ORIGINAL

IN THE
OHIO SUPREME COURT

Case No. 2012-0613

JOHN FRESHWATER,

Appellant,

v.

MOUNT VERNON CITY SCHOOL DISTRICT
BOARD OF EDUCATION,

Appellee.

On appeal from the Court of Appeals of Knox County, Ohio,
Fifth Appellate District

APPELLANT'S MERIT BRIEF

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STATEMENT OF FACTS

The Board hired John Freshwater as an eighth-grade science teacher in 1987. All available evidence demonstrates that Freshwater's teaching career was conspicuously marked by excellence (Report, 2-3; App. A26-7). This point is not disputed, nor could it be. On average, Freshwater's students performed at or above the state requirements, and their test scores often exceeded the state test scores of other eighth-grade science students (Id.). Freshwater was recognized by his peers on multiple occasions for his outstanding teaching skills (Id.). Throughout Freshwater's employment, he was given at least 20 performance evaluations, each of which was positive. Freshwater had never been disciplined before the events giving rise to the instant case.

During his teaching tenure, Freshwater frequently availed himself of his First Amendment rights to freely exercise his religion as a private citizen in the community. He kept a Bible on his desk, as did other teachers employed by the Board. He also served as the administration-appointed facilitator, monitor, and supervisor of the eighth-grade Fellowship of Christian Athletes (hereinafter "FCA") student group for over 15 years.

In January, 2008, the parents of one of Freshwater's students complained to the Board president about an incident in which an experiment with a Tesla coil in Freshwater's classroom allegedly left marks on the student's arm. The alleged mark was presented in the shape of an "x," or, in the perspective of the accusing family, a cross. No one but the reporting family observed the alleged mark, as the family took a picture of the student's arm instead of taking the child to a physician or showing the arm to any other potentially interested adult.[1] Unfortunately,

[1] No person who would have been required by state law to report incidents of child abuse reported this alleged injury to government authorities.

this isolated complaint became the subject of rumors and speculations that spread quickly throughout the community,[2] thus prompting the Board to begin an investigation of unprecedented proportion into Freshwater's entire teaching career. Ultimately,

> it became obvious that speculation and imagination had pushed reality aside. There was a plausible explanation for how and why the Tesla Coil had been used by John Freshwater. Further, and more crucial to a review of the Amended Resolution, the use of the Tesla Coil by John Freshwater did not seem to be a proper subject for the Amended Resolution. ... The issue and incident was dealt with by the administration. That case was closed.

(Report, p. 2; App. A26).

However, based upon various statements that were made concerning Freshwater during the course of the investigation of that incident, including some that were later admitted to have been fabricated,[3] the Board passed a resolution on June 20, 2008, entitled "Intent to Consider the Termination of the Teaching Contract of John Freshwater." This resolution was based primarily upon complaints (which were not made known to Freshwater prior to the hearing) that Freshwater "consistently failed to adhere to the established curriculum..." Specifically, the Resolution alleged that Freshwater taught creationism and intelligent design in his science classes.

At Freshwater's request, a public hearing pursuant to O.R.C. § 3319.16 was held before Referee Shepherd. The Referee received testimony from over 80 witnesses and admitted approximately 350 exhibits into evidence. On January 7, 2011, the Referee issued a Report

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[2] See Report, p. 2; App. A26 ("Due to the sensational and provocative nature of this specified ground, it and the facts and circumstances surrounding it became the focus of the curious, including those in the video, audio, and print media.").

[3] See reference to initial administrative hearing in *Freshwater v. Mount Vernon City Sch. Dist. Board of Educ.*, 2009 WL 4730597, *2 (S.D. Ohio 2009) ("At the hearing Weston testified that the statement in the report that she had received internal and external complaints for much of her eleven years of employment with the Board of Education was 'inaccurate.'") (App. A39).

recommending that the Board terminate Freshwater's contract for "good and just cause" (Report, p. 11-12; App. A35-6).

On January 10, 2011, the Board adopted the Referee's Report and terminated Freshwater (Resolution, 3; App. A22). The reasoning provided in the Board's Resolution tracked only two of the specified grounds outlined in the Referee's Report (Resolution, 3-4; App. A22-3):

1. Specified Ground No. 2 (a)-(g) (Failure to Adhere to Established Curriculum)

Referee Shepherd concluded that the evidence did not establish that Freshwater had failed to adequately teach the mandatory subject areas for his classes (Report, 3; App. A27). In fact, Shepherd pointed out that Freshwater's students "learned and tested well with regards to the mandatory subject areas" (Id.). However, Shepherd perceived that Freshwater "was determined to inject his personal religious beliefs into his plan and pattern of instruction of his students," thereby violating Board policies that "Students should receive unbiased instruction in the schools, so they may privately accept or reject the knowledge thus gained, in accordance with their own religious tenets." (Id.).

The facts upon which Shepherd and the Board based their conclusion that Freshwater's teaching violated this policy were: (1) that he allowed his students to examine evidence both for and against evolution, (2) that he developed a method of allowing students to point out passages in printed materials that could be questioned or debated by saying "here," and (3) that some of the evidence against evolution was based upon the principles of Creationism and Intelligent Design (Report, 4; App. A28). However, it is undisputed that Freshwater adjusted his teaching methods to the specific requests made known to him (i.e., by ceasing the use of certain handouts) when he was asked to do so (Tr. 920, 983, 1287, 2244, 2281, 3730, 3816; Supp. 24, 31, 58, 60, 77, 81).

Finally, Shepherd and the Board found that Freshwater had failed to adhere to established curriculum by telling his students that "the Bible states that homosexuality is a sin, so anyone who chooses to be a homosexual is a sinner." (Report, 7; App. A31). Freshwater denies ever making this or any similar statement, and evidence recently obtained proves conclusively that the single witness who alleges to have heard Freshwater make this statement, Jim Stockdale, was not, in fact, even present in Freshwater's class during the Fall of 2006, and thus he could not have witnessed the alleged statement (See Supp. 103-13).[4] In light of the facts that Freshwater has consistently and vehemently denied making the statement, and that the only witness who alleges to have heard the statement has been discredited, it cannot form a legitimate basis for Freshwater's termination.

