IN THE COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JOHN FRESHWATER, Appellant, v. MOUNT VERNON CITY SCHOOL DISTRICT BOARD OF EDUCATION, Appellee.	)	CASE NO. 11-CA-000023 Trial Court Case No. 11AP02-0090

APPELLEE MOUNT VERNON CITY SCHOOL DISTRICT BOARD OF EDUCATION'S BRIEF

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RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR

The Court below did not abuse its discretion in affirming the termination of Appellant's teaching contract(s) for good and just cause because there was substantial, reliable and probative evidence in the record to support the Board's decision to terminate Appellant's employment in accordance with the findings of the Referee's Report and Recommendation.

ISSUES FOR REVIEW

I. Does a trial court abuse its discretion by choosing not to hold a hearing it considers unnecessary, as permitted by R.C. § 3319.16, or is such a decision plainly within the court's judgment?

II. Did the trial court abuse its discretion when it affirmed the firing of a public school teacher for his use of the non-scientific religious principles of creationism and Intelligent Design in his eighth grade science classroom to dispute the scientific explanation of evolution, or did the trial court properly exercise its discretion in affirming the School Board's decision because the record showed the teacher's actions violated the School Board's Bylaws/Policies and exposed the Board to a violation of the First Amendment's Establishment Clause by unlawfully promoting religion, which gave the School Board good and just cause to terminate the teacher's employment?

III. Did the trial court abuse its discretion in affirming the School Board's decision that a public school teacher does not have the right to act in defiance of direct instructions and orders of his superiors to remove all items in his classroom that formed a religious display, or did the trial court properly exercise its discretion in affirming the School Board's decision to fire him for good and just cause for his direct acts of insubordination in refusing to follow lawful directives?

IV. Did the trial court abuse its discretion affirming that a School Board did not have an unconstitutional animus toward a public school teacher's perceived religious faith when it terminated his employment for good and just cause for his use of the non-scientific religious principles of creationism and Intelligent Design in his eighth grade science class and for insubordination for his refusal to remove all items of a religious nature that formed a religious display from his classroom, or did the trial court properly exercise its discretion in affirming the School Board's decision because the teacher left the Board no option but to terminate his employment because he refused to teach eighth grade science without injecting religion into his classroom?

I. STATEMENT OF THE CASE

Pursuant to App. R. 16 (B), Appellee Board of Education ("Appellee" or "Board") includes a statement of the case and a statement of the facts because it is dissatisfied with Appellant John Freshwater's ("Appellant" or "Freshwater") inaccurate statements.

This case is before this Court on appeal from the October 5, 2011 decision of the Knox County Court of Common Pleas that affirmed Appellee's January 10, 2011 resolution to terminate Appellant's employment. The matter began in June 2008 when Freshwater requested a hearing, pursuant to R.C. § 3319.16, after the Board resolved to consider the termination of his teaching contract. Pursuant to R.C. § 3319.16, a public hearing was held before Referee R. Lee Shepherd, Esq. The Referee presided over 38 days of witness testimony from over 80 witnesses that generated over 6,000 pages of transcript. The Referee also admitted approximately 350 exhibits into evidence. The hearing process took nearly two years to complete. The Referee issued his Report on January 7, 2011, recommending the Board terminate Freshwater's employment contract(s) for good and just cause.

On January 10, 2011, the Board adopted the Referee's Report and resolved to terminate Freshwater's employment for two main reasons. First, Freshwater injected his personal religious beliefs into his plan and pattern of instructing his students that also included a religious display in his classroom, and second, insubordination. (Jan. 10, 2011, Board Resolution, pp. 2-4, attached at Appendix 1).

Ohio Revised Code Section 3319.16 governs the termination of public school teachers and states a teacher must not be terminated except for good and just cause. The statute also permits public school teachers to file an original action in the court of common pleas to appeal his or her termination by a board of education. On February 8, 2011, Freshwater filed such an action to appeal the Board's decision to the Knox County Court of Common Pleas.

On October 5, 2011, the trial court entered a Journal Entry affirming the Board's decision to terminate Freshwater, finding in the record "clear and convincing evidence" of good and just cause. As permitted by R.C. § 3319.16, the Court found Freshwater's request for it to conduct additional hearings not well-taken, based on the depth and breadth of witnesses and exhibits presented at the Referee's hearing. On November 2, 2011, Freshwater appealed that decision to this Court.

II. STATEMENT OF THE FACTS

The Mount Vernon Board of Education operates the Mount Vernon City School District and educates over 4,000 students. In 2003, Freshwater, one of the Board's eighth grade science teachers, petitioned the Board to add a policy permitting teachers to educate students on the alleged "controversy" surrounding evolution. This proposed policy was created by the Intelligent Design Network organization. His request was denied. In early December 2007, Freshwater used a Tesla Coil in class to demonstrate the effects of the electrical arc it produced on inert gases. During one such demonstration, he burned the shape of a cross onto a student's arm with the device, causing the student's parents to complain to the school. That complaint led to an investigation of Freshwater that yielded the bases for the termination of his employment, including the fact that Freshwater disregarded the Board's denial of his earlier petition and taught religious creation theories to dispute the science of evolution.[1]

The Board investigated Freshwater not for his religious beliefs, but because he was the only teacher about whom the administration received complaints about his use of religion in his classroom. For instance, parents complained to Superintendent Steve Short that Freshwater had the Ten Commandments and other religious items posted in his room. (Tr. 70). Short had the

[1] Ultimately, the Board did not use the Tesla Coil incident to terminate Freshwater. (*See* Referee's Report, at 2; *see also* Jan. 10, 2011, Board Resolution), attached at Appendix 1.

middle school principal inspect Freshwater's classroom who reported that, in addition to the religious posters, Freshwater had a box of Bibles in his room and a Bible on his desk. (Tr. 70-71). The burned student's family, through their attorney, raised other complaints to the school district, including that Freshwater taught his own religious beliefs and referred to his Bible in class. (Board Ex. 3). Then, even after the administration talked to Freshwater about the complaints and concerns of religion in his classroom, he offered an extra credit assignment to his class to watch the movie "Expelled, No Intelligence Allowed," a documentary associated with Intelligent Design ("ID"), the latest incarnation of creationism. (Board Ex. 4). The Board decided to have an independent company, HR OnCall, investigate Freshwater because of the seriousness of the complaints against him. (Board Ex. 6).

