No. 09-50401

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHRISTINA CASTILLO COMER,

Plaintiff – Appellant,

v.

ROBERT SCOTT, COMMISSIONER, TEXAS EDUCATION AGENCY, IN HIS OFFICIAL CAPACITY; TEXAS EDUCATION AGENCY,

Defendants – Appellees.

On Appeal From The United States District Court
for the Western District of Texas

REPLY BRIEF FOR APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Other Authorities:

INTRODUCTION

The Defendant (the "TEA" or the "Agency") fired its long-time Director of Science for forwarding an email informing others of a lecture critical of "teaching creationism." In the TEA's view, Director Comer's forwarding of that email "creat[ed] the perception that TEA has a biased position on a subject directly related to the science education TEKS." USCA5 at 31 (Compl. Ex. B).

Both the district court and the TEA recognize that treating creationism, a religious belief, as a subject directly related to science education violates the Establishment Clause. Consequently, the TEA's only justification for prohibiting its Director of Science from forwarding a message critical of including creationism in the science curriculum is "so that the Board can make its own curriculum decisions – whatever they may be." Appellee's Br. 21 (hereinafter "TEA Br.").[1] However, the record contains no statement, order, policy or directive of the Texas State Board of Education (the "Board") indicating that the Board wishes to consider teaching creationism. Thus, the TEA's justification – the core of its defense – is entirely speculative.

[1] *See also* TEA Br. 17 ("The policy requires only that TEA staff refrain from publicly expressing opinions concerning substantive curriculum issues that are required to be determined by the Board."); *id.* at 19 ("TEA's neutrality requirement is directed generally at the Board's authority to decide substantive curriculum issues – whatever they may be, and whenever they may be considered."); *id.* at 21 (neutrality policy "requir[es] only silence and restraint by Agency staff so that the Board can make its own curriculum decisions – whatever they may be.").

In contrast, the record contains many written statements of the TEA that refute its contentions that its Director of Science had no science responsibilities, its creationism policy had nothing to do with creationism and thus its firing of Director Comer was not about creationism. The TEA's brief ignores those parts of the record.

The TEA's brief in defense of its creationism policy is both internally contradictory and self-defeating. It is contradictory because in one place it says that its creationism policy applies to "any curricular issue that may be considered by the Board." TEA Br. 5. Yet, according to the Jackson Affidavit submitted by the TEA, the policy applies to actual "issues under consideration" or "under review." TEA Br. 10 (citing USCA5 at 205 (Jackson Aff.)).

The brief is self-defeating, because if – as the TEA suggests – the Board never considered teaching creationism as science, Director Comer's forwarding of an email about a lecture critical of teaching creationism could not have violated the TEA policy applicable to any "issue under consideration" by the Board. As evidenced both by the Termination Memo and the absence of any Board pronouncement in the record, the TEA's unwritten policy is not about *any* "issue under consideration," or even about "any curriculum issue that may be considered by the Board." TEA Br. 5 (citing USCA5 at 212 (Martinez Aff.)). The policy is about "teaching creationism in public education." USCA5 at 31 (Compl. Ex. B).

That is the policy described in the Termination Memo and that is the policy Director Comer supposedly violated by forwarding the email. USCA5 at 256 (SJ Fact ¶ 12). That policy violates the Establishment Clause because, when the state treats religion as science, "the conclusion is inescapable that the only real effect . . . is the advancement of religion." *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 764 (M.D. Pa. 2005) (citing *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1272 (E.D. Ark. 1982)).

I. THE AGENCY'S EQUATING OF CREATIONISM WITH SCIENCE VIOLATES THE ESTABLISHMENT CLAUSE.

A. Nothing In The Record Supports The TEA's Contention That The Board Might Consider "Teaching Creationism."

The TEA attempts to justify its creationism policy by its purported need to avoid "compromis[ing] the agency's ability to fairly and accurately implement the policy choices made by the Board. . . . Neutrality is 'essential' to preserving TEA's administrative role in facilitating the curriculum review process for the Board and carrying out the Board's decisions." TEA Br. 9, 10. Thus, the Agency's brief requires this Court to conclude that "teaching creationism" is a "policy choice" the Board may wish to make.

