hoover v. Norwest Private Mortgage Banking, 605 N.W.2d 757, 765 (Minn. Ct. App. 2000). Pretext has been defined as a "lie, specifically a phony reason for some action." Russell v. Acme-Evans Co., 51 F.3d 64, 68 (7th Cir. 1995), reh'g and suggestion for reh'g en banc denied; see also Jordan v. Summers, 205 F.3d 337, 343 (7th Cir. 2000). A mere scintilla of evidence of pretext does not create an issue

of material fact. As stated by the United States Supreme Court, a plaintiff must present "sufficient evidence to find that the employer's asserted justification is false." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097, 2109 (2000). The ultimate determination is whether a reasonable factfinder could infer discrimination. Crawford v. Formosa Plastics Corp., __ F.3d __, 2000 WL 1781668 (2000), citing Reeves, 120 S.Ct. at 2106.

The record stands undisputed that the School District reassigned LeVake because LeVake did not and would not teach the School District's established biology curriculum. The teaching of evolution is part of the biology curriculum. LeVake admits he told the co-chair of the high school department that "I can't teach evolution." (LeVake Depo., p. 64; R.A. 34.) LeVake later changed his tune and stated he could teach evolution but only if he was allowed to teach his disagreements with the theory. As Mr. Dixon's letter to LeVake clearly sets forth:

- LeVake proposed to use the curriculum as a basis for pointing out and discussing both the extent of LeVake's disagreement with the curriculum and why it is that the curriculum is incorrect.

- Such an approach cannot be said to constitute teaching the board of education's approved curriculum.

- In a public school system, the prescribed curriculum is the responsibility of the board of education. Ultimately the board has the responsibility for adopting the curriculum.

- While LeVake may be personally intrigued by the discrepancies that he perceives with the theory of evolution and want to pursue them on his own, the classroom is not the appropriate forum in which to do so.

(R.A. 169-70.) LeVake now asks this Court to give him his biology teaching job back with the right to teach what he feels to be the criticisms of evolution. (LeVake Depo., pp. 167-68; R.A.

78-79.) LeVake certainly has not been able to create a material issue of fact that his reassignment was in any respect pretext. There is no material issue of fact.

c. No Material Issue of Fact.

LeVake, in his brief to this Court, as he did to the trial court, asserts conclusions he believes the Court should reach based upon his twist of the facts. LeVake's twists, however, often misrepresent the facts, take the facts out of context or only provide half the facts.

As the courts have clearly recognized, although LeVake himself may conclude that the School District's stated reasons are pretextual, LeVake's "own naked opinion" is not enough to create a material issue of fact. The law does not permit recovery based on LeVake's subjective belief regarding employer motivation, especially where it is clearly contradicted by the objective evidence before the court. MacIntyre-Hardy v. West Telemarketing Corp., 97 F. Supp.2d 718, 732 (E.D. Va. 2000).

LeVake ignores the testimony of record that it was Johnson, the high school principal, who was vested with the authority to reassign LeVake and it was Superintendent Dixon who was vested with authority to overrule Johnson's decision. As to Principal Johnson, LeVake has failed to adduce any specific disputed facts to justify a finding that Johnson reassigned him based, even in part, on any attitudes toward LeVake's religious beliefs as opposed to the fact that LeVake did not and would not teach the board mandated curriculum.

Mr. Johnson, after listening to LeVake at two meetings, asked LeVake to write a position paper. Mr. Johnson recognized that science is an area of inquiry, that you are always looking for new information and new perspective on things. Mr. Johnson wanted to see how LeVake was going to balance the teaching of evolution with his stated hobby of looking at the

inconsistencies in the theory. (Johnson Depo., p. 36; R.A. 135.) From a reading of LeVake's position paper, Mr. Johnson was concerned not only with the amount of time LeVake proposed to spend teaching evolution theory as opposed to teaching its inconsistencies, but he was also concerned with the "spin or the emphasis or the importance placed on the inconsistencies of the theory."[8] Mr. Johnson stated that at none of the meetings that he attended did the subject of LeVake's religious beliefs or views come up. (Johnson Depo., pp. 28-29, 34; R.A. 133-35.)

Superintendent Dixon had the authority to overrule Mr. Johnson's decision to reassign LeVake. Mr. Dixon stated that it was appropriate to reassign LeVake because LeVake clearly demonstrated he could not teach the prescribed curriculum. (Dixon Depo., p. 19; R.A. 123, 169.) As to LeVake's purported religious beliefs, Mr. Dixon stated:

> Q. From what you had heard, had you heard anything about Mr. LeVake's religious beliefs that caused you to think that they would somehow be in conflict with him teaching about evolution in biology class?
>
> A. Religious beliefs, no.
>
> Q. How about his world view or his philosophy?
>
> A. Only what he stated when he talked to me himself.