The investigation revealed many students, teachers, and other Board employees witnessed Freshwater use the Bible and espouse his religious views in his classroom. (*See* Board Ex. 6). For instance, Katie Beach, a special education teacher who spent time in Freshwater's classroom, testified she witnessed Freshwater tell his students "that the Bible was his truth...that he believed that that's as far back as we can trace our earth and our planet." (Tr. 960-63). He also taught "the dating methods in science, such as radiometric or carbon dating were not accurate..." (Tr. 963). Beach witnessed Freshwater tell his students the Big Bang theory could not explain how such a complex world was created and to look to the Bible as an alternative. (Tr. 962).

Freshwater discussed Easter and the meaning of Good Friday in class. (Tr. 345). He referred students to the Answers in Genesis website, which advocates creationism. (Tr. 471-72). He showed a video in class and at a Fellowship of Christian Athletes meeting called "The Watchmaker" that advocates ID and creationism. (Tr. 343, 1005-06, 3128; Board Ex. 17). He

also gave handouts in class that taught ID and creationism. His teaching methods indisputably endorsed Christian religious beliefs.

Freshwater's classroom was full of religious items. In the front of his room was a bulletin board containing two neon banners from the Cross Club (FCA); a poster of the Ten Commandments; a poster of President Bush and his cabinet in prayer featuring a Bible verse, James 5:16: "The effectual fervent prayer of a righteous man availeth much;" and a poster advocating the evangelical Will Graham Celebration. (Board Exs. 25, 27; Tr. 969). Posters on Freshwater's cabinet doors displayed Bible verses. (Tr. 3780-81, 5950; Board Exs. 26, 106-108). Three additional copies of the Ten Commandments were posted next to his classroom door, his Bible sat on the top of his desk and two boxes of Bibles were in the back of his room. (Board Ex. 28-29; Tr. 70-71).

On April 7, 2008, middle school principal William White directed Freshwater to remove all items from his classroom that made up his religious display and to take his Bible off of his desk and keep it out of sight when students were in the room. (Tr. 75, 442-43, 506). Principal White met with Freshwater three days later, discovered nothing had been removed, and again ordered him to comply with the April 7, 2008 directive. (Tr. 4409-10; 506-12). After another three days, White discovered that, once again, not a single item had been removed. White set a compliance date of April 16, 2008, and Freshwater knew that his failure and refusal to do so would be insubordination. (Tr. 447-48, 512-13; Board Ex. 13). Prior to the deadline, Freshwater added two more books from the school library, The Oxford Annotated Bible and *Jesus of Nazareth*, to his display on a student lab table in order to make a statement. (Tr. 444-47, 6257; Board Ex. 102-103; Employee Ex. 148). By the deadline, Freshwater had removed some items, but refused to remove his personal Bible, the library Bible, Jesus *of Nazareth*, and the poster of

President Bush and his cabinet in prayer with Bible quote. (Board Ex. 45-47). He did not express to the Board his refusal to remove his Bible from his religious display until after he went public with his decision. Freshwater announced his resolution not to remove his Bible at a public press conference on Mount Vernon's public square, and then gave the Board formal, written notice. (Board Ex. 14, 105).

The discovery of Freshwater's religious instruction and his refusal to remove the religious display, as directed, triggered the Board to adopt a resolution to consider termination of his employment. The Board followed all of the applicable procedures in R.C. § 3319.16, and impartial Referee Shepherd recommended the Board terminate Freshwater for good and just cause. The Referee found "Freshwater was determined to inject his personal religious beliefs into his plan and pattern of instruction of his students. In doing so, he exceeded the bounds of all of the pertinent Bylaws and/or Policies" of the Board. (Referee's Report, at 3, attached at Appendix 1). Additionally, Freshwater improperly participated in Fellowship of Christian Athletes ("FCA"), a student Christian club, in violation of the FCA Handbook (Referee's Report, at 8). The Referee also found Freshwater's refusal to remove all items of his religious display and adding more books to it was an act of "defiance, disregard, and resistance." (Referee's Report, at 10). The Referee concluded his Report by finding that Freshwater's use of religion in his class and failure to objectively instruct his students repeatedly violated the Establishment Clause and gave the Board good and just cause to fire him. He also found that Freshwater's repeated acts of defiance also constituted good and just cause for his firing. (Referee's Report, at 13).

III. ARGUMENT

A. Summary

The Board did not violate any of Freshwater's rights when it terminated his employment. The trial court did not abuse its discretion in upholding the Board's decision for a number of reasons. Under R.C. § 3319.16, the court had the discretion whether to hold a hearing. It chose not to because the record from the administrative hearing was so extensive. There was no need for another hearing. Appellant was not entitled to introduce new evidence with the trial court. It was up to the trial court to decide whether to admit additional evidence. It chose not to. Regardless, Appellant has not demonstrated that his Exhibit B would be admissible. It does not prove anything and was appropriately excluded.

Furthermore, Freshwater had no right to espouse on religious principles in his eighth grade science class, but he always found a way to add religious ideas to his teaching. He couched his proselytizing as teaching a controversy or "all sides" of scientific concepts, such as evolution. Yet, the controversy and the "other side" of evolution to which he refers is distinctly religious in nature. It is unconstitutional to teach the religious controversy between creationism/ID and evolution in a public middle school. Freshwater abused his role as monitor of the FCA by inappropriately leading prayer at meetings and contacting speakers for FCA events. Freshwater's actions exposed the Board to Establishment Clause violations and it had a right to stop his conduct. As an employee of the Board who is hired to teach science, Freshwater had no free speech right to espouse on religious principles in class. The Board had a right to control its own speech and prevent Appellant from distorting its curriculum by adding religion to it.

Freshwater did not have the academic freedom to teach religious principles in a public middle school because the children are impressionable and class is mandatory. His use of

religion in the classroom tipped the Board's neutral stance on religion into religious promotion. The Referee found Freshwater's incessant use of religion in his classroom, in violation of the Establishment Clause, constituted good and just cause for his firing.

Freshwater further maintained a religious display in his classroom consisting of various religious items on doors, windows, cupboards, desks, and the like. He kept his personal Bible out for all to see and referenced it during class time. The Board ordered Freshwater to remove all items that made up his religious display. He flatly refused. Freshwater had no right to keep his Bible on his desk during class time when it was part of a religious display the Board had every right to order be removed. His insubordination was good and just cause for his firing. The trial court did not abuse its discretion because there was more than a preponderance of evidence to support the Board's decision. Indeed, the trial court found clear and convincing evidence that the Board lawfully terminated Appellant's employment.

