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DISTRICT and DR. JAMES CORBETT

7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10
11 CHAD FARNAN, a minor, by and
through his parents BILL FARNAN and
12 TERESA FARNAN,

13 Plaintiff,

14 v.

15 CAPISTRANO UNIFIED SCHOOL
DISTRICT; DR. JAMES CORBETT,
16 individually and in his official capacity as
an employee of Capistrano Unified School
17 District; and DOES 1 through 20,
inclusive,

18 Defendants.

19
20 CALIFORNIA TEACHERS
ASSOCIATION/NEA; and
21 CAPISTRANO UNIFIED EDUCATION
ASSOCIATION,
22

23 Union Intervenors/Defendants.

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25 ///

26 ///

27 ///

28 ///

CASE NO.: SACV07-1434-JVS (ANx)

**DEFENDANTS' MOTION FOR
LEAVE TO FILE AN AMENDED
ANSWER; MEMORANDUM OF
POINTS AND AUTHORITIES;
DECLARATION OF DANIEL K.
SPRADLIN**

HEARINGS PENDING:

TYPE: Motions
DATE: July 13, 2009
TIME: 1:30 P.M.
COURTROOM: 10C/Judge Selna

WOODRUFF, SPRADLIN
& SMART
ATTORNEYS AT LAW
COSTA MESA

1 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on July 13, 2009, at 1:30 p.m. or as soon
3 thereafter as the matter may be heard in Courtroom 10C of the above-entitled Court,
4 located in the Ronald Reagan Federal Building, 411 West Fourth Street, Santa Ana,
5 California 92701, Defendants CAPISTRANO UNIFIED SCHOOL DISTRICT
6 (“CUSD”) and DR. JAMES CORBETT (“Dr. Corbett”) (sometimes collectively
7 “Defendants”) will and hereby do move this Court for leave to file an amended answer
8 in order to plead qualified immunity as an affirmative defense in this matter. A copy
9 of this amended answer is attached as Exhibit A.

10 This motion is based on this notice, the attached memorandum of points and
11 authorities and declaration of Daniel K. Spradlin, the Court’s order re the parties’
12 motions for summary judgment, the evidence filed by the parties’ in support of their
13 motions for summary judgment, such matters of which this Court may be asked to
14 take judicial notice, as well as the pleadings and records on file in this matter.

15 DATED: June 8, 2009 WOODRUFF, SPRADLIN & SMART, APC

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18 By: Daniel K. Spradlin
19 DANIEL K. SPRADLIN
20 ROBERTA A. KRAUS
21 Attorneys for Defendants CAPISTRANO
22 UNIFIED SCHOOL DISTRICT and DR.
23 JAMES CORBETT
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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

Throughout this litigation Plaintiff CHAD FARNAN, a minor, by and through his parents BILL FARNAN and TERESA FARNAN (“Farnan”) has asserted that “the gravamen of [his] case was and remains the barrage of religious hostility expressed by Dr. Corbett throughout the Fall 2007 semester during his Advanced Placement European History class.”¹ As posited by Farnan, this case at no time “concern[ed] a few incidental statements of a teacher that may periodically reflect upon the teacher’s personal beliefs” but concerned Dr. Corbett’s alleged “continual and incessant actions.”²

Yet, on May 1, 2009, this Court found that Dr. Corbett did not engage in a continual and incessant barrage of religious hostility. Instead, this Court determined that Dr. Corbett violated the Establishment Clause when Dr. Corbett stated “religious, superstitious nonsense” during a discussion about the lawsuit filed against CUSD, Dr. Corbett and others by former biology teacher John Pelozza who had refused to teach the state mandated curriculum (the theory of evolution) but instead taught creationism in the classroom. Dr. Corbett made this single statement during the course of one lecture while teaching his year-long AP European History course. The Court found that no other statement attributed to Dr. Corbett during this year-long AP European History course violated the Establishment Clause and that there was no evidence presented sufficient to establish that Dr. Corbett had a pattern and practice of violating the Establishment Clause.

It is because of this ruling that it has become apparent that Dr. Corbett is entitled to a determination of qualified immunity in his favor. While the Court has held that the single statement by Dr. Corbett violated the Establishment Clause, in

¹ See, Plaintiff’s reply to Defendants’ opposition to Plaintiff’s motion for summary judgment, 1:4-6.

² See, Plaintiff’s opposition to Defendants’ motion for summary judgment, 10:14-16.