(Dixon Depo., p. 32; R.A. 126.) Superintendent Dixon referred in his letter to LeVake to LeVake's own position paper statements characterizing evolution as impossible and stating that he would teach evolution, but only with an honest look at the difficulties and

[8] Although the authority to make the reassignment decision was vested solely in Mr. Johnson, Mr. Johnson testified that he made that decision to reassign jointly with Ms. Freund. (Johnson Depo., p. 20; R.A. 132)

inconsistencies. (R.A. 169, 171.) Superintendent Dixon asserted that LeVake had made it clear that he could not teach the curriculum.

Superintendent Dixon, in his deposition, admitted that LeVake's views may have been linked to his religious beliefs "but that's not my issue." (Dixon Depo., p. 33; R.A. 127.) As the trial court properly concluded, this is not an admission on Superintendent Dixon's part that LeVake's religious beliefs were considered in the reassignment decision. It is simply an after-the-fact reflection that LeVake's difficulties with the curriculum may, indeed, have been connected to his religious views. (R.A. 14.) There is no question that from a review of the record that LeVake's reassignment was based upon doubts concerning LeVake's efficacy as a biology teacher. (R.A. 15.)

On pages 8 and 9 of his brief, LeVake states what he claims is "specific evidence that LeVake's religious beliefs were a factor in Respondents' decision." LeVake begins his discussion by referring to Ms. Freund's "questioning of LeVake about religion" as his proof. However, LeVake fails to put Ms. Freund's questions in their proper context. In his deposition, when asked if Ms. Freund inquired as to LeVake's mention of religion in class, LeVake responded as follows:

> Q. You had indicated that Cheryl [Freund] asked you whether you had mentioned the Bible or God in class?
>
> A. Yeah.
>
> Q. You understood of course that as a public school teacher you can't discuss religion in class?
>
> A. Right.

Q. Okay. You understood that that was what she was concerned about as a possibility when she asked this question?

A. That was what she was asking, yeah.

Q. Similarly, when she asked whether -- do your students know that you're Christian, you also understood that's what she was getting at?

A. She was getting at if I -- my interpretation of her question was that had I ever, you know, tried to convert my class into my way of thinking or.

Q. Right, she was just checking to make sure that you weren't discussing religion in class?

A. Right.

(LeVake Depo., pp. 140-41; R.A. 63-64.) Based upon LeVake's own testimony, it is disingenuous for him to suggest to this Court that Ms. Freund's questions demonstrate Defendants' actions were religiously motivated. Even LeVake knew Ms. Freund was making sure that the questions were asked to make sure that LeVake was not putting the School District in a possible position of violation of the establishment clause. The First Amendment of the Constitution requires that public institutions be religiously neutral.

It is difficult to know, even now, whether LeVake himself views his evolution dispute as religion based. LeVake himself has maintained that there is a secular basis to his disagreement with evolution.[9] (LeVake Depo., p. 164; R.A. 75.) LeVake testified that he

[9] LeVake has placed himself in a dilemma. He has argued to the School District that his criticisms of evolution were science based and there was no establishment clause issue. Now that LeVake has been reassigned, he turns around and claims he has been discriminated against on the basis of religion.

never was asked his religious beliefs. He merely assumes that School District personnel were aware of his beliefs.

What if LeVake was a physical education/health education teacher who held the religious belief that females should not wear shorts. The School District rules mandate a set uniform for its physical education classes, which consist of shorts for both males and females. Assume LeVake refused to allow his female students to wear shorts and even says he is doing so because of his religious beliefs. The School District reassigns LeVake to teach health education because LeVake states he cannot teach physical education unless he gets his own way and females wear dresses. Could LeVake claim that because the School District knew his refusal to follow School District rules was based on his own personal religious views that its act of reassignment therefore is based on religious discrimination? The answer has to be no.

Even if it is true that Defendants (or at least some of them) suspected that there was a religious component to LeVake's desire to criticize evolution, that does not establish that the School District's actions were, in any respect, religiously motivated. What the School District ultimately knew or even suspected as to LeVake's motivation for wanting to teach criticisms of evolution is ultimately a red herring. The School District is entitled to have its established curriculum followed and the fact that it so insists is not discrimination against LeVake on the basis of religion.