B. Standard of Review

An appellate court's review is limited to whether the common pleas court, in its review of the board's decision, abused its discretion. *Graziano v. Amherst Exempted Village Bd. of Edn.*, 32 Ohio St.3d 289, 293, 513 N.E.2d 282, 285 (1987). "An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Wolfe v. Ohio Motor Vehicle Dealers Bd.*, 5th Dist. No. 2003CA00231, 2004 Ohio 122, 2004 Ohio App. LEXIS 111, ¶19 citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Absent an abuse of discretion, this court may not substitute its judgment for the judgment of the common pleas court. "The Court must simply review whether there was evidence in the referee's findings and recommendation, the Board's resolution and order of termination to support the common pleas court's decision." *Johnson v. Edgewood City*

Sch. Dist. Bd. of Edn., 12th Dist. No. CA2008-09-215, 2009-Ohio-3827, 2009 Ohio App. LEXIS 3223, ¶ 24. If there is evidence to support the trial court's decision, then the lower court did not act unreasonably, arbitrarily, or unconscionably. *Kitchen v. Bd. of Edn.*, 12th Dist. No. 2006-09-234, 2007-Ohio-2846, 2007 Ohio App. LEXIS 2643, at ¶ 1-2.

To provide the context in which the abuse of discretion standard is applied, the standard of review regarding the lower court and the Board's decision is further explained. An Ohio public school teacher's contract may be terminated for good and just cause in accordance with R.C. § 3319.16. "When a contract termination proceeding is conducted by a referee pursuant to R.C. § 3319.16, a board of education must accept the referee's findings of fact unless they are against the greater weight, or **preponderance**, of the evidence." *Aldridge v. Huntington Local Sch. Dist. Bd. of Edn.*, 38 Ohio St.3d 154, 527 N.E.2d 291 (1988), syllabus (emphasis added). "The school board has the discretion to accept or reject the [Referee's] recommendation unless such acceptance or rejection is contrary to law." *Id.* at syllabus. Importantly, "both the findings and recommendations of the referee are accorded due deference because it is the referee who is best able to observe the demeanor and credibility of the witnesses." *Kitchen*, 2007-Ohio-2846, 2007 Ohio App. LEXIS 2643, ¶ 16.

The common pleas court's review of a board's decision is not de novo, but R.C. § 3319.16 "empowers the court to weigh the evidence, *hold additional hearings if necessary*, and to render factual determinations." *Id.* (emphasis added). *See e.g.*, *Wolford v. Bd. of Edn. of Newark City Sch. Dist.*, 5th Dist. No. 92-CA-5, 1992 Ohio App. LEXIS 4675 (Sept. 8,1992). A common pleas court may reverse a board's order of termination only where it finds that the order is not supported by or is against the weight of the evidence. *Hale v. Lancaster Bd. of Edn.*, 13 Ohio St.2d 92, 234 N.E.2d 583 (1968), at syllabus. "If substantial and credible evidence is presented to

support the charges of the board, and a fair administrative hearing is had, the [common pleas court] court *cannot substitute its judgment for the judgment of the administrative authorities.*" *Strohm v. Reynoldsburg City Sch. Dist. Bd. of Edn.*, 10th Dist. No. 97APE07-972, 1998 Ohio App. LEXIS 1375, at 12 (Mar. 31, 1998) (emphasis added).

The trial court found clear and convincing evidence to support its decision despite the applicable preponderance of the evidence standard. Because of that evidence, Appellant seeks to divert this Court's attention to other issues and encourage it to engage in an impermissible de novo review.

C. The Trial Court Did Not Abuse Its Discretion by Denying Freshwater an Additional Hearing Because it is Permitted to "Hold Additional Hearings as it Considers Advisable" Under R.C. § 3319.16.

The trial court had the discretion to conduct additional hearings and chose not to. Revised Code Section 3319.16 states that a court of common pleas "shall examine the transcript and record of the hearing and *shall hold such additional hearings as it considers advisable....*" (emphasis added). In other words, a trial court can hold additional hearings, if necessary. *See Elsass v. St. Marys City Sch. Dist. Bd. of Edn.*, 3rd Dist. No. 2-10-30, 2011-Ohio-1870, 2011 Ohio App. LEXIS 1609, ¶ 43. Here, the lower court determined additional hearings were unnecessary. It held that, "[b]ased on the number of witnesses and exhibits presented at the Referee's hearing held over a period of twenty-one months, the Court finds Freshwater's request that the Court conduct additional hearings is not well taken." (Appellant's Ex. A). The Court acknowledged the extensive nature of the record, noting Freshwater's administrative hearing consisted of 38 days of witness testimony from over 80 witnesses generating 6,344 pages of transcript and included 350 exhibits. *Id.* The court determined it need not conduct an additional hearing due to the extensive nature of the record. The court's decision not to hold yet another hearing was eminently reasonable, not an abuse of discretion.

Furthermore, the court fulfilled its duty under R.C. § 3319.16 by examining the transcript and record of the hearing. After the court's examination, it found clear and convincing evidence to support the Board's termination of Freshwater's employment for good and just cause. *Id.* The court was not required by any law to put forth an extensive analysis of its decision and Appellant has cited no authority to the contrary. The record spoke for itself. Therefore, Appellant's argument that the lower court's decision to not hold an additional hearing was "unreasonable, arbitrary, and unconscionable, and therefore constitutes an abuse of discretion" must fail. (Appellant's Brief, pp.18-19).

D. The Trial Court Did Not Abuse Its Discretion by Denying Appellant an Additional Hearing Because He is Not Entitled to Introduce Additional Evidence.

Freshwater was not entitled to introduce additional evidence at the trial court. Section 3319.16 grants a trial court the discretion to hold a hearing. If it does, the trial court "*may consider other evidence* in addition to the transcript and record." R.C. § 3319.16 (emphasis added). The statute left the decision of whether to consider other evidence to the discretion of the trial court.