2. Specified Ground No. 4 (Disobedience of Orders).

According to Shepherd's Report, school administrators "began implementing a plan of corrective action in hopes of forestalling legal action against the Mount Vernon Schools." (Report, 9; App. A33). As part of this "corrective action," administrators demanded that Freshwater remove a number of items from his classroom (Id.).

Middle School Principal William White testified that following the communication of these instructions, when he returned to Freshwater's classroom, "Almost everything had been

[4] Stockdale alleged that on the day in question, in the Fall of 2006, he was substituting for Kerri Mahan, the inclusion (or special education) teacher for Freshwater's eighth-grade science class (Report, p. 7; App. A31). But an analysis of school records conclusively demonstrates that Stockdale did not, in fact, substitute for Mahan or any other inclusion teacher who could have been in Freshwater's class at any time during the Fall of 2006, and thus would have had no occasion to witness the statement he has accused Freshwater of making. The attendance records contained in the Supplement show that Stockdale never substituted for Mahan, and counsel's spreadsheet analysis shows that there was only one day when Stockdale was in the building, and both Mahan and Thompson were absent (half day each, 10/27/2006; there is no indication that the half-day absences were simultaneous.). Teacher Marth (for whom Stockdale substituted that day) was out for the entire day (half "professional," half "personal"). Substituting for Marth's classes would not locate him in Freshwater's classroom at any time.

removed, but there was still the Colin Powell poster . . . out of the school library he had checked out the Bible and had a book called Jesus of Nazareth." (Report, 11; App. A35 (citing Tr. 513-14; Supp. 21)). Freshwater testified that he did not recall being told to remove the patriotic poster of Colin Powell (Tr. 444; Supp. 12). More importantly, it is undisputed that the identical patriotic poster was on display in other rooms throughout the school building (Transcript, pp. 539, 2082, 2094, 2125 and 3601; Supp. 23, 47, 48, 50, 71). In fact, the teachers received the poster from the school's office (Tr. 1784, 2396, 4656; Supp. 39, 62, 92). The school board president testified that he did not consider the poster, in and of itself, to be religious in nature (Tr. 5529, 5537; Supp. 94, 95). Other witnesses agreed with the board president in determining the poster was not religious in nature (Tr. 3822, 3911; Supp. 82, 83). Nonetheless, Referee Shepherd and the Board concluded that this failure to remove the patriotic poster of Colin Powell, and the presence in the classroom of materials checked out from the school library constituted "defiance" (Report, 10; App. A34).

Based on the foregoing analysis of these issues, Referee Shepherd concluded that Freshwater had "repeatedly violated the Establishment Clause" and that under either a clear and convincing evidence standard or a preponderance of the evidence standard, Freshwater's conduct represented a "fairly serious matter," and was a valid basis for his termination based upon "good and just cause" (Id. at 11-12; App. A35-36). In adopting only two of the grounds for termination, Referee Shepherd specifically noted that he had not determined whether either would be sufficient in and of itself for termination (Id.). In its Resolution of January 10, 2011, the Board adopted the Referee's Report, finding good and just cause to terminate Freshwater's employment on the basis of the aforementioned grounds.

ARGUMENT

I. Proposition of Law 1 – The termination of a public school teacher's employment based on the content or viewpoint of his curriculum-related academic discussions with students and use of supplemental academic materials violates the teacher's and students' First Amendment rights to academic freedom.

A. Freshwater's teaching methods were good practices and were in accordance with the Board's policies.

As an eighth-grade science teacher, Freshwater sought to encourage his students to differentiate between facts and theories or hypotheses, to question and test theories and hypotheses, and to identify and discuss instances where textbook statements were subject to intellectual and scientific debate. This teaching methodology—fostering critical thinking and the challenging and evaluation of a variety of postulated theories—is particularly appropriate in a science classroom.[5] Moreover, Ohio's Academic Content Standards (Board Exhibit 37, p. 215-216; App. A46-47) and Board Policy 2240, "Controversial Issues" emphasized teaching and discussion in this regard:

> The Board of Education believes that the consideration of controversial issues has a legitimate place in the instructional program of the schools.
>
> Properly introduced and conducted, the consideration of such issues can help students learn to identify important issues, explore fully and fairly all sides of an issue, weigh carefully the values and factors involved, and develop techniques for formulating and evaluating positions.

[5] For instance, Massachusetts Institute of Technology (MIT) explains on its website, "In addition to a rigorous introduction to the sciences, these [course] requirements are intended to stimulate and challenge each student to review critically his or her knowledge, and to explore alternative conceptual and mathematical formulations which may provide better explanations of natural phenomena or may lead to better applications of technology. The development of critical and constructive approaches to both theory and practice in science, engineering, and other professions is a central objective of the Institute's educational programs." (http://web.mit.edu/catalog/overv.chap3-gir.html, last viewed on August 15, 2012).

For purposes of this policy, a controversial issue is a topic on which opposing points of view have been promulgated by responsible opinion.

The Board will permit the introduction and proper educational use of controversial issues provided that their use in the instructional program:

A. is related to the instructional goals of the course of study and level of maturity of the students;

B. does not tend to indoctrinate or persuade students to a particular point of view;

C. encourages open-mindedness and is conducted in a spirit of scholarly inquiry.

(Employee Exhibit 81; App. A51-53).

The Board has claimed that Freshwater's teaching methods violated the District Bylaw/Policy regarding "Religion in the Curriculum," which states, "Instructional activities shall not be permitted to advance or inhibit any particular religion," (App. A48-50). However, Freshwater cannot fairly be said to have advanced or inhibited "any particular religion" by merely discussing a widely-known origins of life theory for purposes of exploring its scientific value as opposed to its religious or anti-religious implications.