LeVake also argues that this Court must reverse the grant of summary judgment issued below because the trial court disregarded LeVake's deposition testimony in which LeVake relates the "essence" of conversation LeVake purportedly had with Brad Covert (a school board member). In that conversation, according to LeVake, Mr. Covert describes a conversation that

he purportedly had with Ms. Freund during which she purportedly stated that LeVake's reassignment was due to LeVake's belief in God. (Appellant's Brief, pp. 19-20; LeVake Depo., p. 162; R.A. 73.)

The "statement" which LeVake would like this Court to attribute to Ms. Freund is not, however, Ms. Freund's statement at all. It is LeVake's statement. All LeVake has offered is his interpretation of what Ms. Freund purportedly stated to Mr. Covert. LeVake testified:

> Brad Covert (COVERT) is on the school board at the time and he called me and said that Cheryl [Freund] had come out to his house and kind of was -- was complaining, got him off the tractor, that's what I remember about it, that's what kind of sticks in my memory, too, is that she got him off the tractor during planting time and said that, <u>in essence said, this is what Brad told me, that Rod's got this internal conflict about teaching evolution in class because of his beliefs in God and we think we should get him out of that science class</u>.

(LeVake Depo., p. 162; R.A. 73; emphasis added.) The trial court disregarded LeVake's assertion as being without evidentiary support noting that Mr. Covert, in his deposition testimony, "makes no reference to Ms. Freund telling him that Plaintiff's religious beliefs were causing a conflict." (R.A. 14.) Moreover, Plaintiff readily admits that there is no testimony of record wherein either Mr. Covert or Ms. Freund state that Plaintiff's religious beliefs precipitated his reassignment. (Appellant's Brief, p. 19 n. 15.)

The admission of evidence rests within the sound discretion of the trial court and its determinations on such matters will not be found erroneous absent a "clear showing of abuse of discretion." <u>State v. Buggs</u>, 581 N.W.2d 329, 334 (Minn. 1998). Ultimately, LeVake's claim that he was reassigned because of his "belief in God" is merely his own averment. Averments,

of course, are not "specific facts showing that there is a genuine issue for trial." Minn. R. Civ. P. 56.05. Accordingly, summary judgment is appropriate here and this Court should affirm.

Further, it stands undisputed that the decision to reassign LeVake initially rested with Mr. Johnson and ultimately with Mr. Dixon. LeVake has no record evidence that LeVake's alleged religious beliefs entered into the decisionmaker's decision. Accordingly, whatever Ms. Freund may have relayed to Covert is immaterial. The trial court, given the record, did not clearly abuse its discretion in discounting LeVake's testimony.

LeVake also argues that the grant of summary judgment must be reversed because the trial court improperly viewed a CNN news magazine segment entitled "In the Beginning" which included part of an interview with LeVake. In the interview, LeVake asserted that he was not willing to teach evolution as fact but was willing to teach it critically and to take a look at both sides of the issue. Accordingly, LeVake's assertion in the CNN interview appears to be the same as on appeal. Before the trial court, LeVake only objected to its admission on relevancy grounds, not on hearsay or prejudice grounds as he now asserts on appeal. (Compare T. 17 with Appellant's Brief, p. 20.) The trial court certainly did not commit reversible error in allowing the CNN segment on relevancy grounds.

Even if the CNN tape should not have been admitted, such admission certainly cannot be considered prejudicial. Bigay v. Garvey, 562 N.W.2d 695, 702 (Minn. Ct. App. 1997), reversed on other grounds, 575 N.W.2d 107 (Minn. 1998). The trial court itself stated that this video segment has "little evidentiary value" because it was created and aired almost two years after LeVake's reassignment and "thus does not address the main issue in this case." (R.A. 10.)

The Minnesota Supreme Court has held that if the judgment is supported by adequate evidence, apart from any claim that evidence was received in violation of Minnesota law, the trial court's judgment must be affirmed. Chris/Rob Realty v. Chrysler Realty Corp., 260 N.W.2d 456, 459 (Minn. 1977). The Supreme Court stated that it has confidence in the ability of a court to be objective and to disregard evidence improperly admitted. The court went on to state:

> While a mere recital by the court that it was not influenced by the improper evidence will not suffice, such a statement together with other evidence supporting the judgment and indicating that the inadmissible evidence was not a material factor in the court's decision will preclude reversal.

Id. The trial court did not commit error.

LeVake has failed to present any evidence that the School District's reassignment was based on anything other than LeVake's refusal to teach the curriculum as set forth by the School District. See Bilal v. Northwest Airlines, Inc., 537 N.W.2d 614, 619 (1995) (religious discrimination cannot be established based on plaintiff's perception rather than discriminatory intent). The trial court must be affirmed.

C. The School District Did Not Violate Appellant's Free Speech Rights By Reassigning Him to Teach Another Class.

LeVake also contends that Defendants violated his free speech rights by reassigning him for expressing a desire to include criticisms of evolution in his biology class. (Appellant's Brief, p. 21.) Throughout his brief, LeVake ignores the material facts.

