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Western District of Texas

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Case Number: 1:08-cv-511
Filer: Texas Education Agency
Robert Scott
Document Number: 34

Docket Text:
REPLY to Response to Motion, filed by Robert Scott, Texas Education Agency, re [23] MOTION for Summary Judgment filed by Defendant Texas Education Agency, Defendant Robert Scott *Defendants' Reply in Support of Summary Judgment* (Todd, James)

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

CHRISTINA CASTILLO COMER Plaintiff,	§ § §	
v.	§	CA No. 1:08CV00511-LY
	§	
ROBERT SCOTT, et al., Defendants.	§ §	

DEFENDANT'S REPLY IN SUPPORT OF SUMMARY JUDGMENT

In response to Plaintiff's Opposition to Defendants' Motion for Summary Judgment (doc. 31), the defendant, Robert Scott, respectfully submits the following. In view of the plaintiff's declaration that she "is no longer pursuing her claims against the Texas Education Agency" (*id.* at 1 n. 1 (referring to her prior doc. 24 at 4 n. 2)), this brief will refer to the defendant (singular). However, because in his official capacity Commissioner Scott assumes the identity of the agency he directs, *Hafer v. Melo*, 502 U.S. 21, 26, 112 S.Ct. 358, 362 (1991), the brief will accordingly present the viewpoint of TEA.

1. The plaintiff has not created a fact issue as to whether she was terminated.

Now that the plaintiff has had a full opportunity to present summary judgment evidence, all of the facts presented in the Factual Background section of the defendant's summary judgment brief (doc. 23) at 3-9 and supporting evidence (docs. 23-2 and 23-3) remain uncontroverted. The plaintiff suggests in a footnote, without arguing in the text, that the defendant's MSJ did not "identify . . . any particular facts that it asserts are both material and undisputed . . ." Doc. 31 at 1 n. 2. Of course, the defendant did aver that the facts he presented "are established by evidence that cannot be controverted by competent summary judgment proof . . ." Doc. 23 at 3.

Whether a fact is material is a question of law. *John v. State of La. (Bd. of Trustees for State Colleges and Universities)*, 757 F.2d 698, 712 (5th Cir. 1985). In several instances in this case, whether a particular fact is material depends on the extent to which Comer can support an essential element of her claim. Thus, for example, the illusory "dispute" over whether she resigned or was terminated cannot "affect the outcome of the action"[1] unless the plaintiff can show that she had a right to notice and a hearing prior to termination.

Nevertheless, despite asserting the conclusion that TEA "did fire" and "was firing" Comer (doc. 24-2 ¶¶ 10, 12), the specific facts she presents in Plaintiff's Statement of Undisputed Material Facts (doc. 24-2) do not controvert those presented by the defendant as to the events of November 5-7, 2007.[2] The plaintiff has made no effort to satisfy the elements for constructive discharge. *See* the MTD (doc. 16) at 13 n. 3.

> The test that [plaintiff] must meet is an objective, "reasonable employee" test: whether a reasonable person in the plaintiff's shoes would have felt compelled to resign. . . . "[C]onstructive discharge requires a greater degree of harassment than that required by a hostile environment claim." Aggravating factors used to support constructive discharge include hostile working conditions or the employer's invidious intent to create or perpetuate the intolerable conditions compelling the resignation. The resigning employee bears the burden to prove constructive discharge.

Haley v. Alliance Compressor LLC, 391 F.3d 644, 650 (5th Cir. 2004) (citations omitted). Note that a plaintiff's failure to utilize agency grievance procedures can be fatal to such a claim. *Cuesta v. Tex. Dept. of Criminal Justice*, 805 F. Supp. 451, 459 (W.D. Tex. 1991).

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[1] *See Commerce and Industry Ins. Co. v. Grinnell Corp.*, 280 F.3d 566, 570 (5th Cir. 2002).

[2] The defendant's MSJ (doc. 23) at 8 (last full paragraph) mistakenly refers to the November 7th meeting as November 5th.

2. The TEA "neutrality policy" is constitutional.

The constitutionality of what Comer calls the defendant's "neutrality policy" is pivotal to all three of her "counts." Indeed, as shown in the defendant's opp. brief (doc. 28), all three counts are really the same claim. In this regard, replies are in order to just a few of the statements in the plaintiff's opposition brief.

In part 4 of her brief, the plaintiff characterizes the defendant as having "concede[d]" and "admit[ted]" that the "neutrality policy" is "tied to development of the science curriculum" and that there is a "connection between the 'neutrality' policy and the curriculum." Doc. 31 at 3. But this is not an admission or a concession, because the defendant has never denied a connection and it is not adverse to his legal position.

As previously discussed, the tie or connection has to do with the delineation and separation of responsibility for curriculum development between TEA and the State Board of Education. Because development of the substantive content of the curriculum is the responsibility (and authority) of the Board rather than TEA, the defendant requires that TEA staff avoid statements or conduct that could give the impression that the agency espouses a view as to what any curriculum component should or should not include.