As Referee Shepherd noted, the District Bylaws/Policies developed specifically for science teachers states that "Students should receive unbiased instruction in the schools, so they may privately accept or reject the knowledge thus gained, in accordance with their own religious tenets" (Id). This is exactly the type of instruction Freshwater provided. In light of the widely known, genuine intellectual debate that exists regarding the relative plausibility and weaknesses of evolution and intelligent design, providing students with "unbiased instruction" might well be said to *require* the juxtaposition of these two major theories, but *a fortiori* it cannot be said to forbid it. Referee Shepherd aptly noted that Freshwater had "instruct[ed] his eighth grade

students in such a way that they were examining evidence both for and against evolution" (Report, p. 4; App. A28). In light of the fact that the two competing theories are considered by many scientists to be mutually exclusive, this is the essence of "unbiased instruction" for this particular curriculum.

Shepherd's conclusion that Freshwater improperly "injected his beliefs as associated with his own religious tenets into his science instruction" (Id.) appears to be based solely on his presumption that one of the two major theories was consistent with Freshwater's own personal belief system. This smacks of unfairness and religious hostility. Freshwater submits that his encouraging students to think critically about scientific theories, as directed by Ohio's Academic Content Standards and Board policies referenced above, cannot be rendered illegal based solely on the speculation that Freshwater's own personal beliefs are aligned with one of the competing theories considered. Freshwater did not engage in religious proselytization—he discussed a scientific theory that happens to be consistent with the teachings of multiple major world religions.

While Referee Shepherd and the Board also took issue with Freshwater's provision of handouts to supplement his use of the textbook, evidence adduced at trial clearly demonstrated that teachers were given wide latitude to use outside materials in conjunction with the curriculum, and had been encouraged to do so (Tr. 1502, 1815, 1934, 1946, 2018, 2108, 2425, 2597, 2855, 2917, 3979; Supp. 35, 41-44, 49, 63, 64, 67, 69, 84). No pre-authorization was ever necessary, nor was there a protocol in place to obtain such authorization (Tr. 1501, 2058, 2265; Supp. 34, 46, 59). The school principal admitted that Freshwater's use of the handout was for legitimate purposes of scientific instruction. (Tr. 3626-29; Supp. 73-76). Moreover, on the two occasions when school officials raised objections to materials being used by Freshwater, he

immediately ceased using them (Tr. 920, 983, 1287, 2244, 2281, 3730, 3816; Supp. 24, 28, 31, 58, 60, 77, 81). Freshwater never received any adverse notations in his personnel file to warn him that there was any problem with his teaching methodology in this regard or any other.

Referee Shepherd and the Board also found fault with Freshwater's development of means by which students could independently call attention to instances in printed materials where scientific theories or estimates appeared to the students to be portrayed as indisputable facts (Report, p. 4; App., A27-28). Freshwater encouraged students to say the word, "here," aloud as a way of briefly communicating their identification of one of these instances (Id.). This methodology was consistent with the state's Academic Content Standards, which directed eighth-grade science teachers to "explain why it is important to examine data objectively and not let bias affect observations" (Board Exhibit 37, p. 215; App., A47). Thus, the Board's termination of Freshwater's employment for the reasons stated is a direct contradiction of its own governing policies and standards, which provide the only official guidance from the Board to Freshwater on these issues.

B. Freshwater's termination based on the Board's stated reasons is a form of government censorship and a violation of the rights of academic freedom enjoyed by Freshwater and his students.

By forbidding students and teachers to be critical of any ideas contained in classroom curriculum, the Board has not only unfairly terminated Freshwater's employment, but has engaged in a course of censorship that is repugnant to the bedrock principles of the First Amendment. It is well-established that the broad discretion of school boards to manage school affairs "must be exercised in a manner that comports with the transcendent imperatives of the First Amendment." *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 863-64 (1982). The First Amendment's guarantees are essential not only for fostering

individual expression, but also for affording access to discussion, debate, and a diversity of ideas. *Id.* at 866 (*quoting First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)). In furtherance of these principles, the United States Supreme Court has affirmatively held that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Id.* (*quoting Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)).

While these concepts have been expounded in a variety of factual contexts, the High Court has extrapolated from them a specific, First Amendment-based right to academic freedom that applies in the public school context. The Court has made it clear that there are constitutional limits on the State's power even to control the curriculum within the schools, and has noted that the fact that boards are charged with educating the young for citizenship "is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Pico*, 457 U.S. 861, 864-65 (*quoting West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

The Supreme Court has demonstrated commitment to the concept of academic freedom since at least as early as 1967, when it held in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), that state regulations prohibiting employment of "subversive" teachers violated the First Amendment. The Court explained:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'

Keyishian, supra, at 603 (*quoting Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *United States v. Associated Press, D.C.*, 52 F.Supp. 362, 372 (1943)).

More recently, in *Pico*, the Supreme Court considered a case in which a local board of education removed certain books from its high school and junior high school libraries based on its belief that they were "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy." 457 U.S. at 857. In describing the nature of the rights implicated by the removal of the books, the Court discussed precedents that have: focused on the First Amendment's role in "affording the public access to discussion, debate, and the dissemination of information and ideas," recognized that the State may not "contract the spectrum of available knowledge," and protected "the right to receive information and ideas." *Id.* at 866-67 (*quoting First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); and *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)). The Court found that the right to transmit and receive ideas is inherent in the First Amendment's explicit protections of free speech and free press. *Id.* at 867. *See also Saxbe v. Washington Post Co.*, 417 U.S. 843, 862-63 (1974) (Powell, J., dissenting) ("[P]ublic debate must not only be unfettered; it must be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression.").

The Court in *Pico* went on to recognize that even young students are important beneficiaries of academic freedom, because "such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members." *Id.* at 868. The Court concluded that if the school board had intended by its removal decision to deny access to ideas with which it disagreed, then the decision violated the Constitution. *Id.* at 871

The protection of academic freedom requires a strict application of First Amendment principles in the context of the classroom or teacher-to-student academic discussions. In this educational setting, the Court has appropriately signaled that government censorship will not be tolerated. As the Court stated quite simply in *Pico*, "Our Constitution does not permit the official suppression of *ideas*." *Id.* at 871 (emphasis in original).