LeVake in his deposition admits he told Mr. Hubert, the co-chair of the science department, that he "can't teach evolution" and that he certainly was not willing to teach evolution the way the established curriculum required. LeVake insists that he now be allowed

to teach his students what he feels to be the criticisms of the theory of evolution and to contradict that which is contained in the textbook.

In order to establish a prima facie case for violation of a constitutional right to free speech, LeVake must show that (1) his "conduct was constitutionally protected" and (2) that said conduct was the "substantial," i.e., "motivating factor," in the School District's decision to reassign him. Mount Healthy City School District Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). The circumstances at bar require the Court to determine if LeVake's refusal to teach the curriculum as set forth by the School Board, and his insistence that he has a right to take control of the curriculum and to teach his view on the inconsistencies of evolution, constitutes an exercise of LeVake's constitutionally protected First Amendment rights. As a matter of law, it does not.

As a preliminary matter, it stands undisputed that the care, management and control of the School District is vested in the local school board. Minn. Stat. § 123B.09, subd. 1. School boards must manage the schools of the district, including prescribing textbooks and courses of study. Id. at subd. 8. School boards annually must adopt a written policy that includes the district's goals for instruction and curriculum; a system for periodically reviewing all instruction and curriculum; a plan for improving instruction and curriculum; and an instruction plan that includes education effectiveness processes developed under § 122A.625 and integrates instruction, curriculum and technology. Minn. Stat. § 120B.11, subd. 2.

Every school board is then required to publish its "annual report on curriculum, instruction and student performance." Id. at subd. 5. "Curriculum" is defined as written plans for providing students with learning experiences that lead to knowledge, skills and positive

attitudes. Id. at subd. 1(b). It is differentiated from "instruction" which is the method of providing learning experiences that enable a student to meet graduation standards. Id. at subd. 1(1)(a).

As long ago as 1949, the Minnesota Attorney General issued an opinion stating that a school board may determine what shall be taught in schools with the exception of those things which the law forbids. Op. Minn. Att'y Gen. 169-K (Oct. 21, 1949). That opinion also concluded that a school board may not provide for the teaching of distinctive doctrines or creeds of a religious sect. Id.

It is well established that a teacher has a right to exercise free speech on matters of public concern under the First Amendment. See Pickering v. Bd. of Educ. of Township High School Dist. 205, 391 U.S. 563 (1968). The question of whether a public employee's speech is constitutionally protected turns upon the public or private nature of such speech. The U.S. Supreme Court has distinguished between speech "as a citizen upon matters of public concern" and "as an employee upon matters only of personal interest." Connick v. Myers, 461 U.S. 138, 147 (1983). "The focus is upon whether the 'public' or 'community' is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a 'private' matter between employer and employee." Piver v. Bender County Bd. of Educ., 835 F.2d 1076, 1079-80 (4th Cir. 1987). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record." Connick, 461 U.S. at 147-48.

The Supreme Court has made clear that the concern is to maintain for the government employee the same right enjoyed by his privately employed counterpart. To this end, in its

decisions determining what speech is to be entitled to First Amendment protection, the court has emphasized the unrelatedness of the speech at issue to the speaker's employment duties. See United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 465 (1995) (concluding that balancing test applied to employees "expressive activities in their capacity as citizens, not as government employees" and noting that "with few exceptions, the content of employees' messages [had] nothing to do with their jobs") Id. at 466 (emphasizing that the court had applied the Pickering balancing test "only when the employee spoke as a citizen upon matters of public concern rather than as an employee upon matters only of personal interest") Id. at 480-81 (O'Connor, J., concurring in the judgment in part and dissenting in part) (agreeing that balancing test was appropriate because restriction applied only to "off hour speech bearing no nexus to government employment"); Pickering, 391 U.S. at 574 (explaining that when "the fact of employment is only tangentially and insubstantially involved and the subject matter of the public communication made by [the employee] . . . it is necessary to regard [employee] as a member of the general public he seeks to be"). Thus, critical to the determination of whether the employee's speech is entitled to First Amendment protection is whether the speech is "made primarily in the [employee's] role as a citizen or primarily in his role as an employee." See Terrell v. Univ. of Texas System Police, 792 F.2d 1360, 1362 (5th Cir. 1986), cert. denied, 479 U.S. 1064 (1987); Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 369 (4th Cir. 1998), cert. denied, 525 U.S. 813 (1998) (holding that the selection of a play by high school drama teacher did not involve a matter of public concern because the choice was made by the teacher in her capacity as a teacher in a matter dealing with curriculum); Holland v. Rimmer, 25 F.3d 1251, 1255-56 (4th Cir. 1994) (concluding that speech by supervisor disciplining subordinates

was not speech as private citizen on matters of public concern because it constituted "inhouse communication between employees speaking as employees"); see also Dimeglio v. Haines, 45 F.3d 790, 805 (4th Cir. 1995) (noting that "the [supreme] court [has] distinguished between speaking as a citizen and as an employee and [has] focused on speech as a citizen as that for which constitutional protection is afforded").