In her brief, Comer persists with her insistence that a single line from the TEA web page somehow trumps the command of the Legislature that it is up to the State Board to "establish curriculum . . . requirements" and prescribe "essential knowledge and skills" for Texas public schools, while TEA provides staff assistance. *See* the statutory provisions cited in doc. 16 at 5-7. The plaintiff has not attempted to interpret or analyze the sections cited. In any event, the defendant's construction of the Texas Education Code is entitled to deference. *First American Title*

Ins. Co. v. Combs, 258 S.W.3d 627, 632 (Tex. 2008); *Moses v. Fort Worth Indep. Sch. Dist.*, 977 S.W.2d 851, 853 (Tex. App. – Fort Worth 1998, no pet.) (citing *Dodd v. Meno*, 870 S.W.2d 4, 7 (Tex. 1994)). *Accord Transitional Learning Community at Galveston, Inc. v. U.S. Office of Personnel Management*, 220 F.3d 427, 430 (5th Cir. 2000) (citing *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782 (1984)).

Conceding that the "connection" encompasses more than the evolution/creationism debate, Comer argues that the other examples of curriculum issues are distinguishable because they are "of no Constitutional interest."[3] Doc. 31 at 2. However, it is not difficult to imagine constitutional interest arising as to some of the other curriculum issues identified (doc. 16 at 7-8) as well, such as the portrayal of minorities in the history curriculum or the role of language instruction in the education of children with limited English proficiency.[4] *See also* the discussion in doc. 28 at 11-12.

The plaintiff offers a slightly different hypothetical from the one she advanced in doc. 24 at 14. In this one, a teacher asks the TEA science curriculum director if creationism is a science. Doc. 31 at 2. Again, the appropriate answer is that the state public school science curriculum does not include creationism. See doc. 28 at 6-7 & n. 5. Comer argues that her inability to discuss the merits of creationism "fails to fulfill the Agency's stated mission of providing 'guidance' to schools . . ." *Id.* However, even if that were true (which the defendant disputes for the reasons analyzed in part

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[3] As to Comer's argument that "*Aguillard* forecloses any such debate" (doc. 31 at 3), *see* the authorities quoted in doc. 28 at 12 n. 11. Although the state legislatures and school boards in the cases cited by Comer did not succeed in crafting policies that fit the *Aguillard* exception described therein, the fact that it remains theoretically available means that the SBOE is not constitutionally foreclosed from at least exploring the matter.

[4] The latter issue is pending before the Fifth Circuit in Commissioner Scott's and TEA's appeal from Judge Justice's decision in *U.S. v. Texas*, 572 F. Supp.2d 726 (E.D. Tex. 2008), in which the plaintiffs argue, *inter alia*, that inadequate bi-lingual education violates the constitutional equal protection rights of students with limited English proficiency.

1 of doc. 28), an agency's failure to fulfill its mission is a matter "of no Constitutional interest." *Cf. Ramirez v. Ahn*, 843 F.2d 864, 869 (5th Cir. 1988) ("the Constitution does not mandate error-free decision making").

In her insistence that "more significantly, [the policy] violates the Establishment Clause" (doc. 31 at 2), the plaintiff continues to overlook a critical distinction between her case and the public school classroom cases, such as *Aguillard*, on which she relies for her repeated assertion that a policy of neutrality necessarily implies approval of creationism as a science curriculum topic. As with the sentry dog that failed to bark,[5] silence gives consent,[6] as a matter of law, only when the speaker is expected to take a position on the matter in question. *See Hollingsworth v. State*, 78 Tex. Crim. 489, 182 S.W. 465, 474 (Tex. Crim. App. 1915) ("The maxim, 'Qui tacet consentire videtur,' . . . could not, in principle, be applicable [where] the party was not bound or interested to answer."); *accord Thompson v. U.S.*, 227 F.2d 671, 674 (5th Cir. 1955).

Because, for the reasons discussed in doc. 28 at 4-7 & 11, Comer was not expected to advise non-TEA personnel as to whether a topic not included in the science curriculum should or should not be included, requiring her to refrain from appearing to express a position on the subject could not have objectively conveyed a pro-religious message.

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[5] "'Is there any point to which you would wish to draw my attention?'
'To the curious incident of the dog in the night-time.'
'The dog did nothing in the night-time.'
'That was the curious incident,' remarked Sherlock Holmes." Arthur Conan Doyle, *Silver Blaze*, in SHERLOCK HOLMES: THE COMPLETE NOVELS AND STORIES vol. I (Bantam Books 1987) at 472.

[6] "The maxim is '*Qui tacet consentiret*': the maxim of the law is 'Silence gives consent.' If therefore you wish to construe what my silence betokened, you must construe that I consented, not that I denied." Robert Bolt, *A Man For All Seasons* (1960), act 2, in Bolt, THREE PLAYS (Mercury Books, London 1963).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically submitted for filing, a true and correct copy of the above and foregoing Defendant's' Reply in Support of Summary Judgment in accordance with the Electronic Case Files System of the Western District of Texas on this the 14th day of November, 2008, which will send notification to the following:

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CHRISTINA CASTILLO COMER Plaintiff,	§ § §	
v.	§	CA No. 1:08CV00511-LY
ROBERT SCOTT, Commissioner, Texas Education Agency, in his official capacity and TEXAS EDUCATION AGENCY, Defendants.	§ § § § § §	

ORDER

On this day the Court considered Plaintiff's Motion for Summary Judgment. After due consideration, the Court is of the opinion that the Motion is not meritorious and that it should not be granted. It is accordingly,

ORDERED that:

Plaintiff's Motion for Summary Judgment be and hereby is DENIED, and

Defendants' Motion for Summary Judgment be and hereby is GRANTED, and

The plaintiff's claims against the defendants be and hereby are DISMISSED.

SIGNED this _____ day of _____, 2008.

_____
HON. LEE YEAKEL
UNITED STATES DISTRICT JUDGE