The official suppression of ideas is precisely what the Board has undertaken in this case, and its action is thus utterly repugnant to the First Amendment. Freshwater's teaching method represents the very best of the profession: the encouragement of students to engage their own minds, to consider the merits of a variety of competing ideas, and to evaluate the information they receive.

While the caselaw on the issue of teaching evolution or creation science may appear, at first glance, to favor the Board's position (that creation science/intelligent design may not be taught in public schools), the better view of the topically relevant cases is from a higher level of generality; the lesson to be gleaned is of a constitutional nature rather than a public policy concern, and the lesson is that the state may not censor ideas from the classroom. Indeed, this interpretation is the only way to harmonize the cases addressing evolution and creation science with the well-established First Amendment prohibition of governmental hostility toward religion and the Court's explicit approval of including religious content in secular educational programs of public schools. *See Epperson v. Arkansas*, *infra*. If discussions of evolution may not be banned from a science classroom, then neither may discussions of creationism be banned.

In *Epperson v. Arkansas*, where the United States Supreme Court struck down a state law forbidding the teaching of evolution, the Court explained:

> While study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide

> with the First Amendment's prohibition, the State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion. This prohibition is absolute. It forbids the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma.
>
> ***
>
> The 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.

393 U.S. 97, 106-107 (1968).

In both *Epperson* and *Edwards v. Aguillard*, 482 U.S. 578 (1987), the two seminal United States Supreme Court cases addressing laws that focused on the teaching of evolution or creation science, the Court found fault with the laws because it understood them to impose mandates upon school curriculum for a religious purpose. In *Epperson*, the mandate prohibited the teaching of evolution, and in *Edwards*, the law required that creation science be taught along with evolution.

The lesson these cases teach is not that teachers and students may not discuss theories of creation science in public schools, but rather that government officials may not authoritatively mandate or prohibit, for ideological reasons, the intellectual pursuit of any particular academic theory. Academic freedom is the constitutional norm; government encroachment upon it must be enjoined. In *Edwards*, for instance, the Court lamented that "under the Act's requirements, teachers who were once free to teach any and all facets of this subject are now unable to do so." 482 U.S. at 588-89. *See also id.*, 482 U.S. at 634 ("The people of Louisiana, including those who are Christian fundamentalists, are quite entitled, as a secular matter, to have whatever scientific evidence there may be against evolution presented in their schools, just as Mr. Scopes was entitled to present whatever scientific evidence there was for it.") (Scalia, J., dissenting). The Court clearly stands on the side of true pursuit of academic freedom, whereby teachers and

students are free to view the undeniable focus of considerable scientific and societal debate from a variety of perspectives.

In terminating a teacher for allowing students to consider the widely-known alternative theory to evolution, the Board has turned the principle of law the Supreme Court announced in *Epperson* and *Edwards* on its head. For the High Court is not concerned with which scientific theories are actually taught to students in public schools, but rather in ensuring that students are free from the form of government indoctrination that results from the censorship or suppression of ideas. This is surely just as great of a concern (if not greater, in light of our nation's rich history of "benevolent neutrality" toward religion) where the indoctrination in question is anti-religious in sentiment as where it is religious. *See, e.g., Epperson, supra,* at 104 (government may not be hostile to any religion; First Amendment mandates government neutrality between religion and nonreligion); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (official hostility toward religion forbidden); *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) (government may not inhibit religion).

Epperson includes an important reminder that even full-on study of religion and of the Bible is not off-limits in the public school system where it forms part of a secular program of education as opposed to the inculcation of a religious creed. 393 U.S. at 106. It would be absurd, then, to assert that the First Amendment would countenance—much less require—a Board's demand that teachers chisel from their lectures any idea that bears a relationship to some religion. To the extent that it can be considered to be a discussion of religion at all, a discussion of the theory of creationism or intelligent design, voluntarily undertaken by a science teacher to round out the mandated discussion of evolution and to allow students to examine the merits and

weaknesses of each for themselves, is unquestionably "part of a secular program of education," and it is therefore protected under the First Amendment.

The all-important distinction, heretofore ignored in Freshwater's case, is between a school board policy or state law *mandating* that a certain subject or viewpoint be taught or not taught, on the one hand, and an individual teacher's exercise of academic freedom to discuss curriculum-related ideas and theories with students in the classroom, on the other. The former represents official indoctrination: an impediment to academic freedom that, under some circumstances, courts may find to violate the Establishment Clause. The latter, however, is a picture of academic freedom in action: a teacher striving to present students with a well-rounded education on topics within the curriculum.

At least one United States Circuit Court of Appeals has taken the appropriate cue from these Supreme Court's cases dealing with academic freedom. In *Zykan v. Warsaw Community Sch. Corp.*, 631 F.2d 1300 (7th Cir. 1980), the Seventh Circuit explained:

> In the classroom there are recognized limits on local control of educational matters. School boards are for example not free to fire teachers for every random comment in the classroom. In the case of the students themselves, local school boards must respect certain strictures that for example bar them from insisting upon instruction in a religiously-inspired dogma to the exclusion of all other points of view, or from placing a flat prohibition on the mention of certain relevant topics in the classroom, or from forbidding students to take an interest in subjects not directly covered by the regular curriculum. At the very least, academic freedom at the secondary school level precludes a local board from imposing "a pall of orthodoxy" on the offerings of the classroom, which might either implicate the state in the propagation of an identifiable religious creed or otherwise impair permanently the student's ability to investigate matters that arise in the natural course of intellectual inquiry.