The focus on the capacity of the speaker recognizes the basic truth that speech by public employees undertaken in the course of their job duties will frequently involve matters of vital concern to the public, without giving these employees a First Amendment right to dictate to the state how they will do their jobs. The Fourth Circuit recently in Urofsky v. Gilmore, 216 F.3d 401, 407-08 (4th Cir. 2000), gave this example:

> For example, suppose an assistant district attorney, at the district attorney's direction, makes a formal statement to the press regarding an upcoming murder trial -- a matter that is unquestionably of concern to the public. It cannot seriously be doubted that the assistant does not possess a First Amendment right to challenge his employer's instructions regarding the content of the statement. In contrast when the same assistant district attorney writes a letter to the editor of the local newspaper to expose a pattern of prosecutorial malfeasance, the speech is entitled to constitutional protection because it is made in the employee's capacity as a private citizen and touches on matters of public concern.

When considering the context of the present speech with the content and forum, and as the district court properly concluded, LeVake's speech dwindles down to an employment dispute which is outside the realm of public concern. The speech at issue here is clearly made in LeVake's role as employee. It cannot be doubted that in order to pursue its legitimate goals effectively, the School District must retain the ability to control the manner in which its employees discharge their duties and to direct its employees to undertake the responsibilities of

their positions in a specified way. Under LeVake's analysis, the assistant district attorney in the above hypothetical put forth by the Fourth Circuit would have a First Amendment right to challenge his employer's directions regarding the press conference. As the Fourth Circuit noted in Urofsky, it is difficult to imagine the array of routine employment decisions that would be presented as constitutional questions under such a view of the law. See Connick, 461 U.S. at 143 (recognizing that "government offices could not function if every employment decision became a constitutional matter").

Public school officials have control of the curriculum of the school, irrespective of a teacher's First Amendment rights. See Palmer v. Board of Education of City of Chicago, 603 F.2d 1271, 1274 (7th Cir. 1979) (school board has compelling interest in setting the curriculum). Here LeVake was specifically told he must teach the established curriculum. He unequivocally informed the School District he could only teach it his way. In this situation prior restraint on speech is more permissible than after the fact punishment. Krizek v. Bd. of Educ. of Cicero-Stickney Township High School Dist. No. 201, 713 F. Supp. 1131, 1141 n. 5 (N.D. Ill. 1989). Teachers may not claim constitutional rights in order to take control of the curriculum. Boring, 136 F.3d at 369. In Boring, the court found that a teacher's selection of a school play was curriculum related. Thus, it did not involve a matter of public concern, and therefore was not First Amendment protected speech. The Fourth Circuit, in so holding, acknowledged that "schools are typically not public forums" and unqualifiedly joined the Fifth Circuit in concluding that "although, the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school's curricula." Id. at 369, quoting Kirkland v. North Side Indep. School Dist., 890 F.2d 794, 800

(5th Cir. 1989). See also Webster v. New Lenox School Dist. No. 122, 917 F.2d 1004, 1007-08 (7th Cir. 1990) (teacher has no first amendment right to determine the curriculum content and therefore school board's prohibition on the teaching of creation science was appropriate); In re Proposed Termination of James E. Johnson's Teaching Contract with Indep. School Dist. No. 709, 451 N.W.2d 343, 346 (Minn. Ct. App. 1990) (where teacher terminated for inability to impart basic knowledge, no grounds to claim violation of any right to academic freedom); Newton v. Slye, 116 F. Supp.2d 677, 682-83 (W.D. Va. 2000) (posted pamphlet was part of curriculum and thus posting was not protected speech); Cockrel v. Shelby County School Dist., 81 F. Supp.2d 771, 775-76 (E.D. Kty. 2000) (teacher's selection of industrial hemp and the presentation of same as part of her fifth grade curriculum did not constitute an exercise of her First Amendment rights).

While there existed no need in Boring to undertake a balancing test to weigh the teacher's interest against the school district in promoting its education mission, the Fourth Circuit left its views unmistakable. The school defendants had a pedagogical stake in the principal's decision to edit the otherwise objectionable play:

> While we are of the opinion that plaintiff [teacher] had no first amendment right to insist on the makeup of the curriculum, even assuming that she did have, we are of opinion that a school administration did have such a legitimate pedagogical interest and the holding of the district court was correct.