1 2007 the law was not established that a single statement by a teacher made during one
2 lecture given in the course of a year-long class could trigger an Establishment Clause
3 violation. Accordingly, it did not become apparent that Dr. Corbett would be entitled
4 to a qualified immunity defense until the Court's ruling on the parties' motions for
5 summary judgment on May 1, 2009. As a direct result of the Court's May 1, 2009
6 ruling, Defendants now seek leave to amend Defendants' answer to include qualified
7 immunity as an affirmative defense.³

8 **A. Statement of Facts**

9 On December 13, 2007, Farnan filed his complaint against CUSD and Dr.
10 Corbett seeking damages and injunctive relief. A first amended complaint
11 subsequently was filed and Defendants answered the first amended complaint on
12 March 19, 2008. On April 28, 2008 the motion of Intervenors, CALIFORNIA
13 TEACHERS ASSOCIATION/NEA and CAPISTRANO UNIFIED EDUCATION
14 ASSOCIATION ("Union Intervenors") was granted and the Union Intervenors'
15 answer to Farnan's first amended complaint was filed. In their answer the Union
16 Intervenors' asserted the qualified immunity defense on Dr. Corbett's behalf. (See,
17 Exhibit B)

18 Prior to the filing of Defendants' answer, and up through this Court's ruling on
19 the parties' motions for summary judgment, Farnan has contended that Dr. Corbett
20 made anti-Christian or anti-religious comments on a daily basis throughout the 2007
21 semester; that anti-Christian comments essentially were the theme of Dr. Corbett's
22 lectures. According to Farnan, it was the continual and incessant comments attributed
23 to Dr. Corbett that violated the Establishment Clause. Examples of Farnan's position
24 in this regard are voluminous and can be found, by way of illustration, in the
25 following documents:

26 _____
27 ³ Pursuant to the Joint proposal for disposition of the equitable and other remaining
28 issues, this motion is filed concurrently with Defendants' post-summary judgment
motion for a determination that Dr. Corbett is entitled to qualified immunity ("motion
for determination")

1 (1) Farnan's first amended complaint in which Farnan asserts: "On a regular
2 basis during the Fall 2007 semester . . ." (4:7-11); "Parents and/or students have
3 complained to the District for many years regarding Dr. Corbett's religious hostility
4 expressed in his classroom" (9:26-27); and "Dr. Corbett continues to spend a large
5 portion of class time . . . , he clearly demonstrates hostility towards religion . . .", "As
6 a result of his ongoing comments . . ." (10:3-7);

7 (2) Farnan's opposition to Defendants' motion to dismiss in which Farnan
8 asserts: "statements made by Dr. Corbett are continual and incessant" (10:14);
9 "continual and incessant disapproval of religion" (10:23); "For months Chad Farnan
10 sat in an AP European History class . . . learning . . . about Dr. Corbett's own
11 propagation of a 'religion of secularism'" (12:11-14); and "When taken together, [Dr.
12 Corbett's comments] are clearly anti-Christian diatribes" (15:12-13);

13 (3) Farnan's responses to Defendants' special interrogatories, response nos. 5
14 and 7 in which Farnan asserts: "Throughout the Fall 2007 semester, Dr. Corbett made
15 numerous statements regarding Christianity and religion generally that expresses a
16 viewpoint that is derogatory, disparaging, and belittling regarding religion and
17 Christianity in particular. . . . While there are individual comments that are
18 particularly offensive and expressive of said viewpoints, those and all of his
19 comments must be taken in context of the entire lecture and class environment . . ."
20 (6:16-25 and 7:20-28);

21 (4) Farnan's opposition to Defendants' motion for summary judgment:
22 "Plaintiffs brought this action with the intent to quell the religious hostility that has
23 germinated for many years in Dr. Corbett's public classroom at Capistrano Valley
24 High School" (1:2-4); "numerous hostile comments of Dr. Corbett" (4:4-5); "the
25 Court must inquire into the purpose for the overreaching theme established by Dr.
26 Corbett's lectures" (6:6-7); "[Dr. Corbett] states it many times, and in many ways,
27 both indirectly and directly" (6:16-17); "Dr. Corbett is using his bully pulpit to spew
28 his propaganda . . ." (8:12-13); "Dr. Corbett's statements regarding religion and

1 Christianity, both in Chad's class and other classes, send primarily a message of
2 disapproval of religion" (9:2-4); "Defendants' actions fail the third prong of the
3 Lemon test because the statements made by Dr. Corbett are continual and incessant,
4 and the School District has done nothing to lessen them" (9:18-20); "*This case does*
5 *not concern a few incidental statements of a teacher that may periodically reflect*
6 *upon the teacher's personal beliefs. Instead, it concerns Dr. Corbett's continual and*
7 *incessant actions . . .*" (10:14-16; emphasis added); and "When applying the correct
8 standard, and reviewing all of Dr. Corbett's comments instead of singling out a few
9 comments . . ." (14:24-26);