Nothing in the record supports that conclusion. The record does not contain any statement of any kind from any representative of the Board regarding the Board's supposed need or desire to preserve "teaching creationism" as a possible

policy choice. Absent such a statement from the Board, it is pure speculation that the Board actually needs or wants the Agency to avoid "creating the perception that TEA has a biased position" on "teaching creationism."

Surely the absence of such a statement from the Board is no accident. Had the Board stated that it would consider teaching creationism, that would have been an admission that it was considering violating the Establishment Clause. The district court, quoting from the TEA's opposition to Director Comer's motion for summary judgment, noted that the TEA "readily agree[s] that if the Board chooses to consider including some kind of recognition of alternatives to evolutionary theory in the biology curriculum, it will be entering perilous waters." R.E., Tab 2, at 16 (Mem. Op. and Order). If "alternatives to evolutionary theory" means creationism, then the Board would be falling into a black hole, not merely "entering perilous waters."[2] Conversely, had the Board stated that it would *never* consider teaching creationism, the TEA's creationism policy would be unnecessary and its defense would have collapsed.

The district court received no evidence from the TEA that the Board wishes to preserve "teaching creationism" as a policy choice, and thus erred in simply

[2] In the same spirit, the TEA wrote: "[C]onstitutional issues might be presented when Board members make certain sensitive decisions about the education curriculum – or when Agency employees are asked to implement and administer the Board's decisions." TEA Br. 2. If "certain sensitive decisions" refers to a decision to consider teaching creationism, the result is not merely a "constitutional issue" but a constitutional violation.

assuming that the Agency must avoid appearing "biased" on that subject. R.E., Tab 2, at 16. That assumption is the lynchpin of the Agency's defense. In the absence of any evidence of a Board directive, the only reasonable inference is the contrary – that the Board, mindful of *Edwards v. Aguillard*, 482 U.S. 578 (1987), had no intention of entering what the Agency and the district court concede are "perilous waters" by considering the teaching of creationism in violation of the Establishment Clause. Thus, there is neither evidence nor any reasonable basis to infer that the Agency actually must avoid "creating the perception that TEA has a biased position" on creationism. As a result, the entire premise of the Agency's creationism policy and its defense in this case crumble.

B. The Agency's Policy Equates Creationism With Science.

The district court properly acknowledged that the Agency's policy of treating "teaching creationism in public education" as a "subject directly related to the science education TEKS" in fact "treats creationism as science." USCA5 at 31 (Compl. Ex. B); R.E., Tab 2, at 16. That finding alone is fatal to the TEA's policy, because when a state treats creationism as science, "the conclusion is inescapable that the only real effect . . . is the advancement of religion." *Kitzmiller*, 400 F. Supp. 2d at 764 (citing *McLean*, 529 F. Supp. at 1272).

The TEA protests that "[n]othing in the [unwritten] TEA policy remotely takes a position on the debate between evolution versus creationism, or

contemplates the teaching of any particular curriculum in public schools." TEA Br. iii. Its protest fails on two grounds.

First, the TEA's premise – here and throughout its brief – is that there is a "debate between evolution versus creationism." There is no such debate. As 135 Texas biology professors wrote: "evolution is a central pillar in any modern science education, while [creationism and] 'intelligent design' is a religious idea that deserves no place in the science classroom at all. . . . There can be no neutrality on an issue that is scientifically and legally clear-cut." USCA5 at 72-73 (Compl. Ex. P). The Texas Academy of Science has stated that it "is the overwhelming consensus of the scientific community that creationism and intelligent design are faith-based concepts that have no scientific merit." USCA5 at 41 (Compl. Ex. E). These statements stand unrefuted in the record. Just as there is no debate about "whether the Earth goes around the sun," (USCA5 at 72) or about astronomy versus astrology, or about chemistry versus alchemy, there is no scientific debate about whether creationism is science.