631 F.2d at 1305-6 (citations omitted). The court went on to reject the plaintiff students' claim that their academic freedom rights had been violated, but it did so on the basis that there was no indication that the actions by school officials of which the students complained "ha[d] been

guided by an interest in imposing some religious or scientific orthodoxy or a desire to eliminate a particular kind of inquiry generally." *Id.* at 1306. In this case, on the other hand, the course of action taken against Freshwater by school officials and the Board can be described, precisely, as "a desire to eliminate a particular kind of inquiry generally"—the line of inquiry that questions the factual basis of the theory of evolution and explores alternative theories.

Academic freedom would be an empty platitude if it provided no protection from censorship of ideas that have religious connections or implications. The impact of the loss of academic freedom on the development of science, technology, and the pursuit of learning in general would be profound and tragic. Consider that while today's science class may discuss modern theories of origins of life first espoused in the Bible (and censored on that basis alone), yesterday's classes considered theories about the Hydrologic Cycle or the spherical Earth—also enshrined in religious texts long before accepted by science.[6] The advancement of knowledge demands that students and teachers be free to consider, discuss and debate ideas of all kinds rather than forced to discard any due to the government's disdain for its source.

Finally, even if the Board could demonstrate the absolute falsity of creation science/intelligent design, it would be difficult for anyone to argue that there is no value in students merely discussing and understanding the basics of the theory and how it differs from evolution. Whatever its origins, creation science/intelligent design is a theory that continues to be believed and defended by numerous highly respected, internationally renowned scientists as well as countless laypersons. *See Edwards*, 482 U.S. at 622 (Scalia, J., dissenting) (citing witness testimony). Many scientists believe that the body of scientific evidence supporting

[6] The Hydrologic Cycle is said to be described in the Bible (Job 36:27-28; Ecclesiastes 11:3: Job 26:8), as is the fact of the Earth's spherical shape (Isaiah 40:22; Job 26:7). See http://www.godlessgeeks.com/LINKS/ScientificBible.htm (last visited August 17, 2012).

creation science is *stronger* than that supporting evolution. *Id.* at 623 (Scalia, J., dissenting) (citing evidence). *See also Epperson*, 393 U.S. at 114 ("Certainly, the Darwinian theory, precisely like the Genesis story of the creation of man, is not above challenge. In fact the Darwinian theory has not merely been criticized by religionists but by scientists...") (Black, J., concurring). Students exposed to creation science gain a better understanding of the state of scientific evidence about the origins of life. *Id.* (Scalia, J., dissenting) (citing evidence).

If academic freedom is to exist in America's public schools, then this Court must recognize that the Board's termination of Freshwater based upon his discussion of scientific theories with his students constitutes censorship and violates the First Amendment.

II. Proposition of Law II - The termination of a public school teacher's employment based on the fact that his academic discussions with students and supplemental academic materials include ideas that are consistent with multiple major world religions manifests hostility toward religion in violation of the Establishment Clause.

The First Amendment's Establishment Clause does not justify, and in fact forbids, the Board's actions. The Board's ostensible reliance upon the First Amendment's Establishment Clause to justify its actions is misguided and demands immediate and unequivocal correction.

The record of this case is utterly devoid of any evidence that Freshwater's academic discussions with students about alternative origins of life theories were used in any way to advance the creed of any religion. Rather, the theories in question were uniformly evaluated for their scientific and logical merits (Tr. 3625-3629, 3767; Supp. 72-76, 78). However genuine it may be, the Board's apparent belief that creationism and/or intelligent design theories have no scientific value cannot be accepted. The theories suggest that the physical universe and life within it appeared suddenly and have not changed substantially since appearing. *See Edwards v.*

Aguillard, 482 U.S. 578, 612 (Scalia, J., dissenting) (citing expert affidavits). According to experts, the concepts are strictly scientific and can be presented without religious reference. *Id.*

Nonetheless, because widely-accepted theories on the origins of life are consistent with the views of multiple major world religions, Referee Shepherd and the Board concluded that classroom discussion of these alternative theories constitutes a violation of the First Amendment's Establishment Clause (Report, 12; App. A36). This conclusion demonstrates a fundamental misunderstanding of the First Amendment that, in fact, turns this foundational freedom on its head.

The action of a government official does not violate the Establishment Clause merely because it "happens to coincide or harmonize with the tenets of some or all religions." *Harris v. McRae*, 448 U.S. 297, 319 (1980) (*quoting McGowan v. Maryland*, 366 U.S. 420, 442 (1961)). Thus, the fact that one competing theory on the formation of the universe and the beginning of life is consistent with the teachings of multiple major world religions simply does not transform its classroom discussion into a violation of the First Amendment's Establishment Clause. Any contrary policy would lead to an absurd and unworkable result that would transform local school boards and administrators into religion police, as they would be forced to parse each classroom's curriculum and censor it of any ideas consistent with the particular teacher's own belief system.

The course upon which the Board has set itself is not one of *avoiding* an Establishment Clause violation, but rather, is one of sure collision with the Clause's demand of religious neutrality. *See Epperson, supra*, at 104 (government may not be hostile to any religion; First Amendment mandates government neutrality between religion and nonreligion); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (official hostility toward religion forbidden); *Committee for*

Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973) (government may not inhibit religion).

Not only does the Board's censorship of creation science based solely on its consistency with major world religions demonstrate hostility toward religion, it also demonstrates a favoritism of the religion of "secular humanism." *See Torcaso v. Watkins*, 367 U.S. 488, 495, n. 11 (1961) (listing "Secular Humanism" as a religion along with Buddhism, Taoism, and Ethical Culture). Evolution is a central tenet of secular humanism. See *Humanist Manifesto I, First, Second* and *Third* (1933), available at www.americanhumanist.org ("Religious humanists regard the universe as self-existing and not created." ... "Humanism believes that man is a part of nature and that he has emerged as a result of a continuous process.").

The idea that evolution is a religiously-neutral theory is a myth. Just as the theory of creation or intelligent design depends on the unproven idea of an intelligent designer or creator, so the theory of evolution depends on the unexplained and unproven idea that inanimate materials suddenly became animated. The Board's course of action is far more problematic under the First Amendment than a policy of academic freedom, whereby individual teachers and their students remain free to consider and discuss a variety of perspectives on topics in the school's curriculum, free from state-mandated indoctrination in any.