10 (6) Farnan's memorandum of points and authorities in support of motion for
11 summary judgment: "[T]eachers, including [Dr. Corbett] violate the Establishment
12 Clause when they use the classroom to *repeatedly express* disapproval of religion,
13 religious faith, and the resulting worldviews" (1:6-8; emphasis added); "Defendants'
14 decision to 'teach' anti-Christian themes" (15:8-9); "barrage of hostility aimed at Dr.
15 Corbett's students over the years past" (17:16-17); "the statements of Dr. Corbett are
16 continual and incessant" (18:3-4);

17 (7) Declaration of Chad Farnan in support of Farnan's' motion for summary
18 judgment:⁴ "Dr. James Corbett spent a significant amount of class time discussing
19 topics and issues not relevant to European history" (2:19-20); "On a regular basis
20 during the fall 2007 semester, Dr. Corbett discussed a wide variety of topics not
21 related to Advanced Placement European History" (3:3-4); "While teaching the
22 subject of the class and while discussing various other topics, Dr. Corbett made
23 statements and expressed viewpoints that were derogatory, disparaging, and belittling
24 regarding religion and Christianity in particular" (3:5-9); "These comments were not
25 limited to one particular day, but instead occurred on most days that I was in his
26

27 ⁴ Many of these same assertions are also contained in Plaintiff's statement of
28 uncontroverted facts and conclusions of law in support of his motion for summary
judgment. (See, for example, fact nos. 9, 10, 11, 36, 37)

1 classroom” (3:10-11); “Dr. Corbett’s anti-Christian viewpoints are well-known by the
2 students at my high school as they are often presented through comments he makes
3 during class” (3:12-14); “Dr. Corbett made many comments regarding his personal
4 bias against Christianity” (3:15-16); “When Dr. Corbett was talking to my class, he
5 regularly included his own ideas about God and religion” (3:16-17); “As a result of his
6 ongoing comments . . .” (3:19-20);

7 (8) Farnan’s reply to Defendants’ opposition to Farnan’s motion for
8 summary judgment: “*The gravamen of Plaintiffs’ case was and remains the barrage*
9 *of religious hostility expressed by Dr. Corbett throughout the Fall 2007 semester*
10 *during his Advanced Placement European History class*” (1:4-6; emphasis added); and

11 (9) Farnan’s response to Defendants’ objections to Farnan’s evidence
12 submitted by Farnan in support of his motion for summary judgment: “Dr. Corbett’s
13 habit or routine practice of making negative or hostile comments about religion and
14 Christianity . . .” (3:21-22)

15 This Court, itself, in denying Defendants motion to dismiss, also noted that the
16 gist of Farnan’s claim against Defendants is based on Farnan’s claim that his rights
17 were violated by a “practice and policy hostile toward religion and favoring irreligion
18 over religion.” (Court’s minute order denying motion to dismiss, ¶2)

19 Now, following the ruling by this Court on the parties’ motions for summary
20 judgment, it has become apparent that Dr. Corbett is entitled to a qualified immunity
21 defense. As noted above, up until that ruling Farnan at all times asserted that it was the
22 barrage of comments made by Dr. Corbett that violated the Establishment Clause and
23 that this case was not about “a few incidental statements;” however, that is exactly
24 what this Court ruled when it granted Farnan’s motion for summary judgment on the
25 single, incidental statement that in essence stated the teaching of creationism in a high
26 school biology class was “religious, superstitious nonsense.” Thus, with this ruling it
27 has become apparent to Defendants’ counsel that Dr. Corbett is entitled to qualified
28 immunity; however, that defense was not asserted in the answer filed on behalf of Dr.

1 Corbett. Thus, leave to amend is sought and should be granted.

2 **2. THE FEDERAL RULES OF CIVIL PROCEDURE REQUIRE THAT**
3 **LEAVE TO AMEND BE “FREELY GIVEN”**

4 Rule 15(a) of the Federal Rules of Civil Procedure provides that leave of court
5 is required to amend any pleading more than 20 days after that pleading is served;
6 however, Rule 15(a) expressly provides that such leave “shall be freely given when
7 justice so requires.” Regarding Rule 15(a), the United States Supreme Court in
8 Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), held that
9 “this mandate *is to be heeded*.” (Emphasis added) Indeed, the United States Supreme
10 Court and the Ninth Circuit have repeatedly reaffirmed that leave to amend is to be
11 granted with extreme liberality. (See for example, Ibid [leave to amend should be
12 freely given]; U.S. v. Webb, 655 F.2d 977, 979 (9th Cir. 1981) [courts should be
13 guided by the policy favoring decisions on the merits “rather than on the pleadings or
14 technicalities”]; 3-15 J. Moore, Moore's Federal Practice ¶ 15.14 (3d ed. 2008) [“A
15 liberal, pro-amendment ethos dominates the intent and judicial construction of Rule
16 15(a)”])