Despite the applicable standard, Appellant claims that "because the court held no hearing, it was unable to consider the highly relevant exonerating information ... that became available following the Board's adoption of its Resolution." (Appellant's Brief, at 7). Specifically, he claims he acquired records after the close of the administrative hearing that show Jim Stockdale, who testified he heard Freshwater tell students homosexuality is a sin, was not in school on the date he said Freshwater made the statement. Freshwater fails to show why his Exhibit B should have been admitted as evidence in the first place, or why, for that matter, Freshwater did not attempt to have it admitted during the Referee's hearing. The lower court's decision not to hold

additional hearings or admit additional evidence was not an abuse of its discretion because Appellant would have had access to the records at the time of the hearing, had he wished to obtain them. Appellant claims the records were recently obtained. (Appellant's Brief, at 15). But, he does not argue that the records were unavailable during the Referee's hearing. Employee attendance records are public records that would have been available during the hearing had Appellant requested them. Appellant could have requested the records before Mr. Stockdale testified because he was well-aware of the issue before Stockdale took the stand, or he could have requested the records after his cross examination. He did not. Simply put, the "evidence" is not new and the trial court rightfully denied its consideration.

While inapplicable here because R.C. § 3319.16 is the exclusive statute regarding teacher terminations, R.C. § 2506.03 is an illustrative provision that speaks to the issue of whether a trial court must consider additional evidence in administrative appeals. Section 2506.03 provides that additional information must be considered when a transcript does not contain all of an appellant's evidence, if appellant, or his counsel, was not permitted to appear and present his case at the administrative hearing, testimony at the hearing was not made under oath, appellant was unable to present evidence due to a lack of subpoena power, or if the hearing officer failed to file conclusions of fact with his decision. None of the circumstances above would apply to Appellant, and he does not argue that they do. Consequently, there is no basis to deem the trial court's decision an abuse of discretion.

Moreover, even if Appellant's Exhibit B had been admitted, it does not negate the existence of good and just cause. Appellant claims his Exhibit B "conclusively demonstrates that the sole purported witness to this incident *was not in fact, in Freshwater's classroom on the day in question.*" (emphasis in original). This is wrong for two reasons. One, Exhibit B does not

conclusively establish anything. Even if it were evidence, Appellee could have argued against its probative value. The records could be incomplete or, most likely, the witness could have been mistaken as to the date he heard the comments. Two, there is no "day in question." The only fact that matters is that Mr. Stockdale witnessed Freshwater tell his students that the Bible says homosexuality is a sin and that, therefore, scientists, such as the ones who found a genetic link to homosexuality, are sometimes wrong. (*See* Tr. 4153). It is irrelevant what day he witnessed the comments being made. The fact that they were heard at all is what gave the Board cause for concern, and ultimately, corroborating evidence to support the good and just cause for Appellant's firing. The witness testified to Freshwater's homosexuality comments and the Referee weighed the testimony in his report that was adopted by the Board. It cannot be an abuse of discretion to affirm the Board's decision that was based, in part, on such testimony.

E. The Trial Court Did Not Abuse Its Discretion In Affirming the Board's Decision to Fire Appellant for Good and Just Cause For His Purposeful Use of His Classroom to Advance Religious Views.

1. Freshwater had no right to promote religion and teach his science class to doubt science.

The Board's decision was appropriately affirmed by the trial court because it has a right to control its own speech. The Board exercised control of its speech by preventing Appellant from continuing to improperly teach religion in class. An analysis of the government's regulation of speech ordinarily hinges on the context, or forum, in which the speech takes place. *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 961 (9th Cir. 2011). *See, e.g., Perry Edn. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-46, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983). The U.S. Supreme Court, however, has held that where the government acts as both sovereign and employer, this general forum-based analysis does not apply. *Pickering v. Bd. of Edn.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed.2d 811 (1968); *accord Garcetti v. Ceballos*, 547 U.S. 410,

417-19, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006); *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 80, 125 S. Ct. 521, 160 L. Ed. 2d 410 (2004). Instead, the Court applies a distinct *Pickering*-based analysis that "reconcile[s] the employee's right to engage in speech and the government employer's right to protect its own legitimate interests in performing its mission." *Roe* at 82. As initially described in *Pickering*, this analysis required only that courts balance "'the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* at 568. Since *Pickering*, however, the test has evolved. *See, e.g., Ceballos* at 423-24, 426. In *Ceballos*, the Court found that for the *Pickering* test to apply, a government employee's speech must not be made pursuant to his duties as an employee. *Id.* Hence, the analysis of *Pickering* and its progeny only comes into play if the speech is not made pursuant to the employee's duties and touches on a matter of public concern.

Freshwater's speech was indisputably made pursuant to his duties as an employee. When Freshwater, a middle school science teacher, "goes to work and performs the duties he is paid to perform, he speaks not as an individual, but as a public employee, and the school district is free to take 'legitimate and appropriate steps to ensure that its message is neither garbled nor distorted.'" *Poway*, 658 F.3d at 957 (9th Cir. 2011), *quoting Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833, 115 S. Ct. 2510, 132 L. Ed.2d 700 (1995). Appellee took legitimate and appropriate steps to ensure that one of its teachers did not distort its teaching of science to impressionable eighth graders by endorsing Christian religious beliefs.

Furthermore, a school board, through one of its teachers as a representative of the board, violates the Establishment Clause when he or she takes action that has a primarily religious purpose or effect. *See Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S. Ct. 2105, 29 L. Ed.2d 745

(1971). "The Establishment Clause forbids not just "teaching" religion, but any governmental action that endorses or has the primary purpose or effect of advancing religion." *Kitzmiller v. Dover Area Sch. Dist.*, 400 F.Supp. 2d 707, 727 (M. D. Pa. 2005), *citing Epperson v. Ark.*, 393 U.S. 97, 103, 89 S. Ct. 266, 21 L. Ed.2d 228 (1968). The "popular alternative theories" to the Big Bang theory and evolution that Freshwater taught in his class are not science. ID is not science and the concept cannot "uncouple itself from its creationist, and thus, religious, antecedents." *Dover* at 765.