III. Proposition of Law III - The termination of a public school teacher's employment based on the presence of religious texts in the classroom and the display of patriotic posters violates the teacher's and students' First Amendment rights to academic freedom and manifests hostility toward religion in violation of the Establishment Clause.

A. Freshwater's classroom was in compliance with Board policy.

Freshwater's termination rested, in part, on his failure to remove three items from his

classroom upon being directed to "remove or discontinue the display of all religious articles in his classroom, including all posters of a religious nature." (Resolution, 4; App. A23). These items included a patriotic Colin Powell poster, the *Oxford Bible* from the school's library, and a book entitled *Jesus of Nazareth*, also from the school's library. The fact that these items were not considered to be harmful in other classrooms is demonstrated by the fact that each one of them was maintained elsewhere in the school without objection, and that teachers received the posters from the school office (Tr. 1784, 2396, 4656; Supp. 39, 62, 92).

Testimony revealed that up until the Board sought to terminate Freshwater, the Board had freely allowed teachers to choose the décor of their classrooms, including the display of posters and artwork that suited their own preferences (Tr. 298-300, 525-26, 539-40, 1786, 2024, 2142, 2147, 2366 and 2828; App. A3, A22-3, A40, A45, A51-2; A61, A66). The Board has not pointed to any policy prohibiting teachers from decorating their rooms in any particular fashion. Furthermore, state law provides:

> No board of education shall prohibit a classroom teacher from providing in the teacher's classroom reasonable periods of time for activities of a moral, philosophical, or patriotic theme.

ORC §3313.601.

Ohio law thus goes beyond allowing the mere *display* of patriotic pictures (which is all Freshwater has been accused of doing); it allows teachers to actually use instructional time to conduct *activities* to emphasize moral, philosophical, or patriotic themes. Freshwater and multiple other Board employees chose to hang this particular poster because of its patriotic value. The Board is out of sync with the moral fiber of our nation, generally, and in violation of Ohio State law, specifically, in using the mere presence of this benign poster as an excuse for terminating Freshwater's employment.

Freshwater's termination for failing to remove the Bible (also an object kept by other teachers in other classrooms) and *Jesus of Nazareth* are similarly bizarre. Bibles were regularly maintained by other teachers in their classrooms (Tr. 523-25; Supp., 22). The *Jesus of Nazareth* book and *Oxford Bible* were holdings of the school's own library. Freshwater's possession of these items did not violate any Board policy, as indicated by the fact that other faculty members have not been disciplined for possessing them.

B. Freshwater's termination based on the Board's stated reasons is a form of government censorship and a violation of the rights of academic freedom enjoyed by Freshwater and his students.

Where teachers are generally free to possess books and display posters in their classrooms, the termination of one teacher for possessing books and displaying a poster with a putative religious viewpoint casts an unconstitutional "pall of orthodoxy" upon the very halls of learning where future citizens are engaged in the pursuit of knowledge and diverse ideas. *See Pico, supra,* at 870 (*quoting Keyishian, supra,* at 603). As outlined in Proposition of Law I, above, the academic freedom inherent in the First Amendment forbids the official suppression of ideas in the classroom. *Pico, supra,* at 871. Freshwater submits that any official order commanding the removal from a classroom of a seminal work of literature such as the *Bible*, or any other book for that matter, based on the content of its ideas, is particularly appalling and deserving of this Court's outrage and opprobrium.

C. The First Amendment's Establishment Clause does not justify, and in fact forbids, the Board's actions.

It is abundantly clear that the Board and the administrative officials acting under its authority sought to sterilize Freshwater's classroom of any trace of religion. This effort may

well have been genuinely based on a desire to comply with the First Amendment's Establishment Clause, but, in fact, it had the opposite effect.

The Board has neither in practice nor in theory suggested that the display of the Colin Powell posters or the presence of Bibles and books about Jesus inside the school, generally, violate the Establishment Clause. Nor could it effectively do so in light of its allowance of these items in other parts of the school. The Board appears, then, to be postulating a theory that the items trigger Establishment Clause concerns *only where they happen to coincide with a particular teacher's personal beliefs*.

As argued earlier, if it is to be applied evenhandedly, this type of *de facto* policy requires the Board and its agents to become religion police, to familiarize themselves with the particular belief systems of each teacher and then to scrutinize the teacher's chosen décor as well as his or her classroom library to ensure that it is sterile of any religiously complementary chattel. One can only imagine the nonsensical results of such a system: Hindu health teachers barred from displaying posters depicting cows or keeping books extolling the merits of vegetarianism; Muslim history teachers precluded from keeping books about Mohammed in their classroom libraries.

As explained in Proposition of Law II, above, the central demand of the Establishment Clause is government neutrality. *See Epperson, supra*, at 104 (government may not be hostile to any religion; First Amendment mandates government neutrality between religion and nonreligion); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (official hostility toward religion forbidden); *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) (government may not inhibit religion). The Board's order for Freshwater to remove these few, benign items from his classroom, particularly where the same items were permitted in

other rooms within the building, can only be viewed as governmental hostility toward religion, or at least toward religious teachers.

The Board cannot argue that its purpose was to promote neutrality toward religion in light of the fact that its official policies—permitting teachers' non-disruptive classroom displays—already were policies of neutrality. *See Edwards*, *supra*, at 586, 588-89 (noting that pre-existing state law already allowed schools to teach any scientific theory, thus fulfilling the alleged "academic freedom" purposes of the law). Rather, it is apparent that the Board's purpose was to ensure that religious items were banned entirely from Freshwater's classroom. The effect was a figurative pronouncement to the entire school community that religious teachers are subject to intense scrutiny and that classrooms (or at least those of religious teachers) must be sterilized of religious references. This type of official disfavoring and inhibiting of religion, and the niggling entanglement required to effectuate it, violate the First Amendment's Establishment Clause. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (law must have a secular purpose, a primary effect that neither advances nor inhibits religion, and must not foster an excessive entanglement with religion).

