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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.

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

**DEFENDANTS' NOTICE OF
MOTION AND MOTION FOR
ORDER AMENDING SCHEDULING
ORDER AND TO AMEND ANSWER
TO ASSERT QUALIFIED
IMMUNITY AS AN AFFIRMATIVE
DEFENSE; MEMORANDUM OF
POINTS AND AUTHORITIES;
DECLARATION OF DANIEL K.
SPRADLIN**

HEARINGS PENDING:

TYPE: Motions
DATE: August 31, 2009
TIME: 1:30 p.m.
COURTROOM: 10C/Judge Selna

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1 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on August 31, 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 move this Court for an order amending the Scheduling Order and
8 extending the time limit for hearing motions to amend and to determine the
9 applicability of the qualified immunity defense and to amend their answer. A copy of
10 this amended answer is attached as Exhibit A.

11 This motion is made on the grounds that good cause justifies the granting of this
12 motion.

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

18 DATED: July 24, 2009

WOODRUFF, SPRADLIN & SMART, APC

19
20 BY: 

21 DANIEL K. SPRADLIN
22 ROBERTA A. KRAUS
23 Attorneys for Defendants CAPISTRANO
24 UNIFIED SCHOOL DISTRICT and DR.
25 JAMES CORBETT
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WOODRUFF, SPREADLIN
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 1. INTRODUCTION

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

11 On May 1, 2009, this Court found that Dr. Corbett did *not* engage in a continual
12 and incessant barrage of religious hostility as alleged by Farnan; however, this Court
13 did find that that Dr. Corbett violated the Establishment Clause when he made the
14 single statement “religious, superstitious nonsense” during a discussion about a prior
15 lawsuit filed against CUSD, Dr. Corbett and others by former biology teacher John
16 Pelozza who had refused to teach the state-mandated curriculum (the theory of
17 evolution) but instead taught creationism in the classroom. The Court found that no
18 other statement attributed to Dr. Corbett during the AP European History course
19 violated the Establishment Clause and that there was no evidence presented sufficient
20 to establish that Dr. Corbett had a pattern and practice of violating the Establishment
21 Clause.

22 It is because of this ruling that it has become apparent that Dr. Corbett is
23 entitled to a determination of qualified immunity in his favor. While the Court has
24 held that the single statement by Dr. Corbett violated the Establishment Clause, in
25 2007 the law was not established that a single statement by a teacher made during one
26 _____

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

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

1 lecture given in the course of a year-long class could trigger an Establishment Clause
2 violation. Accordingly, it did not become apparent that Dr. Corbett would be entitled
3 to a qualified immunity defense until the Court's ruling on the parties' motions for
4 summary judgment on May 1, 2009.

5 At the same time that it made its ruling on the motions for summary judgment,
6 this Court also ordered the parties to file a joint proposal for disposition of the
7 equitable *and any other remaining issues* no later than May 22, 2009. On May 22,
8 2009, the parties filed their joint proposal in which Defendants proposed filing a
9 motion to amend their answer under Federal Rules of Civil Procedure, Rule 15, and
10 filing a motion for determination of qualified immunity in Dr. Corbett's favor. At the
11 status conference on June 1, 2009, the Court set the proposed motions for hearing on
12 July 13, 2009, and adopted the proposed briefing schedule set forth in the joint
13 proposal.

14 On July 13, 2009, this Court denied Defendants' motion to file an amended
15 answer, *without prejudice*, because Defendants first needed to apply to this Court to
16 amend the Scheduling Order, which set a deadline of August 17, 2008 for amending
17 pleadings, and denied the motion for qualified immunity as moot, *without prejudice*,
18 pending a proper motion to amend the Scheduling Order so that the Court could rule
19 on Defendants' motion to amend their answer. Defendants now seek to amend the
20 Scheduling Order so that this Court may hear and rule on their motion to amend their
21 answer and motion for determination of qualified immunity in favor of Dr. Corbett.
22 Further, as a direct result of the Court's May 1, 2009 ruling, Defendants now also seek
23 leave to amend Defendants' answer to include qualified immunity as an affirmative
24 defense. Defendants also concurrently file their post-summary judgment motion for a
25 determination that Dr. Corbett is entitled to qualified immunity.

26 **A. Statement of Facts**

27 On December 13, 2007, Farnan filed his complaint against CUSD and Dr.
28 Corbett seeking damages and injunctive relief. A first amended complaint

1 subsequently was filed and Defendants answered the first amended complaint on
2 March 19, 2008. On April 28, 2008, the motion of Intervenors, CALIFORNIA
3 TEACHERS ASSOCIATION/NEA and CAPISTRANO UNIFIED EDUCATION
4 ASSOCIATION (“Union Intervenors”) was granted and the Union Intervenors’
5 answer to Farnan’s first amended complaint was filed. In their answer the Union
6 Intervenors’ asserted the qualified immunity defense on Dr. Corbett’s behalf. (See,
7 Exhibit B)