The following selected examples, coupled with testimony about Freshwater's references to the Bible (Tr. 962-964; 344-346; 4254) and codeword "here,"[2] reveal the obvious religious purpose and effect of his speech. Freshwater taught students about religion in his classroom. A student survey was conducted in the ninth grade and it asked about what the student learned in science the previous year. (*See* Board Ex. 32). Many of Freshwater's former students answers' reveal Freshwater's teachings. One of Freshwater's former student's response to the question of the topic she enjoyed most the year before was "evolution and religion - I find those topics very interesting." (Board Ex. 32, p. 24). Another one of his students wrote that he enjoyed studying "cells, because they couldn't have happened on their own." *Id.* at 26. Another student answered the most important concept she learned was the debate between God or the Big Bang. *Id.* at 28. There are more examples. Board Exhibits 39-41, 49, 51, show a handout Freshwater used in his class to convey Intelligent Design. On the bottom of each handout, it asks the student to consider whether an ID is involved. The fill-in-the-blanks questionnaire promotes the student to question science. Freshwater also acknowledged assigning approximately a dozen students in his class to

[2] Freshwater encouraged students to use a codeword – "here" – to signal areas in the science textbook that were not necessarily provable, and in question. (*See,* Tr. 349; 2195-2196; 2209-2210; 2737; 2880; 4505). Specifically, Freshwater had his students use the word "here" to dispute topics such as radio carbon dating, billions-of-years-old rocks, and other science with the Christian creationist tenet of a "young earth" theory. (Tr. 2195-2196; 2208-2210; 2737; 2880).

go to www.answersingenesis.org, a creationist website which is blatantly hostile to science and promotes creationism. By its own description, it "seeks to expose the bankruptcy of evolutionary ideas...."(*See*, Tr. 347; 471-472; 4803; *see also* Bd. Ex. 23; Tr. 1544-1546; 6146-6150; 1382-1383). He also referred students to the *Watchmaker Video*, a non-scientific video which promotes ID. (*See* Board Ex. 17, and Board Ex. 59, which contains documentation of the author, a Christian Apologist website: www.kids4truth.com. The record is replete with such examples. As the Referee stated, "[A] great deal of evidence was presented, both as testimony and as exhibits, detailing John Freshwater's biased instruction" and, thus, the primarily religious purpose and effect of his speech. (*See* Referee's Report, page 4). He concluded Freshwater achieved his objective "overtly and covertly." *Id.*

Freshwater claims that the concept of ID is not inherently religious nor identified with any particular religion, which misses the mark because ID does not have to be identified with any particular religion. The pertinent Establishment Clause test is whether the government promotes religion over non-religion. In *Edwards v. Aguillard*, 482 U.S. 578, 586, 588-89, 107 S. Ct. 2573, 96 L. Ed.2d 510 (1987), the Supreme Court concluded that a challenged statute did not serve the legislature's professed purposes of encouraging academic freedom and making the science curriculum more comprehensive by "teaching all of the evidence" regarding origins of life. In *Edwards*, the state law already allowed schools to teach any scientific theory. The Supreme Court further held that the belief that a supernatural creator was responsible for the creation of human kind is a religious viewpoint. Thus, *Edwards* nationalized the prohibition of teaching creationism in public schools. *Id.* at 591. ID is the latest incarnation of creationism and is equally prohibited from being touted as a scientific alternative to evolution. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F.Supp. 2d 707, 709 (M. D. Pa. 2005). Freshwater is making the

same failed arguments found in *Edwards*. Therefore, the trial court could not have abused its discretion when its decision comported with U.S. Supreme Court precedent.

Additionally, Appellant relies on *Epperson*, 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed.2d 228 (1968) for two propositions: 1) the Bible is not completely off-limits in the public school system; and 2) the Establishment Clause forbids state actions that aid or oppose any religion. Yet, the Board's position does not violate *Epperson*. Appellant misunderstands the case's holding and analysis. The Bible is not completely off-limits in a public school system when the study of religions and the Bible are from a "literary and historic viewpoint, presented objectively as part of a secular program of education." *Epperson* at 107.

Freshwater taught eighth grade science. He did not teach the literary aspects of the Bible in an English class or from an historic viewpoint in a social studies class. He did not teach a comparative religion class and he did not present the Bible in an objective manner. Rather, he used the Bible and its teachings in class to dispute scientific concepts, facilitated discussion about the merits of ID and creationism, and spoke of his own belief in the Bible. Appellant asserts that *Epperson* permits the study of religions and the Bible where they "form part of a secular program of education as opposed to the inculcation of a religious creed." (Appellant's Brief, at 14). A teacher, however, does not have to inculcate a religious creed in his students to violate the Establishment Clause, he simply has to promote religion that tips the school district's neutrality into favoring religion. The Establishment Clause requires "government neutrality between religion and religion, and between religion and nonreligion." *Epperson*, 393 U.S. at 104.

Freshwater clearly promoted religion when he taught and facilitated discussion about inherently religious, non-scientific theories in his eighth grade science class. The Board's refusal to permit such action was not hostile to religion, but necessary to maintain religious neutrality.

Appellant implies the teaching of evolution is hostile to religion in that it scientifically explains the origins of humankind, which is antagonistic to Fundamentalist Christian beliefs in the literal interpretation of the Bible. Appellant conveniently ignores the *Epperson* Court's warning that "the state has no legitimate interest in protecting any or all religions from views distasteful to them." *Epperson* at 107 (internal quotations omitted). The teaching of evolution without the accompaniment of ID does not make its teaching hostile to religion simply because Fundamentalist Christians disagree with the theory. Evolution is not a religion and it is not anti-religious. It is simply a scientific theory to be taught in science class.

Appellant cannot rely on *Epperson*, yet he cites to this quote in support of his position:

> [T]he State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a *scientific theory or doctrine* where that prohibition is based upon reasons that violate the First Amendment (emphasis added).

Appellant's Brief p. 14. The Board did not violate Freshwater's First Amendment rights. The *Epperson* court struck down an Arkansas law that prohibited the teaching of evolution in the state's public schools; it did not in any way sanction the idea that teaching non-scientific, religious concepts in a science class maintains a public school's neutral position toward religion. The Board's decision to fire Appellant for promoting religion in his science class upholds, rather than violates, the First Amendment and solidly affirms the Board's religious neutrality.

i. Appellant had No Freedom of Speech Right When He Spoke as a Teacher for the Board.