CONCLUSION

The Board's actions are nothing less than the censorship of ideas. As such, they eviscerate the First Amendment academic freedom rights of Freshwater and his students, and they transgress the neutrality requirement of the Establishment Clause. As the United States Supreme Court has instructed, "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding." *Pico,* at 868 (*quoting Keyishian*, at 603.

Here, the Board has ignored these essential principles and attempted to transform students into "closed-circuit recipients of only that which the State chooses to communicate."

See Tinker v. Des Moines School Dist., 393 U.S. 507, 511 (1969). By virtue of the First Amendment, this is not permitted.

Freshwater prays that this Court reverse the decision of the court below upholding the Board's Resolution and thereby vindicate the First Amendment rights of public school teachers and students; award him monetary damages in an amount to be determined as a result of his wrongful termination and the interference with his rights under the First and Fourteenth Amendments to the United States Constitution; order that the Board reinstate him to his teaching position; and order such other relief as the Court may deem appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 2012, a copy of the foregoing brief was mailed by first-class mail, postage prepaid, to

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APPENDIX

ORIGINAL

IN THE SUPREME COURT OF OHIO

John D. Freshwater Appellant, v. MOUNT VERNON CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al. Appellee.	:	CASE NO. 12-0613 On Appeal from the Fifth District Court of Appeals Case No. 2011-CA-000023

NOTICE OF APPEAL OF APPELLANT JOHN D. FRESHWATER

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NOTICE OF APPEAL OF APPELLANT JOHN D. FRESHWATER

Appellant John D. Freshwater hereby gives notice of his appeal to the Supreme Court of Ohio from the decision and judgment of the Knox County, Fifth District Court of Appeals, Case Number 11CA000023, *John Freshwater v. Mount Vernon City School District Board of Education*, dated March 5, 2012. This case raises a substantial constitutional questions under Supreme Court Practice Rule 2.1(A)(2) and an issue of public and great general interest under Supreme Court Practice Rule 2.1(A)(3). A time-stamped copy of the Court of Appeals decision is attached.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for appellees, David Kane Smith, Krista Keim, and Paul J. Deegan, Britton Smith Peters & Kalail Co., L.P.A., 3 Summit Park Drive, Suite 400, Cleveland, OH 44131 on April 13, 2012.

R. Kelly Hamilton

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
JOHN FRESHWATER	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellant	:	Hon. Sheila G. Farmer, J.
	:	
-vs-	:	
	:	Case No. 2011-CA-000023
MOUNT VERNON CITY SCHOOL DISTRICT BOARD OF EDUCATION	:	
	:	OPINION
Defendant-Appellee		

CHARACTER OF PROCEEDING: Civil appeal from the Knox County Court of Common Pleas, Case No. 11AP02-0090

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY:

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Gwin, P.J.

{1} This case comes to us on the accelerated calendar. App. R. 11.1, which governs accelerated calendar cases, provides, in pertinent part:

(E) Determination and judgment on appeal.

The appeal will be determined as provided by App. R. 11.1. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form.

The decision may be by judgment entry in which case it will not be published in any form.

{2} One of the important purposes of the accelerated calendar is to enable an appellate court to render a brief and conclusory decision more quickly than in a case on the regular calendar where the briefs, facts and legal issues are more complicated. *Crawford v. Eastland Shopping Mall Assn.*, 11 Ohio App.3d 158, 463 N.E.2d 655(10th Dist. 1983). This appeal shall be considered in accordance with the aforementioned rule.

{3} This case arises out of the Mount Vernon City School District Board of Education ("Board of Education"), decision to terminate appellant John Freshwater's ("Freshwater") employment pursuant to the R.C. 3319.16 after he failed to adhere to the established curriculum under the Academic Content Standards for eighth grade as adopted by the Board of Education by teaching creationism and intelligent design in his eighth grade science classes.

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{4} Freshwater was hired by the Board of Education in 1987 and was employed by them as an eighth grade science teacher until the incidents pertaining to this lawsuit occurred. For 16 of the 20 years that Freshwater taught, he was the faculty appointed facilitator, monitor, and supervisor of the eighth grade group called the Fellowship of Christian Athletes. For his entire teaching career, Freshwater kept a Bible on his desk. Several other teachers employed by the Board of Education also kept Bibles on their desks. Freshwater has been engaged as a private citizen in promoting certain religious activities and liberties in the Mount Vernon, Ohio community.

{5} Throughout Freshwater's employment, he was given performance evaluations on at least twenty occasions, each of which was positive. Freshwater had never been disciplined before the events relevant to the instant action.

{6} In January 2008, the parents of one of Freshwater's students complained to the president of the Board of Education, Defendant Ian Watson, about an incident in which Freshwater used a device called a Tesla Coil to make a mark that lasted a week and one-half to two weeks on the student's arm. Defendants characterize the mark as the religious symbol of a Christian cross. Freshwater claims that, although he had used a Tesla Coil before, he did not expect it to leave a mark on the student nor did he believe that was even a possibility.

{7} Because of this complaint, the Board of Education retained counsel and requested an investigation of the charges made against Freshwater. The contract between the Board of Education and the Mount Vernon Education Association provided the authority for such an investigation. A report on the investigation was provided to the Board of Education. The report indicated that it had interviewed Weston and that "Dr.

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Weston stated that she has had to deal with internal and external complaints about his (Plaintiff Freshwater) failure to follow the curriculum for much of her 11 years at Mount Vernon." *Id.* at ¶ 114.

{8} An administrative hearing regarding the charges brought against Freshwater was conducted. "Short, Weston and White testified in the hearing they had personal knowledge of or a perceived belief concerning Plaintiff Freshwater's personal religious activities as a result of actions taken by Freshwater during Freshwater's time outside of school duties." *Id.* at ¶ 113. At the hearing, Weston testified that the statement in the report that she had received internal and external complaints for much of her eleven years of employment with the Board of Education was "inaccurate." *Id.* at ¶ 115.