Boring, 136 F.3d at 370. As it is within the power of the school board to determine what shall be taught and how it shall be taught, when speech by a teacher runs contrary to the curriculum the school board is trying to teach, a legitimate reason exists for requesting a teacher to teach only the curriculum as set forth by the school board. LeVake refused and has been reassigned.

As the concurring opinion in Boring recognized, if every public school teacher were to have the constitutional right to design, even in part, the content of his class, the school boards would be without the most basic authority to implement a uniform curriculum. "Schools would become the mere instruments for the advancement of the individual and collective social agendas of the teachers." Boring, 136 F.3d at 373 (Luttig, J., concurring).

Cases that LeVake refers to as establishing a First Amendment right of academic freedom have done so in terms of the institution, not the individual. Case law does not support a position that a secondary school teacher has a constitutional right to academic freedom. Miles v. Denver Public Schools, 944 F.2d 773, 779 (10th Cir. 1991). For example, in Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589 (1967), the Supreme Court considered a challenge to a New York statute in a regulation designed "to prevent the appointment or retention of subversive persons in state employment." Id. at 592. Keyishian factually involved the right of a professor to speak and associate in his capacity as a private citizen, and is not germane to LeVake's claim.

In the course of reaching its conclusion that the provisions of New York law were unconstitutionally vague, the Supreme Court discussed the detrimental impact of such laws on academic freedom, which the court characterized as a "special concern of the First Amendment." Id. at 603. The discussion by the Supreme Court indicates, however, that it was not focusing on the individual rights of teachers, but rather on the impact of New York's provisions on schools and institutions: the vice of the New York provisions was that they impinged upon the freedom of the university as an institution. See University of Pennsylvania v. E.E.O.C., 493 U.S. 182, 198 (1990) (noting that Keyishian was a case involving

governmental infringement on the right of an institution "to determine for itself on academic grounds who may teach").

The United States Supreme Court has never recognized, for example, that professors possess a First Amendment right of academic freedom to determine for themselves the content of their courses and scholarship, despite opportunities for the court to so hold. For example, in Epperson v. State of Arkansas, 393 U.S. 97 (1968), the court considered a challenge to a state law that prohibited the teaching of evolution. The court repeated its admonition in Keyishian that "the First Amendment does not tolerate laws that cast a pall of orthodoxy over the classroom," but nevertheless declined to invalidate the statute on the basis that it infringed the teacher's right of academic freedom. Id. at 105. The court instead held that the provision violated the establishment clause. Id. at 106-09.

Almost 20 years later, the opportunity to create an individual First Amendment right of academic freedom again arose in Edwards v. Aguillard, 482 U.S. 578 (1987), another case involving limitation on public school teacher's authority to teach evolution. In Edwards, a state statute required that instruction on evolution be accompanied by teaching on creation science. As in Epperson, the Supreme Court decided the case on establishment clause grounds. Edwards, 482 U.S. at 596-97. This time the Supreme Court did not even mention academic freedom as a relevant consideration in holding the statute unconstitutional.

As previously stated, case law simply does not support a position that a secondary school teacher has a constitutional right to academic freedom. See Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 920 (1982) (Rehnquist, J., dissenting) (government, as educator, is subject to fewer strictures when regulating speech in primary and

secondary schools and universities; school officials may determine the particular subject is not suitable for education of secondary school children); Adams v. Campbell County School Dist., Campbell County, Wyoming, 511 F.2d 1242, 1247 (10th Cir. 1975) (teacher does not have "unlimited liberty as to structure and content of the courses, at least at the secondary level").

This case simply presents your run-of-the-mill employment dispute. The First Amendment does not require school districts to allow individual teachers to determine the curriculum for their classrooms consistent with their own personal views. The School District did not violate any constitutional right in reassigning LeVake.

D. There Was No Violation of Due Process.

Due process is not a self-executing right. There must be a constitutionally protected interest which due process safeguards. See, e.g., Board of Regents of State College v. Roth, 408 U.S. 564, 569-70 (1972). Generally, once teachers have served a certain period of time, state law confers a property interest in continued employment protected by the due process clause, and with it, the requirement of notice. Thus, when a tenured teacher is being dismissed, notice is a constitutional requirement wholly apart from the First Amendment.

