

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

**CHRISTINA CASTILLO COMER,**

Plaintiff,

v.

**ROBERT SCOTT, Commissioner, et al,**

Defendants.

**CA No. 1:08CV00511-LY**

**PLAINTIFF'S MOTION FOR LEAVE TO SUPPLEMENT  
PLAINTIFF'S STATEMENT OF MATERIAL UNDISPUTED FACTS**

Plaintiff Christina Comer, by counsel, hereby moves this Court for leave to supplement her Statement of Undisputed Material Facts in support of her motion for summary judgment with one additional undisputed material fact.

The grounds for this motion are as follows:

1. At the December 17, 2008 hearing on the parties' respective motions for summary judgment, Defendant implied that creationism was or might be a subject under consideration by the State Board of Education when Defendant fired Plaintiff Christina Comer for forwarding an email announcing a lecture about creationism. *See, e.g., Hearing Tr. 21:13-17* ("...if it's a curriculum matter that's debated before the State Board of Education, and the State Board of Education is going to have to make a decision on it..."); *Hearing Tr. 25:11-12* ("...taking a position on an issue that the State Board has to decide.)

2. The one undisputed fact that Plaintiff wishes to add to her Statement of Undisputed Material Facts is:

17. Creationism was not under consideration by the State Board of Education on October 26, 2007, when Plaintiff Comer forwarded the email at issue in this case, or at any

time thereafter. See “Archived Schedules and Agendas” ([www.tea.state.tx.us/sboe](http://www.tea.state.tx.us/sboe)) of each of the seven meetings of the various committees of the State Board of Education from November 14-16, 2007 (the first such meeting after Comer forwarded the email) to September 2008, Ex. Q.

A copy of Plaintiff’s Supplement to Statement Of Undisputed Material Facts, and of the transcript of the December 17, 2008 motions hearing, is submitted herewith.

3. Accordingly, to the extent Defendant is arguing that creationism actually was considered by the Board when or after Plaintiff forwarded the email in question, that argument is factually unfounded. To the extent Defendant is arguing that creationism might be considered by the Board in the future, that argument is constitutionally wrong pursuant to *Edwards v. Aguillard*, 482 U.S. 578 (1987), which precludes such consideration.

For the foregoing reasons, Plaintiff Christina Comer requests that this Court grant her leave to supplement her Statement of Undisputed Material Facts.

Respectfully submitted,

/s/  
\_\_\_\_\_  
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/s/  
\_\_\_\_\_  
Douglas B. Mishkin (admitted *pro hac vice*)  
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202-457-6000

Counsel for Plaintiff

December 24, 2008

#### **RULE CV-7(h) CONFERENCE**

I hereby certify that I attempted without success to reach Defendant’s counsel, James Todd, on Wednesday, December 24, 2008 by telephone and by email. In my email I attached this motion, the proposed Supplement, Exhibit Q and the transcript of the motions hearing, and explained that I

was calling him pursuant to Rule CV-7(h). I also gave Mr. Todd phone numbers where he can reach me until January 5, 2009, when I will return to my office, should he wish to discuss this motion or an accommodation of his deadline for responding.

/s/  
Douglas B. Mishkin

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 24th day of December, 2008, I served the foregoing Plaintiff's Motion for Leave to Supplement Plaintiff's Statement of Undisputed Material Facts, and a copy of the proposed Supplement to Statement of Undisputed Material Facts, via email and the Court's electronic system to Defendants' counsel, as follows:

James C. Todd  
Texas Bar No. 20094700  
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General Litigation Division-019  
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*Attorney for Defendants Texas Education  
Agency and Robert C. Scott, in his individual  
capacity as Commissioner of the Texas Education Agency*

/s/ \_\_\_\_\_  
Douglas B. Mishkin

**CHRISTINA CASTILLO COMER,**

V.

Defendants.

## PLAINTIFF'S SUPPLEMENT TO

## December 24, 2008

United States District Judge