

FILED

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

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CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS

CHRISTINA CASTILLO COMER
Plaintiff,

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§

BY KW
DEPUTY

v.

CA No. 1:08CV00511-LY

ROBERT SCOTT, Commissioner, Texas
Education Agency, in his official
capacity and TEXAS EDUCATION
AGENCY,
Defendants.

DEFENDANTS' ORIGINAL ANSWER

As their Original Answer to the plaintiff's Complaint, defendants Robert Scott, Commissioner of the Texas Education Agency, in his official capacity, and the Texas Education Agency (TEA), respectfully submit the following, in the same order and numbering as the paragraphs in the Complaint.

Introduction

1. As merely the plaintiff's assertions of the basis for her lawsuit, this paragraph does not require admission or denial. The second sentence is a legal conclusion that the defendants are not required to admit or deny and which, moreover, misleadingly oversimplifies the relevant law. The defendants particularly deny the third, fourth, sixth and seventh sentences.
2. Admit.
3. The defendants admit only that the plaintiff was informed on November 8, 2007 that her termination had been proposed and approved, that her conduct in forwarding the email in question was part of one of the grounds for her proposed termination, and that Exhibit B to the Complaint is

accurately (but incompletely) quoted. *See* the defendants' answer to paragraph 45 below.

4. This paragraph consists of legal arguments and conclusions that the defendants are not required to admit or deny. However, the defendants deny that the plaintiff was terminated, that the plaintiff's proposed termination violated the Establishment Clause, that the defendants have employed the symbolic and financial support of the state to achieve a religious purpose, that any policy of the defendants has the purpose or effect of endorsing religion, that TEA takes any official position on whether creationism is a valid scientific theory, that TEA terminated the plaintiff without according her due process, and that the plaintiff was terminated for contravening an unconstitutional policy. As discussed more fully in the defendants' motion to dismiss, the plaintiff has, as a matter of law, misstated the "neutrality" policy in question.

Jurisdiction and Venue

5. The defendants admit that this Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343 but deny that it has jurisdiction under 42 U.S.C. §1983 or 28 U.S.C. §§2201 and 2202.

6. Admit.

Parties

7. Defendants admit only that the plaintiff was the Director of Science for the Curriculum Division in TEA, and held the position since May of 1998.

8. The first sentence is admitted, though the correct title is Commissioner of Education. Otherwise, the defendants admit only that the Commissioner is at the top of the chain of command over the individuals named, though he does not supervise them directly; that Ms. Martinez wrote a memorandum recommending the plaintiff's termination; and that the individuals named participated in the process, according to agency procedures, that could have concluded with the plaintiff's

termination had she not resigned.

9. The defendants admit only that TEA was created by the statutory predecessors to the provisions cited; that the Commissioner of Education heads TEA; that defendant Scott is the current Commissioner; that the Governor appoints the Commissioner; that TEA provides staffing assistance to the separate State Board of Education, which is responsible for developing the statewide curriculum; and that TEA administers the statewide assessment program. Neither of the Texas Education Code sections cited in this paragraph make the Commissioner or TEA responsible for developing the statewide curriculum.

Background

A. Director Comer's Responsibilities at the Texas Education Agency

10. Admit, except that at the time of her resignation the plaintiff's job responsibilities did not include professional development and professional outreach to school boards, administrators, organizations, and teachers groups; technical assistance; or writing and directing of grant programs for science instruction.

11. The defendants lack sufficient knowledge or information to admit or deny averments in this paragraph.

B. Recognition of Director Comer's Outstanding Contributions to Science Education in Texas

12. The defendants lack sufficient knowledge or information to admit or deny averments in this paragraph.

C. The Theory of Evolution

13. This paragraph presents legal arguments and conclusions that do not require admission or denial in this Answer. The defendants admit that the *Aguillard* concurrence is accurately quoted and

cited.