17 The decision to grant or deny leave to amend lies within the discretion of the
18 district court. (Foman v. Davis, supra, 371 U.S. at 182) In Foman, the plaintiff
19 sought to amend her complaint after the district court entered judgment dismissing the
20 complaint. In holding that the district court abused its discretion when it refused to
21 grant the requested leave to amend, the Foman court stated:

22 “In the absence of any apparent or declared reason – such as undue delay,
23 bad faith or dilatory motive on the part of the movant, repeated failure to
24 cure deficiencies by amendments previously allowed, undue prejudice to
25 the opposing party by virtue of allowance of the amendment, futility of
26 amendment, etc. – the leave sought should, as the rules require, be ‘freely
27 given.’” (Ibid.)

28 The Court continued that:

1 “ . . . outright refusal to grant the leave without justifying reason
2 appearing for the denial is not an exercise of discretion; it is merely abuse
3 of that discretion and inconsistent with the spirit of the Federal Rules.”

4 (Ibid.)

5 Leave to amend should be granted unless the amendment would cause prejudice
6 to the opposing party, is sought in bad faith, is futile, or creates undue delay. (Ascon
7 Properties, Inc. v. Mobil Oil Company, 866 F.2d 1149, 1160 (9th Cir. 1989)) The
8 Ninth Circuit has held that mere delay in seeking leave to amend is not a sufficient
9 basis for denying a motion to amend. (Morongo Band of Mission Indians v. Rose,
10 893 F.2d 1074, 1079 (9th Cir. 1990) [finding that even a two-year delay is “not alone
11 enough to support denial”])

12 **A. The Amendment is Not Sought in Bad Faith**

13 In determining whether an amendment is sought in bad faith, courts have
14 inquired whether the party seeking amendment has previously engaged in dilatory
15 tactics and have evaluated the value of the proposed amendment. (See, Thornton v.
16 McClatchy Newspapers, Inc., 261 F.3d 789, 799 (9th. Cir. 2001) [magistrate’s finding
17 of bad faith based on plaintiff’s history of dilatory tactics during the proceedings and
18 the doubtful value of the proposed amendment])

19 Here, Defendants are raising the qualified immunity defense at the first
20 practicable moment. The qualified immunity defense was not available to Defendants
21 until the court’s ruling on May 1, 2009, when this Court determined that Dr. Corbett
22 violated the Establishment Clause when Dr. Corbett stated “religious, superstitious
23 nonsense” during a discussion about the lawsuit filed against CUSD, Dr. Corbett and
24 others by former biology teacher John Peloza. Mr. Peloza refused to teach the state
25 mandated curriculum (the theory of evolution) but instead taught creationism in the
26 classroom. This ruling, as explained below, rendered the qualified immunity defense
27 available to Defendants for the first time in this litigation.

28 ///

1 As set forth in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d
2 396 (1982), the qualified-immunity defense “shield[s] [government agents] from
3 liability for civil damages insofar as their conduct does not violate clearly established
4 statutory or constitutional rights of which a reasonable person would have known.”
5 (Id. at 818; see also, Behrens v. Pelletier, 516 U.S. 299, 305-306, 116 S.Ct. 834, 133
6 L.Ed.2d 773 (1996))

7 Under Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001),
8 two inquiries are to be made in determining whether a public official is entitled to
9 qualified immunity. The first is whether the alleged acts, when construed in the light
10 most favorable to the plaintiff, show that the official’s conduct violated a
11 constitutional right. (Id. at 200-201) If no constitutional right was violated even under
12 the plaintiff’s allegations, the official is entitled to judgment; however, if a
13 constitutional violation could be established under a favorable view of the evidence
14 submitted, the court must move to the second step in the analysis.

15 The second step involves an inquiry into whether the constitutional right was
16 clearly established and “must be undertaken in light of the specific context of the case,
17 not as a broad general proposition.” (Ibid.) Quoting Malley v. Briggs, 475 U.S. 335,
18 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), the Saucier court stated that qualified
19 immunity protects “all but the plainly incompetent or those who knowingly violate the
20 law.” (Saucier v. Katz, supra, 533 U.S. at 202) The inquiry on this prong is not
21 whether a particular right is established in a vacuum but whether it was established on
22 the specific facts of a particular case. (Id. at 202 [the court must find that the right was
23 clearly established in light of the specific facts of a particular case such that “a
24 reasonable official would understand that what he is doing violates that right”])

25 Under qualified immunity, public employees remain immune as long as their
26 actions do not violate clearly established [federal] statutory, or constitutional rights of
27 which a reasonable person would have known. (Harlow v. Fitzgerald, supra, 457 U. S.
28 at 818-819 [allegations of malice are insufficient to overcome application of qualified