Second, the TEA's policy expressly "takes a position" on creationism. The TEA's Termination Memo said that "teaching creationism in public education" was a "subject directly related to the science education TEKS." USCA5 at 31 (Compl. Ex. B). That policy takes the position that teaching creationism as science is a viable option. *Aguillard* says it is not. *See Aguillard*, 482 U.S. at 596-97

(creationism impermissibly "advances a religious doctrine" using "the symbolic and financial support of the government").

The TEA tries to remove creationism from its policy by characterizing the policy as even-handed, saying that Director Comer "would have violated the policy had she distributed an email *supporting* creationism." TEA Br. iii, 16. With this argument, the TEA admits that its unwritten policy equates creationism with science (i.e., with evolution). By saying its policy equally prohibits supporting and opposing the teaching of creationism, the TEA implies that there is a constitutional equivalence to those two positions. There is not.

The Establishment Clause prohibits the teaching of creationism, because creationism is religion. *See Aguillard*, 482 U.S. at 593 (describing creationism as a "religious belief"). It does not prohibit teaching evolution, because evolution is science. *See, e.g.*, *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994) (per curiam). In *Peloza*, a teacher asserted that the school district violated the Establishment Clause by requiring him to teach "evolutionism, a religious belief system, as a valid scientific theory." *Id.* at 520. The court of appeals rejected the teacher's assertion that evolution (which the plaintiff used interchangeably with "evolutionism") is a religion, explaining that "while the belief in a divine creator of the universe is a religious belief, the scientific theory

that higher forms of life evolved from lower forms is not." *Id.* at 521 (citing *Aguillard*, 482 U.S. 578).

Linking creationism and evolution (religion and science) is precisely what the Establishment Clause forbids. Teaching creationism is not made constitutional by "balancing" it with the teaching of evolution. *Aguillard*, 482 U.S. 578. Similarly, the defect in a policy that prohibits *opposing* the teaching of religion as science (a constitutionally-permissible position) is not cured by also prohibiting *supporting* the teaching of religion as science (a constitutionally-impermissible position).

The TEA tries to sanitize its policy by saying that it merely "concerns process, not substance." TEA Br. 19. But a policy that treats "teaching creationism in public education" as a "subject directly related to the science education TEKS" is laden with substance. USCA5 at 31 (Compl. Ex. B). The TEA underscored the creationist substance of that policy by declaring in its Termination Memo that it was firing Director Comer because she forwarded an email about a lecture critical of what the policy protects: the idea of teaching creationism as science. The TEA cannot now airbrush that substance out of its policy by suggesting that "the email she circulated *happened* to oppose creationism." TEA Br. 2 (emphasis added). The TEA wrote in its Termination Memo that creationism is "related to the science education TEKS" and then it fired

Director Comer for forwarding an email about a lecture that said otherwise. USCA5 at 31 (Compl. Ex. B). The TEA's defense is: coincidence. The factual record in this case proves otherwise, and is supported by history. *Epperson*, *Aguillard*, *Selman*, *Kitzmiller*, and *Freiler*[3] did not just "happen" to be about creationism, and the TEA cannot now plausibly assert that the Termination Memo it gave to Director Comer upon her termination just "happened" to cite her criticism of creationism.

The TEA cites *Croft v. Perry*, 562 F.3d. 735 (5th Cir. 2009), a recent Establishment Clause case. TEA Br. 17. *Croft* is not pertinent. It involved a challenge under the *Lemon v. Kurtzman*, 403 U.S. 602 (1971), purpose test to a statute requiring a moment of silence. Here, Director Comer challenges an unwritten policy enforced only against criticism of creationism under *Lemon*'s effect test.