14. The defendants admit that this paragraph accurately quotes the source identified.
15. The defendants admit that this paragraph accurately quotes the source identified.
16. The defendants admit that this paragraph accurately quotes the source identified.
17. The defendants admit that this paragraph accurately quotes the source identified.
18. The defendants admit that this paragraph accurately quotes the source identified. Otherwise, the paragraph presents legal arguments and conclusions the defendants are not required to admit or deny.
19. The defendants admit that this paragraph accurately quotes the source identified. Otherwise, the paragraph presents legal arguments and conclusions the defendants are not required to admit or deny.
20. The defendants admit that this paragraph accurately quotes the source identified.
21. The defendants admit that this paragraph accurately quotes the source identified.
- D. Creationism**
22. The defendants admit that this paragraph accurately but incompletely quotes the *Aguillard* decision.
23. The defendants admit that this paragraph accurately quotes the source identified.
24. The defendants admit that this paragraph accurately but incompletely paraphrases a portion of the *McLean* decision.
25. The defendants admit that this paragraph accurately but incompletely quotes a portion of the *Kitzmiller* decision.
26. The defendants admit that this paragraph accurately but incompletely quotes or paraphrases

portions of the judicial decisions cited.

27. The defendants admit that the current Texas statewide curriculum standards require that students learn the theory of evolution. However, the correct citation to the rule is 19 T.A.C. §§ 112.43 (b)(1), -(c)(7).

28. The defendants admit that the article attached as Exhibit G to the Complaint is accurately quoted in this paragraph, but lack sufficient knowledge or information to admit or deny the accuracy of the article in all particulars. The defendants further admit that the State Board of Education, rather than the Commissioner of Education or TEA, will determine the statewide curriculum.

E. Defendants' Firing of Director Comer

29. Defendants lack sufficient knowledge or information to admit or deny the allegation as to when the plaintiff first read the email in question. Otherwise the paragraph is admitted.

30. Defendants lack sufficient knowledge or information to admit or deny the averments in this paragraph, except that defendants admit that the plaintiff forwarded the email to the two listservs identified.

31. Admit.

32. Admit, except that defendants lack sufficient knowledge or information to admit or deny the averment as to where the recipients were located.

33. Admit.

34. Admit.

35. Admit, except that defendants deny that Ms. Reynolds stated that the plaintiff was not allowed to express her opinions on the subject.

36. Admit.

37. Admit.

38. Admit.

39. Admit.

40. Admit.

41. Defendants lack sufficient knowledge or information to admit or deny the averments in this paragraph, except that they admit that on the date identified the plaintiff was unable to log on to the TEA computer previously assigned to her.

42. Defendants admit that in the identified meeting Dr. Shindell requested, and the plaintiff agreed, that she meet with him at the conclusion of the meeting.

43. Admit, except that Dr. Shindell said: "We are here to discuss your employment status."

44. Admit, except that Dr. Shindell handed the plaintiff only one document.

45. The defendants admit that the paragraph accurately quotes a portion of Exhibit B to the Complaint but deny that it includes all of the "pertinent part(s)" of the memo. As shown in Exhibit B to the Complaint, the memo also included the following statements, omitted from the paragraph:

Ms. Comer has engaged in a series of incidents evidencing a serious lack of good judgment and failure to follow agency policies and supervisory directives.

[after a summary of the plaintiff's history of performance problems and the series of incidents giving rise to the proposed disciplinary action] It is also essential that Ms. Comer support the integrity of the upcoming TEKS development and revision process and ensure that it does not appear in any way that she is advocating for any given position or stance.

Sending this email not only demonstrates a serious lack of good judgment, it also violates the directive Ms. Comer was given not to communicate in writing or otherwise with anyone outside the agency in any way that might compromise the integrity of the TEKS development

and revision process. This constitutes misconduct in violation of OP 07-08, Section 8(a)(4)(p) as well as insubordination as defined by OP 07-08, Section 8(a)(3).