8 Prior to the filing of Defendants’ answer, and up through this Court’s ruling on
9 the parties’ motions for summary judgment, Farnan has contended that Dr. Corbett
10 made anti-Christian or anti-religious comments on a daily basis throughout the 2007
11 semester; that anti-Christian comments essentially were the theme of Dr. Corbett’s
12 lectures. According to Farnan, it was the continual and incessant comments attributed
13 to Dr. Corbett that violated the Establishment Clause. Examples of Farnan’s position
14 in this regard are voluminous and can be found, by way of illustration, in the
15 following documents:

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

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

28 ///

1 (3) Farnan's responses to Defendants' special interrogatories, response nos. 5
2 and 7 in which Farnan asserts: "Throughout the Fall 2007 semester, Dr. Corbett made
3 numerous statements regarding Christianity and religion generally that expresses a
4 viewpoint that is derogatory, disparaging, and belittling regarding religion and
5 Christianity in particular. . . . While there are individual comments that are
6 particularly offensive and expressive of said viewpoints, those and all of his
7 comments must be taken in context of the entire lecture and class environment . . ."
8 (6:16-25 and 7:20-28);

9 (4) Farnan's opposition to Defendants' motion for summary judgment:
10 "Plaintiffs brought this action with the intent to quell the religious hostility that has
11 germinated for many years in Dr. Corbett's public classroom at Capistrano Valley
12 High School" (1:2-4); "numerous hostile comments of Dr. Corbett" (4:4-5); "the
13 Court must inquire into the purpose for the overreaching theme established by Dr.
14 Corbett's lectures" (6:6-7); "[Dr. Corbett] states it many times, and in many ways,
15 both indirectly and directly" (6:16-17); "Dr. Corbett is using his bully pulpit to spew
16 his propaganda . . ." (8:12-13); "Dr. Corbett's statements regarding religion and
17 Christianity, both in Chad's class and other classes, send primarily a message of
18 disapproval of religion" (9:2-4); "Defendants' actions fail the third prong of the
19 Lemon test because the statements made by Dr. Corbett are continual and incessant,
20 and the School District has done nothing to lessen them" (9:18-20); "*This case does
21 not concern a few incidental statements of a teacher that may periodically reflect
22 upon the teacher's personal beliefs. Instead, it concerns Dr. Corbett's continual and
23 incessant actions . . .*" (10:14-16; emphasis added); and "When applying the correct
24 standard, and reviewing all of Dr. Corbett's comments instead of singling out a few
25 comments . . ." (14:24-26);

26 (5) Farnan's memorandum of points and authorities in support of motion for
27 summary judgment: "[T]eachers, including [Dr. Corbett] violate the Establishment
28 Clause when they use the classroom to *repeatedly express* disapproval of religion,

1 religious faith, and the resulting worldviews” (1:6-8; emphasis added); “Defendants’
2 decision to ‘teach’ anti-Christian themes” (15:8-9); “barrage of hostility aimed at Dr.
3 Corbett’s students over the years past” (17:16-17); “the statements of Dr. Corbett are
4 continual and incessant” (18:3-4);

5 (6) Declaration of Chad Farnan in support of Farnan’s’ motion for summary
6 judgment:³ “Dr. James Corbett spent a significant amount of class time discussing
7 topics and issues not relevant to European history” (2:19-20); “On a regular basis
8 during the fall 2007 semester, Dr. Corbett discussed a wide variety of topics not
9 related to Advanced Placement European History” (3:3-4); “While teaching the
10 subject of the class and while discussing various other topics, Dr. Corbett made
11 statements and expressed viewpoints that were derogatory, disparaging, and belittling
12 regarding religion and Christianity in particular” (3:5-9); “These comments were not
13 limited to one particular day, but instead occurred on most days that I was in his
14 classroom” (3:10-11); “Dr. Corbett’s anti-Christian viewpoints are well-known by the
15 students at my high school as they are often presented through comments he makes
16 during class” (3:12-14); “Dr. Corbett made many comments regarding his personal
17 bias against Christianity” (3:15-16); “When Dr. Corbett was talking to my class, he
18 regularly included his own ideas about God and religion” (3:16-17); “As a result of his
19 ongoing comments . . .” (3:19-20);

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

24 (8) Farnan’s response to Defendants’ objections to Farnan’s evidence
25 submitted by Farnan in support of his motion for summary judgment: “Dr. Corbett’s
26 _____

27 ³ 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 habit or routine practice of making negative or hostile comments about religion and
2 Christianity . . .” (3:21-22)

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

7 Now, following the ruling by this Court on the parties’ motions for summary
8 judgment, it has become apparent that Dr. Corbett is entitled to a qualified immunity
9 defense. As noted above, up until that ruling Farnan at all times asserted that it was the
10 barrage of comments made by Dr. Corbett that violated the Establishment Clause and
11 that this case was not about “a few incidental statements;” however, that is exactly
12 what this Court ruled when it granted Farnan’s motion for summary judgment on the
13 single, incidental statement that in essence stated the teaching of creationism in a high
14 school biology class was “religious, superstitious nonsense.” Thus, with this ruling it
15 has become apparent to Defendants’ counsel that Dr. Corbett is entitled to qualified
16 immunity; however, that defense was not asserted in the answer filed on behalf of Dr.
17 Corbett. Thus, a modification to the scheduling order and leave to amend Defendants’
18 answer is sought and should be granted.