The TEA tries to distinguish *Epperson* and its progeny by arguing that Director Comer's forwarding of the email was "insubordination" because it supposedly violated the TEA's unwritten policy of avoiding the perception of "bias" regarding creationism. "Insubordination" implies that the authority being

[3] *See Epperson v. Arkansas*, 393 U.S. 97 (1968); *Aguillard*, 482 U.S. 578; *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286 (N.D. Ga. 2005), *vacated and remanded on other grounds*, 449 F.3d 1320 (11th Cir. 2006); *Kitzmiller*, 400 F. Supp. 2d 707; and *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337 (5th Cir. 1999).

disobeyed is lawful or proper.[4] When the Director of Science acts consistent with the Constitution and the Supreme Court's decision in *Aguillard*, violation of the TEA's unwritten policy about creationism cannot be "insubordination" because the policy itself violates the Establishment Clause.

C. The TEA's "Inside Versus Outside The Classroom" Distinction Fails Factually And Legally.

The TEA's attempt to distinguish its creationism policy from *Epperson*, *Aguillard* and the other creationism cases with its "inside versus outside the classroom" argument fails factually and legally. TEA Br. 20-22; Appellant's Opening Br. 27-29 (hereinafter "Comer Br."). The TEA does not address, and cannot explain away, its numerous written statements in the record connecting the Agency and Director Comer to the curriculum as well as the classroom. Specifically:

* The TEA's website says that the Agency's substantial curricular responsibilities include "oversee[ing] development of the statewide curriculum," "monitor[ing] for compliance with federal guidelines" and "managing the textbook adoption process." USCA5 at 35 (Compl. Ex. C). The TEA belittles these activities as "provid[ing] administrative support." TEA Br. 8.

[4] "An act of disobedience to proper authority; esp., a refusal to obey an order that a superior officer is authorized to give." BLACK'S LAW DICTIONARY 802 (7th ed. 1999).

* The TEA's Monica Martinez affirmed that the Agency tasked Director Comer with providing "statewide leadership for science education Grades K-12," including "Specific Essential Duties" on curricular issues such as "coordination for revisions, implementation and maintenance of the science Texas Essential Knowledge and Skills (TEKS) including dissemination of information on matters pertaining to the science TEKS." USCA5 at 300 (Martinez Aff. 3). In its brief, the TEA tries to whittle the role of its Director of Science down to merely providing "'support and guidance' regarding TEKS compliance" by "providing information and answering questions." TEA Br. 8.

* The TEA's Martinez also acknowledged that Director Comer had responsibilities for legislative analyses and relationships with numerous national and state science education organizations. USCA5 at 300-01 (Martinez Aff. 3-4); Comer Br. 7 n.6. The TEA's brief does not mention these responsibilities.

* The TEA's Termination Memo says it was Comer's duty "to explain law and rule regarding the science Texas Essential Knowledge and Skills (TEKS)." USCA5 at 254 (SJ Fact ¶ 5). In its document entitled "TEA and 'Statutory Authority—' a Refresher," the TEA acknowledges it was an Agency responsibility to "answer questions about rule and law." USCA5 at 302 (Martinez Aff. 5). The TEA's brief does not address these statements.

* The TEA's document, "What We Mean By 'Curriculum,'" says that "curriculum" refers to TEKS and other standards that "link assessment and materials used in the classroom." USCA5 at 303 (Martinez Aff. 6); Comer Br. 28.[5] That link connects activities outside the classroom, such as determining what should be included or excluded from a curriculum, with what is ultimately taught. The TEA's brief ignores this document entirely.

None of these activities, which are part of the continuum of "teaching and learning," constitutionally may "be tailored to the principles or prohibitions of any religious sect or dogma." *Freiler*, 185 F.3d at 343.

D. The "Reasonable Observer" Would Conclude That The TEA's Creationism Policy Advances Religion.

The TEA's brief, without citation to the record, repeats the district court's unsupported assertion that a reasonable observer would "understand that the policy applies *beyond the creationism-evolution debate*." TEA Br. 23 (emphasis added by the TEA); R.E., Tab 2, at 17. The TEA, like the district court, reaches this conclusion by denying *Lemon*'s "reasonable observer" knowledge of the relevant facts, law and history referenced above and in Comer's Brief. Reasonable observers, especially like an Agency staff employee, a science teacher or a school administrator (*see* Comer Br. 20-22), would know that:

[5] "What We Mean By 'Curriculum'" was included in "TEA and 'Statutory Authority—' a Refresher," a document that the TEA asserts it provided to Director Comer. TEA Br. 9. By the TEA's own assertion, Director Comer was on notice of "What We Mean By 'Curriculum.'"