The trial court did not abuse its discretion and its decision must be upheld because public employees have no free-speech rights when they speak pursuant to their official duties. *Ceballos*, 547 U.S. at 421, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006). The Sixth Circuit elaborated on the Supreme Court's holding in *Ceballos*, specifying that "the right to free speech

protected by the First Amendment *does not extend to the in-class curricular speech of teachers in primary and secondary schools made pursuant to their official duties.*" *Evans-Marshall v. Bd. of Edn.*, 624 F.3d 332, 334 (6th Cir. 2010) (emphasis added). "When it comes to in-class curricular speech at the primary or secondary school level, no other court of appeals has held that such speech is protected by the First Amendment." *Id.* at 343. The Free Speech Clause restricts government regulation of private speech; it does not apply to the government's own speech. *Pleasant Grove City v. Summum*, 555 U.S. 460, 129 S. Ct. 1125, 1129, 172 L. Ed.2d 853 (2009); *accord Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553, 125 S. Ct. 2055, 161 L. Ed.2d 896 (2005) ("the Government's own speech... is exempt from First Amendment scrutiny"). When a teacher speaks to students during school, he does so as a representative of the school and free-speech protections are inapplicable.

"When a teacher teaches, the school board does not regulate that speech as much as it hires that speech." *Evans-Marshall* at 340 (internal citations omitted). Expression is a teacher's stock in trade, the commodity he sells to his employer in exchange for a salary, and if it is the school board that hires that speech, it can surely regulate the content of what is or is not expressed. *Id.* "Only the school board has ultimate responsibility for what goes on in the classroom, legitimately giving it a say over what teachers may (or may not) teach in the classroom." *Evans-Marshall* at 340.

While it is true that teachers, like students, do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," that does not transform them into the employee *and* employer when it comes to deciding what, when, and how science is taught to eighth grade students in a public school. *See Evans-Marshall* at 340. Like the Sixth Circuit distinguished in *Evans-Marshall*, consider the difference between the speech of Freshwater and

Marvin Pickering, who were both teachers. *See Pickering,* 391 U.S. at 568, 88 S. Ct. 1731, 20 L. Ed.2d 811 (1968). When Pickering sent a letter to a local newspaper criticizing the school board, he said things that any citizen has a right to say. He did it on his own time and in his own name and the school district could not terminate him for his activity.

Yet, when Freshwater taught eighth grade science, he did something he was hired and paid to do, something he could not have done but for the Board's decision to hire him as a public school teacher. *See Evans-Marshall* at 340. The differences are clear. Freshwater was not speaking as an average citizen asserting his free speech right, but rather, he was speaking as a Board employee teaching Board students. Freshwater's speech in his classroom was not protected by the First Amendment. Therefore, the Board could not have violated Freshwater's free speech rights and the trial court did not abuse its discretion in affirming the Board's decision to terminate Freshwater's employment contract.

ii. Freshwater Claims Evolution is Just a Theory.

Freshwater claims evolution is just a "theory," not "fact." He believes his students should be aware of the difference, which he thinks permits him to have discussions with his class about the evidence for and the religious arguments against, evolution, in accordance with Board policies. (Appellant's Brief, at 9-10). This argument has failed before. *See e.g., Edwards*, 482 U.S. at 586, 588-89, 107 S. Ct. 2573, 96 L. Ed.2d 510 (1987). Appellant ignores the fact "evolution is more than a theory of origin in the context of science....evolution is the dominant *scientific* theory of origin accepted by the majority of scientists." *Dover*, 400 F.Supp. 2d at 743 (M. D. Pa. 2005) *citing Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286, 1309 (N.D. Ga. 2005).

In the context of science, a theory is not an idea or belief about something arrived at through speculation or conjecture. Rather, a scientific "theory" explains natural phenomena, predicts future occurrences or observations of the same kind, can be tested through experiment or otherwise verified through empirical observation, and is supported by a body of reliable knowledge. ID and creationism are not science. *See Dover.* Neither concept predicts future occurrences nor can be tested through experiment or empirical observation. In addition to not being science, ID and creationism are inherently religious principles that are inappropriate in an eighth grade science classroom. *Dover*, 400 F. Supp. 2d at 718, 726.

iii. Appellant Does Not Have Academic Freedom to Promote Religion.

The concept of academic freedom does not permit Freshwater to teach ID and creationism in his eighth grade science classroom. He was directed not to teach such topics, because teaching them is unconstitutional and against Board policy. Nonetheless, Appellant claims he was permitted to teach the religious principles. The concept of academic freedom is derived from the realm of higher learning in universities. *See Keyishian v. Bd. of Regents*, 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed.2d 629 (1967). The United States Supreme Court has never suggested that academic freedom of teachers extends to public school classrooms where the audience is made up of children and attendance is mandatory. *See Ceballos*, 547 U.S. at 417-19, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006). Instead, if anyone in a public middle school setting has "academic freedom," it is the school board, not any individual teacher. *Evans-Marshall*, 624 F.3d 332, 344 (6th Cir. 2010).

Appellant relies on *Keyishian*, to support his academic freedom argument. The plaintiffs in *Keyishian* were college professors and faculty of a state university. The arguments and conclusions made in that case were applicable to a university or college setting. For example, in

the same paragraph from which Appellant quotes, the Court stated that "to impose any strait jacket upon the intellectual leaders in our *colleges and universities* would imperil the future of our nation." *Keyishian* at 603 (emphasis added)(internal quotations omitted). Nowhere in its opinion did the Court relate its holdings to a public middle school science teacher. Indeed, the Sixth Circuit Court of Appeals has specifically held otherwise. The constitutional rules applicable in higher education do not apply in primary and secondary schools, where students do not choose whether or where they will attend school. *Evans-Marshall* at 343-44. The Sixth Circuit explained:

> Even to the extent academic freedom, as a constitutional rule, could somehow apply to primary and secondary schools, that does not insulate a teacher's curricular and pedagogical choices from the school board's oversight, as opposed to the teacher's right to speak and write publicly about academic issues outside of the classroom.

Id. at 344. The principle of academic freedom was "conceived and implemented in the university out of concern for teachers who are also researchers or scholars--work not generally expected of elementary and secondary school teachers." *Id.* at 343-44. In this case, Freshwater was an eighth grade science teacher in a public school and the Board had a responsibility to ensure he taught the approved curriculum and ceased promoting religion in the classroom. Appellant's attempt to hide his inappropriate conduct under the cloak of academic freedom must, therefore, fail.