46. Admit, except that Dr. Shindell informed the plaintiff that she had the option of resigning in lieu of termination, rather than predicting that she would be terminated (which would depend on whether she successfully appealed the proposed termination), and he did not tell the plaintiff she could not speak with "any other entity." Further, the defendants deny that OP 07-08 required any of the individuals named to inform her of her right to appeal at that time. Had she not resigned and had the termination been implemented, the operating procedure would have required that she be so informed at the time the termination was effectuated. *Id.* at § 8(g)(2). In addition, defendants deny that the plaintiff was not informed "at any other time" of her right to appeal a disciplinary action. Ms. Comer was informed of TEA's complaint procedures at the time she was hired, when she was provided a copy of the operating procedure titled "Employee Disciplinary Actions and Complaint Procedures." Thereafter, she had access to the operating procedures on TEA's shared drive and on the Human Resources Division's webpage on TEA's intranet. As a supervisor, Ms. Comer was responsible for ensuring that her staff was aware of TEA's operating procedures.

47. Deny. Dr. Shindell did not walk the plaintiff to her office or ask for her badge until following day, November 8, 2007, after she informed him of her decision to resign.

48. Defendants admit only that the plaintiff submitted a letter of resignation on November 8, 2007, but lack sufficient knowledge or information to admit or deny the averment as to her motive for doing so. By way of further answer, the plaintiff informed Dr. Shindell that she had learned from the Employee Retirement System (ERS) that she was eligible to retire and that she was pleased with that news; the plaintiff and Dr. Shindell then agreed that her co-workers would be told that she had retired rather than that she had resigned.

49. Admit.

50. Deny. *See* paragraph 46 above. Moreover, the plaintiff had the opportunity to respond to the assertions in the Proposed Disciplinary Action memorandum by responding directly to Tom Shindell when he presented it to her, as well as by filing an employee complaint under OP 07-08.

51. The defendants admit that the plaintiff has sought and received local and state publicity for her dispute with TEA but lack sufficient knowledge or information to admit or deny the averment that whatever national or international attention she has obtained has been "widespread."

52. The defendants admit only that the identified individuals wrote the letter quoted in this paragraph. The defendants deny that the policy criticized in the open letter is either unconstitutional or accurately characterized in that correspondence.

COUNT ONE

53. The defendants' answers to paragraphs 1 through 52 above are incorporated by reference.

54. The paragraph asserts legal arguments and conclusions that the defendants are not required to admit or deny. The defendants admit that the cited decisions are accurately quoted, except that the holding in *Aguillard* is misstated in the last sentence.

55. *See* the answer to paragraph 45 above.

56. The paragraph asserts legal arguments and conclusions that the defendants are not required to admit or deny; however, the defendants deny that the plaintiff has accurately stated the holding in *Aguillard*, especially as it applies to her case.

57. Denied.

COUNT TWO

58. The defendants' answers to paragraphs 1 through 57 above are incorporated by reference.

59. Denied.

60. Denied.

COUNT THREE

61. The defendants' answers to paragraphs 1 through 60 above are incorporated by reference.

62. Denied.

PRAYER FOR RELIEF

63. Defendants deny that the plaintiff is entitled to any of the relief requested.

AFFIRMATIVE DEFENSES

64. The plaintiff's claims against TEA as a state entity are jurisdictionally barred by Eleventh Amendment immunity.

65. Even if the plaintiff's exercise of speech protected by the First Amendment was a substantial or motivating factor in her termination, which the defendants deny, she could have been terminated on valid non-retaliatory grounds even in the absence of protected speech.

66. Even if the plaintiff was deprived of a property interest in continued employment without due process, which the defendants deny, the plaintiff could still have been terminated for cause even with all the process that was due.

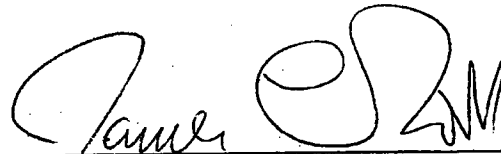
Respectfully submitted,

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A handwritten signature in black ink, appearing to read "James C. Todd", written over a horizontal line.


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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument has been sent, via U.S. Mail, Certified, Return Receipt Requested, to all counsel of record on this the 11th day of August, 2008.

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