* Creationism is a religious belief, not science (*see Aguillard*, 482 U.S. at 593; *Freiler*, 185 F.3d at 346);

* In *Epperson*, *Aguillard*, *Selman*, *Kitzmiller* and *Freiler*, creationists attempted (unsuccessfully) to promote the religious belief of creationism by teaching it as science;

* The only reference to the policy in the record is in the Termination Memo, where the TEA states that "teaching creationism" is a "subject directly related to the science education TEKS" (USCA5 at 31 (Compl. Ex. B)), and that is the subject on which it must avoid creating the perception of bias;

* 135 Texas biology professors condemned the TEA's policy as a sham, designed to promote creationism (*see* USCA5 at 73 (Compl. Ex. P) (letter to head of the TEA, Robert Scott, stating "[t]here can be no neutrality" on whether creationism is science, because it is "scientifically and legally clear-cut" that it is not)); and

* In their 2006 statement, the Science Teachers Association of Texas reported that teachers are "being pressured to introduce nonscientific views, including creationism." *See* USCA5 at 44 (Compl. Ex. F).

Despite the foregoing, the TEA argues that to a reasonable observer, "[n]othing in the TEA neutrality policy *remotely suggested* the teaching of creationism as science." TEA Br. 3 (emphasis added). That observation requires

turning a blind eye to all of the foregoing, especially to the TEA's own statement in the Termination Memo that it fired Director Comer for her failure to remain neutral on "teaching creationism." USCA5 at 31 (Compl. Ex. B).

The TEA's reference in its Statement of Facts (but nowhere in its Argument) to Comer's alleged performance issues is legally irrelevant.[6] To the extent the TEA is trying to offer a "mixed-motives" defense as in an employment discrimination case,[7] the effort fails. *See Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 309-10 (5th Cir. 2004) ("A mixed-motives case arises when an employment decision is based on a mixture of legitimate and illegitimate motives. . . . If the employee proves the unlawful reason was a motivating factor, the employer must demonstrate that it would have taken the same action in the absence of the impermissible motivating factor."). The TEA has not told and cannot tell the Court

[6] Were this case to proceed to trial, Director Comer, a recipient of numerous awards throughout her 30-plus year career as a science educator, would vigorously dispute that there are any legitimate bases for criticism of her performance. *See, e.g.*, Compl. ¶ 12 (noting Director Comer's various accomplishments).

[7] Because Director Comer was fired for violating an unconstitutional policy, she resembles a Title VII plaintiff who was retaliated against for opposing an illegal policy (rather than a plaintiff who was fired for being a member of a protected class). This Court has refused to apply a "mixed-motives" defense to claims similar to those of Director Comer's. Following at least two of its sister circuits, "[t]his court has not extended the holdings of either *Desert Palace* [*v. Costa*, 539 U.S. 90 (2003)] or *Rachid* so as to apply the mixed-motives analysis to Title VII *retaliation* claims." *McCullough v. Houston County*, 297 F. App'x 282, 289 n.7 (5th Cir. 2008); *see also McNutt v. Bd. of Trustees*, 141 F.3d 706, 709 (7th Cir. 1998) (holding that the text of the statute shows Congress intended that retaliation claims should not get mixed-motives analysis); *Woodson v. Scott Paper Co.*, 109 F.3d 913, 933-35 (3d Cir. 1997) (same). Therefore, the TEA cannot claim that the Court should disregard its reliance upon an unconstitutional policy in firing Director Comer by citing alternative "mixed-motive" justifications for the action.

what an employer must say to succeed with a mixed-motives defense: that is, "even if Comer had not forwarded that email, we would have fired her for the other [alleged] performance issues."