Additionally, Freshwater cannot find solace in the Board's Bylaws and Policies concerning "Academic Freedom." (*See* Employee Ex. 84). Nothing in Policy 3218 permits Freshwater to inject the religious principles of creationism and ID into the Board's curriculum. Indeed, there is nothing "controversial" about teaching the science of evolution in eighth grade science class. To suggest otherwise, as Appellant does, is "a pretext to thrust an untestable

alternative hypothesis grounded in religion into the science classroom or to misrepresent well-established scientific propositions." *Dover*, 400 F.Supp. 2d at 765 (M. D. Pa. 2005).

iv. Freshwater's Actions Exposed the Board to Liability Under The Establishment Clause.

The trial court did not abuse its discretion because the record shows Freshwater's actions violated the Establishment Clause. Courts take seriously Establishment Clause violations in schools. Because schoolchildren are impressionable and their attendance at school is involuntary, courts are "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards*, 482 U.S. at 583-84, 107 S. Ct. 2573, 96 L. Ed.2d 510 (1987); *see also Lee v. Weisman*, 505 U.S. 577, 592, 112 S. Ct. 2649, 120 L. Ed.2d 467 (1992) (holding "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure" in the public school context).

The federal courts of appeals have consistently held that school districts can restrict speech that could give rise to a constitutional challenge even though the speech might ultimately be found not to transgress Establishment Clause limits. *See, e.g., Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1008 (7th Cir. 1990) (holding school board's prohibition on teaching of non-evolutionary theory of creation did not violate teacher's free speech rights, stating that avoiding "possible Establishment Clause violations" constitutes "legitimate concern"). If this were not the case, school districts would be charged with foretelling, at the peril of legal liability, precisely where the courts would draw the line between constitutionally permissible and impermissible activity. *See Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 476 (2d Cir. 1999) ("when government endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway, even though the conduct it forbids might not inevitably be determined to violate the

Establishment Clause."). A school district is responsible for a teacher's actions that violate the Establishment Clause when it learns of, and does not prohibit, the offending behavior. *See Steele v. Van Buren Pub. Sch. Dist.*, 845 F.2d 1492, 1496 (8th Cir. 1988); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 (5th Cir. 1995); *Hall v. Bd. of Sch. Comm'rs of Conecuh County*, 656 F.2d 999, 1000 (5th Cir. 1981).

Here, the Referee found that Freshwater did transgress Establishment Clause limits and recommended that the Board terminate Freshwater's employment after 38 days of hearing. The Trial Court determined that Appellee proved by clear and convincing[3] evidence that Freshwater created a religious display in his classroom and taught ID/creationism in his science class. Such conduct endorsed religion and exposed the Board to liability for a violation of the Establishment Clause.

The Board's actions do not constitute "outright hostility to religion" that violates the Establishment Clause's requirement of religious neutrality because Freshwater was the one who used religion in his classroom. (Appellant's Brief, at 12, 15). Tellingly, Freshwater's argument that the Board's reaction to his teaching was hostile to religion is an admission that his teaching methods were religious in nature. The Ninth Circuit thought it worthwhile to note that an argument such as Freshwater's is inherently inconsistent with his claims. *See Poway*, 658 F.3d at Footnote 22 (9th Cir. 2011). If Freshwater's speech does not contain some religious import, then this Court should be hard-pressed to see how the cessation of that speech evidences a "hostility

[3] The applicable standard is a preponderance of the evidence threshold, yet the Referee determined "the debate concerning the level of proof required in this matter need not be argued further. After a thorough review of the evidence... [the Referee determined] this matter by either and both a preponderance of the evidence and clear and convincing evidence." Referee's Report, at 11. The Trial Court also found clear and convincing evidence in the record to support its decision to affirm the Board's decision to terminate Freshwater's contract(s).

to religion." *Id.* In short, Freshwater's argument affirms that he promoted and taught religion in his classroom which exposed the Board to Establishment Clause liability.

2. Insubordination.

The trial court did not abuse its discretion in upholding Freshwater's firing for insubordination. Freshwater's repeated acts of defiance of his superiors' instructions were "fairly serious matters" and proper grounds for termination under R.C. § 3319.16. *See Yarian v. Struthers City Sch. Bd. of Edn.*, 7th Dist. No. 87 C.A. 95, 1988 Ohio App. LEXIS 2643, at *10; *see also Lanzo v. Campbell City Sch. Dist. Bd. of Educ.*, 7th Dist. No. 09 MA 154, 2010 Ohio 4779, 2010 Ohio App. LEXIS 4039. The Board accepted the finding of Referee Shepherd that Appellant had "acted in defiance of direct instructions and orders of the administrators (insubordination)." Specifically, the Referee found, and the Board agreed, that Appellant failed to comply with directives to "remove or discontinue the display of all religious articles in his classroom, including all posters of a religious nature" and "further, ...brought additional religious articles into his classroom, in a direct act of insubordination." (Board Resolution, at 2). Freshwater's display of religious items were not integrated into an appropriate secular curriculum and constituted a per se violation of the Establishment Clause. *Stone v. Graham*, 449 U.S. 39, 42 (1980); *ACLU of Kentucky v. McCreary County*, 354 F.3d 438 (6th Cir. 2003).

In spite of the clear and convincing evidence to the contrary, Appellant claims he complied "in good faith" with "lawful instructions" by administrators. (Appellant's Brief p. 16). The record, however, shows Principal White directed Appellant orally and in writing more than once to remove religious items from his classroom. (Tr. 512-13; Board Ex. 13). Specifically, White discovered the following items in Appellant's room:

Bulletin Board:

Two neon banners from the Cross Club (Board Ex. 27)

Poster of Ten Commandments (Board Ex. 25)

Poster of Evangelical Event - Will Graham Celebration (Board Ex. 25)

Poster of President Bush's Cabinet with a Bible Quote (Board Ex. 25 & 46)

Cabinets Located Above Student Science Lab Tables:

8 ½ x 11 pieces of paper mounted on construction paper that contained Biblical quotes (Board Exhibit 26, 106, 107 & 108)

Classroom Windows Next to Classroom Door:

Three copies of the Ten Commandments (Board Ex. 28)

Freshwater's Desk:

Freshwater's Bible displayed on the top of his desk during instructional time (Board Ex. 29)

Lab Table:

From April 14, 2008 through the remainder of the 2007-2008 school year, a second Bible on display next to a copy of a book titled *Jesus of Nazareth* (Board Ex. 47)

Freshwater also kept anti-evolution textbooks and videos in the science classroom. (*See* Board Ex. 6, at p. 7-8, and Board Ex. 48).

