UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
(AUSTIN DIVISION)

CHRISTINA CASTILLO COMER, Plaintiff,	)	
v.	)	
ROBERT SCOTT, Commissioner,	)	**CA No. 1:08CV00511-LY**
Defendant.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Commissioner of Education Robert Scott's motion for summary judgment[1] ("Def's SJ Motion") essentially repeats the arguments in his pending motion to dismiss. Plaintiff Christina Castillo Comer ("Comer") responded to those arguments in her Memorandum of Points and Authorities In Support of Plaintiff's Motion For Summary Judgment and In Opposition to Defendant's Motion to Dismiss, filed September 18, 2008 ("Comer First Opp."). Comer adopts her First Opp. and her Statement of Undisputed Material Facts[2] in opposing Defendant's motion for summary judgment and explains briefly below how the omissions and admissions in Defendant's motion further support Comer's own pending motion and detract from Defendant's.

[1] Comer is no longer pursuing her claims against the Texas Education Agency. Comer First Opp. at 4, n.2.

[2] Defendant did not identify in its motion for summary judgment any particular facts that it asserts are both material and undisputed pursuant to Federal Rule of Civil Procedure 56(c). Should this Court treat Defendant's motion as setting forth any such facts, Plaintiff is incorporating by reference her Statement of Undisputed Material Facts that she filed in support of her motion for summary judgment. Defendant did include three affidavits with its motion for summary judgment, but none addresses, much less contradicts, any material facts that are the basis for Comer's motion.

1. Whether The Integrated Physics/Chemistry Course Should Count For Science Credit Cannot Be Equated With Treating Creationism As Science. Defendant tries to blunt the Constitutional infirmity of the "neutrality" policy " by arguing it is not limited to the issue of evolution versus creationism." Def's SJ Motion at 5. Even if true, that does not remove the infirmity. Whether "the course Integrated Physics and Chemistry should continue to count as a science credit" *(Id.)* is of no Constitutional interest; Defendant may remain neutral on that question. *See* Comer First Opp. at 15 (Defendant's eight examples of "contested curriculum issues" do not risk Constitutional violation). But under *Edwards v. Aguillard*, 482 U.S. 578 (1987), whether Defendant credits creationism as a valid scientific theory determines whether Defendant is complying with or violating the Establishment Clause.

2. Defendant's Hypothetical Highlights the Unconstitutional Flaw Of The "Neutrality" Policy. In trying to explain how its "neutrality" policy supposedly works, Defendant hypothesizes that "if a school district called TEA with a question about whether they must teach biological evolution in High School, the answer would be yes, because it is required by the current science TEKS." Def's SJ Motion at 4. That much is fine. But Defendant ignores the obvious next question: What if the same school district then asked, "Is creationism science?" According to the "neutrality" policy, the answer would be, "We cannot answer your question because we are neutral about creationism." That answer fails to fulfill the Agency's stated mission of providing "guidance" to schools (and the Director of Science's responsibility to "explain [the] law"); more significantly, it violates the Establishment Clause. Comer First Opp. at 2, 14.

3. The "Neutrality" Policy Is Pervasive. Defendant touts its challenged "neutrality" policy as pervasive and continuing. Under the heading "The Requirement of TEA Staff Neutrality on Curriculum Issues," Defendant reports that "this requirement has been communicated to TEA personnel concerned with curriculum matters, including the plaintiff, in a variety of ways." Def's SJ

Motion at 4. Defendant states that it does this by reminding staff "both in small groups and individually" and regularly during briefings prior to Board meetings. *Id.* at 5. Defendant's acknowledgement of the widespread application of the "neutrality" policy reinforces the need for injunctive relief to avoid future Constitutional violations.

4. **Defendant Now Concedes That TEA's "Neutrality" Policy Treating Creationism As Science Is Tied To Development of the Science Curriculum.** Defendant's pending motion to dismiss (at 6-7) strains to disavow any connection between the Agency and the curriculum, thus suggesting that the "neutrality" policy could not harm or affect the curriculum. Comer pointed out (Comer First Opp. at 14-15) that the Agency's own website establishes a direct connection (TEA "oversees development of the statewide curriculum"), as does Comer's job description (*Id.* at 3).

Now, in the subsequent motion for summary judgment, Defendant admits the connection between the "neutrality" policy and the curriculum.[3] Specifically, Defendant argues that Comer had to remain "neutral" on whether to teach creationism as science because that subject "was expected to be debated by the Board in the upcoming TEKS revision process." Def's SJ Motion at 7. But this argument underscores the unconstitutionality of the neutrality policy: *Aguillard* forecloses any such debate, because creationism is religion, not science, and teaching creationism as science impermissibly promotes religion in violation of the Establishment Clause. Comer First Opp. at 15.

5. **Defendant Misconstrues Comer's Due Process Claim.** Defendant's due process argument in its motion for summary judgment suffers from the same defect as in its motion to dismiss: it ignores the "constitutionally impermissible reason" basis for a government employee's

[3] Defendant's admission confirms the connection between the "neutrality" policy and the curriculum that is established by Defendant's website and its description of Comer's job. Comer First Opp. at 14-15. Although the admission is not necessary to the success of Comer's arguments, it is fatal to any effort by Defendant to deny the connection.

due process claim. Comer First Opp. at 19. Defendant fails to cite, much less address, *Megill v. Board of Regents*, 541 F.2d 1073, 1078 (5th Cir. 1976), which holds that a public employee is entitled to notice and opportunity to be heard if terminated for a "constitutionally impermissible reason." Nothing in Defendant's affiants' accounts of Comer's firing is material to a determination that TEA violated her due process rights.

CONCLUSION

For the foregoing reasons and for the reasons previously set forth in her Memorandum Of Points And Authorities In Support of Plaintiff's Motion For Summary Judgment and In Opposition to Defendant's Motion to Dismiss, Plaintiff Comer requests that this Court deny Defendant's motion for summary judgment.

Respectfully submitted,

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October 17, 2008

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of October, 2008, I served the foregoing PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, memorandum in support thereof, and proposed order via email and the Court's electronic system to Defendants' counsel, as follows:

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