The TEA's Termination Memo proves that it would not have fired Comer for the pre-forwarding-email events, because it is undisputed that it did not do so. *See* USCA5 at 31 (Compl. Ex. B). By calling Director Comer's forwarding of the email the "final straw" (TEA Br. 13), the Agency re-enforces that but for Comer's forwarding of the email in violation of the creationism policy, she would not have been fired.[8] No reasonable observer could conclude that Comer was fired for any reason other than creationism.

II. THE DISTRICT COURT ERRED IN GRANTING THE AGENCY SUMMARY JUDGMENT BY MISAPPLYING RULE 56.

The Agency's brief is silent about an entire argument in Comer's Brief: that the district court erred in granting the TEA's motion for summary judgment because it construed numerous factual inferences against Director Comer while also crediting various factual assertions of the TEA that are unsupported by the record, in violation of Rule 56. Comer Br. 33-38. The district court made

[8] *See Machinchick v. PB Power, Inc.*, 398 F.3d 345, 355 (5th Cir. 2005) ("[T]he employer may seek to avoid liability by proving that it would have made the same decision *in the absence of the illegitimate discriminatory motive*.") (emphasis added); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989) ("The employer instead must show that its legitimate reason, *standing alone*, would have induced it to make the same decision.") (emphasis added) (cited in *Garcia v. City of Houston*, 201 F.3d 672, 676 (5th Cir. 2000)).

outcome-determinative errors in finding no connection between Director Comer and the curriculum and the classroom (despite the TEA's numerous statements in the record establishing the connection); in misapplying *Lemon*'s "reasonable observer" construct (by denying the observer the historical context of the creationism cases and knowledge of key parts of the record); and in expanding the creationism policy to include all curriculum issues before the Board (despite the absence of any evidence of a Board directive and the presence of evidence in the record limiting the policy to creationism). All resulted from the district court's failure to "view the facts and inferences to be drawn therefrom in the light most favorable to the nonmoving party" and to "consider all of the evidence in the record." *See* R.E., Tab 2, at 10 (citing *Commerce & Indus. Ins. Co. v. Grinnell Corp.*, 280 F.3d 566, 570 (5th Cir. 2002) & *Austin v. Will-Burt Co.*, 361 F.3d 862, 866 (5th Cir. 2004)); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

One particularly noteworthy error by the district court was in crediting the Agency's unsupported assertions, repeated throughout its appellate brief, that it needed to avoid creating a perception of bias about teaching creationism or matters that are "under consideration" or "may be considered by the Board." TEA Br. 10 (citing USCA5 at 205). The TEA's failure to proffer any such evidence renders the district court's grant of summary judgment to the Agency inappropriate. *See,*

e.g., *Anderson*, 477 U.S. at 248; *Faruki v. S.I.P., Inc.*, 123 F.3d 315, 319-20 (5th Cir. 1997) (summary judgment reversed where district court failed to grant inferences to non-movant).

CONCLUSION

For these reasons, the Court should reverse and vacate the district court's decision.[9] Specifically, it should grant Director Comer's motion for summary judgment and vacate the grant of summary judgment for defendants, as well as the dismissal of plaintiff's complaint. At a minimum, this Court should vacate the grant of summary judgment to defendants, plus the order dismissing the complaint, and remand for further proceedings.

Contrary to the TEA, Director Comer believes that oral argument would be constructive and reiterates her prior request.

Respectfully submitted,

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[9] *See, e.g.*, *Aubris Res. LP v. St. Paul Fire & Marine Ins. Co.*, 566 F.3d 483, 490 (5th Cir. 2009) (summary judgment in favor of defendant/appellee was vacated and this Court rendered judgment for the plaintiff/appellant).

CERTIFICATE OF COMPLIANCE

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/s/ Douglas B. Mishkin
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I certify that two copies of the foregoing REPLY BRIEF FOR APPELLANT was served on the following counsel of record by FedEx, and electronically on compact diskette in PDF format this 13th day of November 2009:

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