Appellant fails to mention that only after White directed him to remove religious items from his classroom did he check out religious texts from the school library and add them to his religious display on a student science lab table. (Tr. 514). Appellant testified that he defied and disregarded White's directives in order to "make a statement." (Tr. 4474-75; Board Ex. 6, p.13). As the Referee found, bringing these additional items to the classroom was an act "defiance, disregard, and resistance." (Ref. Report, at 10).

Appellant claims it is "nonsensical for the Board to terminate a teacher's employment based on the presence of school library books in his classroom," and that the order to remove the school's copies of the Bible and Jesus of Nazareth from his room casts an unconstitutional "pall of orthodoxy" on the school. (Appellant's Brief, at 17). The Board, however, did not order that the books be removed from the library or banned from the building. It told an eighth grade science teacher not to maintain a display of religious texts and items in his public school classroom, especially when that teacher has been teaching non-scientific, religious concepts to his impressionable students and referring them to the Bible.

Appellant tries to muddy the waters by claiming the Board is "out of sync with the moral fiber of our nation" by instructing him to remove that which he attempts to re-cast as a "patriotic poster." In reality, the poster shows President Bush praying with his cabinet and displays a Bible quote. The poster was part of Freshwater's religious display and he was insubordinate in not removing it when told to do so. Any suggestion now that the poster existed for the purpose of instruction on a patriotic theme pursuant to R.C. § 3313.601 is transparently disingenuous. The trial court exercised proper discretion in affirming Appellant's firing on this basis.

3. Appellant's discriminatory animus argument is untenable.

The record shows the Board had no discriminatory animus against Freshwater. Yet, he claims the Board fired him because of its discriminatory animus towards his perceived religious beliefs. He believes that the circumstances of his investigation and the facts upon which the Referee and the Board based his termination, suggest that a "discriminatory animus was a substantial motivation for the investigation and ultimate firing." (Appellant's Brief, at 18). As demonstrated above, and in the record, the Trial Court did not abuse its discretion in finding otherwise. The record reflects the Referee reviewed the entire record and issued a comprehensive

report. The Referee did not "rubber stamp" the Board's initial resolution to consider the termination of Appellant. Rather, the Referee's report highlighted numerous examples of Appellant's use of religion in his classroom and his insubordination. The Referee found religion at the forefront of the matter, not because the Board had a discriminatory animus against Freshwater, but because of Freshwater's actions. The record supports the Referee's recommendation and the Board's adoption of the Referee's Report. The Trial Court appropriately found the Board's decision was supported by clear and convincing evidence.

i. Religious discrimination claims would be improper before this Court.

To the extent Appellant's discriminatory animus argument can be construed as a religious discrimination claim under state and/or federal law, it is an impermissible attempt to distract this Court from its proper analysis. Freshwater did not argue the issue in such a fashion below and any religious discrimination claims he may have had were either voluntarily dismissed with prejudice in Federal court or dismissed by the Ohio Civil Rights Commission.

ii. Appellant's Equal Protection claim must fail because he spoke as a government employee and he cannot show that any other teacher committed comparable conduct.

Freshwater's attempt to invoke an Equal Protection claim must fail because all the "speech" of which Freshwater complains belongs to the government, and it has the right to speak for itself. *Poway*, 658 F.3d at 975 (9th Cir. 2011) (internal citations omitted). Since Freshwater had no individual right to speak for the government, he could not have suffered an equal protection violation. *Id. citing Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1017 (9th Cir. 2000) (holding "[b]ecause we determine that Downs has no First Amendment right to speak for the government, his equal protection claim based upon the deprivation of his asserted right also fails..."); *see Ceballos*, 547 U.S. at 421-22, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006)

("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It... reflects the exercise of employer control over what the employer itself has commissioned or created.")

The Board did not single out Freshwater. The record shows Freshwater singled himself out. He claims that other teachers had Bibles on their desks, but he was the only one targeted for termination. Freshwater was the only teacher found using his Bible in an unconstitutional manner. No other teacher's classroom was comparable to his. Other Mount Vernon teachers' classrooms and teachings have not been taken to convey a religious message. *See e.g., Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1019 (9th Cir. 2010). The Board received complaints about Freshwater, not any other teacher. Students learned about ID in Freshwater's class, not another teacher's class. Freshwater was the only teacher to refuse to remove his religious display. Thus, the trial court's decision was reasonable and supported by the evidence.

iii. The Tesla Coil incident led the Board to discover Appellant's improper conduct.

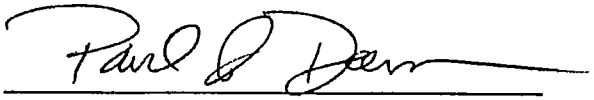
The Board did not use the Tesla Coil incident as a reason to terminate Freshwater. The Referee found that the Tesla Coil case was closed. The Tesla Coil incident, however, led to the discovery of other improper conduct. Appellant claims that "each and every cited basis for the decision was connected to the religious faith for which Freshwater had become infamous as a result of the rumors and speculation that stemmed from the sensationalized Tesla Coil incident." (Appellant's Brief, at 18). Whether there were rumors or speculation related to the Tesla Coil incident, the fact remains the Referee, Board, and trial court found no rumor or speculation regarding the facts that Freshwater taught ID and religious principles to eighth graders and that he was insubordinate in not removing all religious items that formed his religious display in his classroom. The lower court did not abuse its discretion in affirming the Board's decision to

terminate Appellant given the fact that Freshwater himself put religion and religious principles into his classroom against Board policy and the Establishment Clause.

IV. CONCLUSION

Freshwater inappropriately taught science with deference to religious beliefs and principles. He maintained a religious display in his classroom and was non-compliant with the Board's lawful directive to remove his religious display. According to the impartial Referee, both the unlawful religion in Freshwater's classroom and his insubordination were independent grounds which gave the Board good and just cause for his firing. The record contains substantial evidence to support the Board's decision to adopt the Referee's recommendation and Report. The trial court reviewed the extensive record and determined there was clear and convincing evidence to affirm the Board's decision. The trial court did not abuse its discretion in any way and its decision must be affirmed. Indeed, the trial court would have abused its discretion had it not affirmed the Board's decision.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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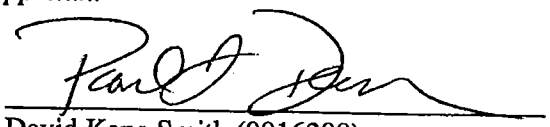

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