As the trial court correctly recognized, as a tenured public school teacher, LeVake did have a property interest in his employment at the high school. (R.A. 21-22.) However, it is undisputed that LeVake still has his employment. LeVake admits he suffered no loss of pay, earning capacity, benefits or seniority. He was merely shifted to a different teaching post, an event which his contract with the School District contemplates and expressly allows. LeVake has suffered no property deprivation and admits he has no basis to allege a violation of due process with respect to any property interest.

LeVake essentially argues that because teaching is an occupation effected through speech, he has a constitutional due process "liberty" right to "notice" that his teaching was inconsistent with the curriculum. The law does not so hold. The law routinely punishes people for things they say, without any First Amendment concerns. Conspiracy, price fixing, sexual harassment, extortion, blackmail and threatening the President of the United States, all punish people for things they say yet the First Amendment is not implicated "because conduct that is otherwise sanctionable does not become constitutionally protected merely because it is effected through speech." Stuller, High School Academic Freedom: The Evolution of a Fish Out of Water, 77 Neb. L. Rev. 301, 340 (1998). As one commentator has explained:

> Teachers are routinely required to have their lesson plans approved in advance: prior restraints. They were often called upon to teach from a text with which they have a measure of disagreement: coerced speech. And, of course, viewpoint discrimination is rampant: humans evolve from lower species; the holocaust did occur, and racial stereotyping is bad.
>
> At what point then does an occupation affected through speech become a constitutionally protected activity? If viewpoint discrimination is impermissible, then the constitution creates a "balanced treatment act" for virtually every aspect of the curriculum. If speech that reflects poor teaching, and therefore poor conduct, is a line of demarcation, the line is more illusory than real.

Id. at 341.

Here LeVake was unequivocally told that he must teach the school curriculum. LeVake says he cannot unless he also teaches what he views as criticisms of the curriculum. The reason for LeVake's reassignment is his refusal to teach the school curriculum. LeVake's contention that he was not given notice as to what was proscribed is without merit. LeVake has no First Amendment right to participate in the makeup of the curriculum. Boring, 136 F.3d at 371 n.2.

Further LeVake had notice. LeVake was not terminated because he would not follow school curriculum. He was merely reassigned. LeVake unquestionably challenged the school's right to establish the contents of the curriculum. The school officials met twice with LeVake and allowed an appeal of the decision to reassign to Superintendent Dixon. LeVake was repeatedly told by the school officials that the curriculum must be taught as set forth by the school board. To this day LeVake insists he, not the School District, has the right to determine what is to be taught in the biology class. This case does not concern an alleged violation of due process.

Further, this case is not akin to the cases cited by LeVake where a school terminates a teacher for classroom conduct not prohibited by any advance restriction. In Mailloux v. Kiley, 323 F. Supp. 1387 (D. Mass. 1971), aff'd 448 F.2d 1242 (1st Cir. 1971), a case cited by LeVake, a high school teacher wrote the word "fuck" on the blackboard, asked the student what the word meant and explained that the definition "sexual intercourse" is not a taboo word in our culture but the word on the blackboard is. The teacher did this to illustrate that to some extent the society and its ways are illustrated by its taboo words. This discussion was to help explain the meaning of a book legitimately assigned to the students. The district court found that the case involved "the use of teaching methods which divide professional opinion." Id. at 1390. The court found that in such a case "the state may suspend or discharge the teacher for using that method but it may not resort to such drastic sanctions unless the state proves he was put on notice either by a regulation or otherwise that he should not use the method." Id. at 1392. The district court standard from that case appears to be that the school may never fire a teacher "after the fact" for poor judgment in choice of teaching materials.

Likewise, in Webb v. Lake Mills Community School Dist., 344 F. Supp. 791 (N.D. Iowa 1972), a high school drama teacher was fired for selecting plays which displayed scenes of vulgarity and drunkenness. The court found for the teacher, holding it was arbitrary and capricious to fire a teacher for selecting plays which were in conformity with the rules as stated to her and did not have a disruptive effect. Id. at 804-05.

In Lacks v. Ferguson Reorganized School Dist. R-2, 147 F.3d 718 (8th Cir. 1998), suggestion for reh'g en banc denied, cert. denied, 526 U.S. 1012 (1999), another case cited by LeVake, the Eighth Circuit concluded that the record contained sufficient evidence for the school board to have concluded that Lacks willfully violated board policy. In that case, Lacks admitted that she allowed students to use profanity in the classroom in the context of performing the plays they had written and reading aloud the poems they had composed. Lacks attempted to defend this practice by arguing that she thought that the board's policy on profanity applied only to student behavior and not to students' creative assignments. Id. at 722. Lacks argued on appeal that she could not be punished for not prohibiting her students' use of profanity unless she was provided with reasonable notice that profanity was prohibited in the students' creative exercises. The Eighth Circuit concluded that it was satisfied that Lacks was provided with enough notice by the school board that profanity was not to be allowed in the classroom. The court concluded that under the circumstances, the notice given was fair. Id. at 723.