19 **2. GOOD CAUSE EXISTS FOR AMENDING THE SCHEDULING ORDER**

20 The Scheduling Order set August 17, 2008 as the deadline for filing amended
21 pleadings and set a deadline of January 28, 2009 for hearing dispositive motions.
22 Subsequently, the law and motion cut off date was extended to March 30, 2009 by this
23 Court’s order dated February 6, 2009. Now, Defendants bring this motion seeking to
24 extend the deadlines so that this Court can hear and determine Defendants’ request to
25 amend their answer and for this Court to determine the qualified immunity defense in
26 Dr. Corbett’s favor.

27 Federal Rules of Civil Procedure, Rule 16(b)(4) provides that “[a] schedule may
28 be modified only for good cause and with the judge's consent.” (See also, Johnson v.

1 Mammoth Recreations, Inc., 975 F. 2d 604, 608 (9th Cir. 1992) [stating that
2 scheduling orders entered before the final pretrial conference may be amended upon a
3 showing of “good cause”]) The “good cause” standard is met if the party seeking the
4 amendment shows diligence. (Ibid.) Factors to be considered include whether matters
5 that were not, and could not have been, foreseeable at the time of the scheduling
6 conference caused the need for amendment and whether the moving party was diligent
7 in seeking amendment once the need to amend became apparent. (Ibid.)

8 If the trial court determines that refusal to allow a modification of a pre-trial
9 order could result in injustice, while allowing the modification would cause no
10 substantial injury to the opponent and no more than a slight inconvenience to the
11 court, modification is appropriate. (See, United States v. First Nat. Bank of Circle, 652
12 F.2d 882, 887 (9th Cir. 1981)) If good cause is found, then the court turns to Rule 15
13 to determine whether the amendment sought should be granted. (Johnson v. Mammoth
14 Recreations, Inc., supra, 975 F.2d at 608)

15 Here, good cause justifies the amending of the Scheduling Order. As shown
16 below and in the accompanying declaration of Daniel K. Spradlin, Defendants have
17 been diligent throughout each stage of this litigation.

18 As noted above, throughout this litigation Farnan has asserted that “the
19 gravamen of [his] case was and remains the barrage of religious hostility expressed by
20 Dr. Corbett throughout the Fall 2007 semester during his Advanced Placement
21 European History class.” This case at no time “concern[ed] a few incidental
22 statements of a teacher that may periodically reflect upon the teacher’s personal
23 beliefs” but concerned Dr. Corbett’s alleged “continual and incessant actions.”

24 Yet, on May 1, 2009, this Court found that Dr. Corbett did not engage in a
25 continual and incessant barrage of religious hostility. Instead, this Court determined
26 that Dr. Corbett violated the Establishment Clause when he made the single statement
27 “religious, superstitious nonsense.” The Court found that no other statement attributed
28 to Dr. Corbett during the AP European History course violated the Establishment

1 Clause and that there was no evidence presented sufficient to establish that Dr. Corbett
2 had a pattern and practice of violating the Establishment Clause.

3 It is because of this ruling that it has become apparent that Dr. Corbett is
4 entitled to a determination of qualified immunity in his favor. While the Court has
5 held that the single statement by Dr. Corbett violated the Establishment Clause, in
6 2007 the law was not established that a single statement by a teacher made during one
7 lecture given in the course of a year-long class could trigger an Establishment Clause
8 violation. Accordingly, it did not become apparent that Dr. Corbett would be entitled
9 to a qualified immunity defense until the Court's ruling on the parties' motions for
10 summary judgment on May 1, 2009. As a direct result of the Court's May 1, 2009
11 ruling, Defendants now seek leave to amend the scheduling order so that this Court
12 may hear and rule on Defendants' motion to amend their answer to include qualified
13 immunity as an affirmative defense. As shown by the accompanying declaration of
14 Daniel K. Spradlin, Defendants have been diligent in defending this action and have
15 not unreasonably delayed in bringing to Farnan's and this Court's attention the need to
16 amend the answer as soon as such need became apparent and necessary. Based on this
17 Court's May 1, 2009 and July 13, 2009 rulings, Defendants now move for an order
18 amending the Scheduling Order so that this Court may consider and rule on
19 Defendants' motion to amend their answer and motion for determination of qualified
20 immunity.

21 **3. THE FEDERAL RULES OF CIVIL PROCEDURE REQUIRE THAT**
22 **LEAVE TO AMEND BE "FREELY GIVEN"**

23 Once the Court finds good cause under Rule 16 for amending the scheduling
24 order, the Court then turns to Rule 15 to determine whether the amendment sought
25 should be granted. (See, Johnson v. Mammoth Recreations, Inc., supra, 975 F.2d at
26 608)

27 Rule 15(a) of the Federal Rules of Civil Procedure provides that leave of court
28 is required to amend any pleading more than 20 days after that pleading is served;