The cases cited by LeVake, particularly Mailloux and Webb, have been subsequently criticized as being too restrictive on school administrators. Other courts have rejected a teacher's claim to be entitled to advance notice of the disapproval. See Boring, 136 F.3d at 371

n.2. Courts have recognized that it is impossible for a school to prescribe every imaginable inappropriate material and schools should not be encouraged to attempt to do so. Any chilling effect of the threat of "termination could be outweighed by the constriction resulting from a maze of regulations on what may and may not be done in the classroom." Krizek, 713 F. Supp. at 1140. As the court concluded:

> Therefore, some after the fact judgment by the school must be allowed. For example, if a teacher showed an X rated movie to elementary school students, surely the teacher could be fired, even absent a regulation against such a showing.

Id. The court in Krizek ultimately concluded that deference must be given to the judgment of the school administration. School administrators must be allowed to establish the contents of the curriculum. The court concluded the standard of review must be more deferential to the school than that stated in Mailloux or Webb. Id. at 1142.

Finally, one has to ask what purpose any additional "due process," in this context, would serve. Establishing a right of procedural due process would be of little to no value to a teacher, such as LeVake, whose jeopardy stems from his conflict with the school board over who gets to decide what curriculum will be communicated. If the teacher is told, as LeVake was, that he is to teach the textbook and the teacher insists that he must communicate his disagreement with the textbook, there is not much point to any additional hearing opportunity for the teacher. In contrast, if the teacher denies receiving any direction at all, there would be an issue for which a fact oriented hearing would be valuable. Based on the record, there is no denial of due process.

E. Defendants Are Entitled to Qualified Immunity for Reassigning LeVake.

As an alternative ground, the Defendants sought summary judgment based on qualified immunity. The trial court did not address this ground based on its rulings on LeVake's

constitutional claims. (R.A. 23.) Defendants have filed with this Court a notice of review on this issue. (R.A. 303.) As did the district court, this Court need only address this ground if it should reverse the trial court on LeVake's constitutional claims. "Government officials performing discretionary functions are shielded from liability for civil damages and are entitled to qualified immunity unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." Samuels v. Meriwether, 94 F.3d 1163, 1166 (9th Cir. 1996), citing Harlow v. Fitzgerald, 457 U.S. 800 (1982). No Minnesota or Eighth Circuit case has addressed the issue of teacher reassignment and qualified immunity.

One court has held that individual school defendants were entitled to qualified immunity for the reassignment of a tenured teacher/principal because the law was not clearly established at the time of their action that reassignment violated his constitutional rights. See, Peterson v. Minidoka County School Dist. No. 331, 118 F.3d 1351, 1356 (9th Cir. 1997) (the individual defendants in this matter were dismissed on summary judgment. The issue of their qualified immunity was not before the appeals court).

The individual Defendants are entitled to qualified immunity for their decision to reassign LeVake. The law is not clearly established that reassigning a teacher pursuant to contract is a violation of a teacher's constitutional rights.

It is undisputed that the decision to reassign a teacher is the discretionary function of the School District. This is clearly stated in the contract that each teacher signs each year. LeVake testified this is a discretionary decision of the School District. Mr. Dixon, the School District

superintendent, affirmed this. (Dixon Depo., pp. 15-16; R.A. 122.) The Defendants are entitled to qualified immunity as to all of LeVake's claims.

CONCLUSION

Respondents/Defendants respectfully request that the trial court's judgment of dismissal be affirmed.

Dated: December 22, 2000 LOMMEN, NELSON, COLE & STAGEBERG, P.A.

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Excerpt from Defendant Cheryl Freund's Answers to Plaintiff's Interrogatories dated October 6, 1999 . . . . . R.A. 270

Affidavit of Sheila A. Bjorklund dated March 24, 2000 . . . . . R.A. 273

Minnesota Rules, Department of Children, Families, and Learning, Chapter 3501 . . . . . R.A. 275

Correspondence from Francis J. Manion at The American Center for Law and Justice to John Giannini, St. Olaf College, dated March 14, 2000 . . . . . R.A. 280

Correspondence from Francis J. Manion at The American Center for Law and Justice to Jonathan Wells, Discovery Institute, dated March 8, 2000 . . . . . R.A. 291

Rodney LeVake Affidavit dated April 11, 2000 . . . . . R.A. 298

Respondents' Notice of Review and Statement of the Case of Respondents Pursuant to Their Notice of Review, dated September 26, 2000 . . . . . R.A. 303