{9} On June 20, 2008, the Board of Education passed by vote a resolution titled *"Intent to Consider the Termination of the Teaching Contract of John Freshwater"* ("Resolution"), which stated that Freshwater "consistently failed to adhere to the established curriculum under the American Content Standards for eighth grade as adopted by ... the Mount Vernon City School Board." *Id.* 4 ¶¶ 23, 24. On July 7, 2008, the Board of Education amended the resolution to correctly identify the curriculum standards as the "Academic Content Standards." *Id.* ¶ 25. The resolution stated that Freshwater taught creationism and intelligent design in his eighth grade science classes, which is not allowed by the Academic Content Standards.

{10} Freshwater contends that he was the target of intentional religious discrimination and harassment, being treated differently than his similarly situated coworkers, and that he was deprived of his constitutional rights to free speech and

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association, equal protection, and due process. See, *Freshwater, et al. v. Mt. Vernon School District, et al.*, S.D.Ohio No. 2:09-CV-464, 2009 WL 4730597 (Dec 8, 2009); *Doe v. Mt. Vernon School District, et al.*, S.D.Ohio No. 2:08-CV-575, 2010 WL 1433301(Apr 6, 2010).

{11} Freshwater requested a hearing pursuant to R.C. 3319.16. A public hearing was held before a referee. 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.

{12} 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.

{13} On February 8, 2011, Freshwater appealed the Board's decision to the Knox County Court of Common Pleas pursuant to R.C. 3319.16. 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. The Court further 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.

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{14} This case is before this Court on appeal from the October 5, 2011 decision of the Knox County Court of Common Pleas that affirmed the appellee's January 10, 2011 resolution to terminate appellant's employment. Freshwater raises one assignment of error,

{15} "I. THE COURT BELOW ABUSED ITS DISCRETION IN FINDING THAT THERE WAS CLEAR AND CONVINCING EVIDENCE TO SUPPORT THE BOARD OF EDUCATION'S TERMINATION OF FRESHWATER'S EMPLOYMENT CONTRACT(S) FOR GOOD AND JUST CAUSE, IN AFFIRMING THE BOARD'S TERMINATION OF FRESHWATER'S EMPLOYMENT CONTRACT(S), AND IN ORDERING FRESHWATER TO PAY THE COSTS OF THE APPEAL."

I.

{16} R.C. 3319.16 provides that a tenured teacher can be terminated "for gross inefficiency or immorality; for willful and persistent violations of reasonable regulations of the board of education; or for other good and just cause." These constitute three separate, independent bases, each of which is sufficient to terminate a tenured teacher. *Hale v. Lancaster Bd. of Edn.*, 13 Ohio St. 2d 92, 234 N.E. 2d 583(1968).

{17} The process to be employed in such a matter, after the decision to discharge is made, begins with a referee. He is required to hold an evidentiary hearing from which he presents his report to the school board. The board may then elect to accept or reject his recommendation.

> The decision to terminate a teacher's contract is comprised of two parts: (1) the factual basis for the allegations giving rise to the termination; and (2) the judgment as to whether the facts, as found, constitute gross

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> inefficiency, immorality, or good cause as defined by statute. The distinction between these two is important in understanding the respective roles of the school board and of the statutory referee in the termination process. * * * The referee's primary duty is to ascertain facts. The board's primary duty is to interpret the significance of the facts.

Aldridge v. Huntington School Dist., 38 Ohio St.3d 154, 157-158, 527 N.E.2d 291, 294(1988).

{18} The *Aldridge* court, therefore, held in the syllabus:

> In teacher contract termination disputes arising under R.C. 3319.16:
>
> 1. The referee's findings of fact must be accepted unless such findings are against the greater weight, or preponderance, of the evidence;
>
> 2. A school board has the discretion to accept or reject the recommendation of the referee unless such acceptance or rejection is contrary to law.

{19} From there, the decision of the school board may be appealed to the court of common pleas. The court then engages in a hybrid exercise, encompassing "characteristics both of an original action with evidence presented and a review of an administrative agency's decision based upon a submitted record." *Douglas v. Cincinnati Bd. of Edn.*, 80 Ohio App.3d 173, 177, 608 N.E.2d 1128, 1131(1st Dist.1992). Based upon this review, "[t]he Common Pleas Court may reverse an order of termination of a teacher's contract, made by a Board of Education, where it finds that such order is not

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supported by or is against the weight of the evidence. (Section 3319. 16, Revised Code, construed and applied.)" *Hale,* 13 Ohio St. 2d 92, 234 N.E. 2d 583, paragraph one of the syllabus.

{20} The Supreme Court of Ohio has delineated the standard of review and the role of a court of appeals:

> If the judgment of the court of common pleas is then appealed to the court of appeals, review in the appellate court is strictly limited to a determination of whether the common pleas court abused its discretion. This scope of review is, of course, extremely narrow. The term 'abuse of discretion' has been defined as implying '"not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency."' (Citations omitted.)

Graziano v. Amherst Exempted Village Bd. of Edn., 32 Ohio St.3d 289, 295, 513 N.E.2d 282(1987). (Douglas, J., concurring).

{21} Thus, unless this court determines that the trial court abused its discretion, we are compelled to affirm its decision as "the court of appeals may not engage in what amounts to a substitution of judgment of the trial court in an R.C. 3319.16 proceeding." *Id.* at 294, 513 N.E.2d at 286.

> "Abuse of discretion" has been defined as an attitude that is unreasonable, arbitrary or unconscionable. * * * It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.

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> A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result.

AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp., 50 Ohio St.3d 157, 161, 553 N.E.2d 597, 601(1990).

{22} In the matter *sub judice,* we do not perceive an "unreasonable, arbitrary or unconscionable attitude," nor one that is "not merely error of judgment, but [one of] perversity of will, passion, prejudice, partiality, or moral delinquency." To the contrary, the referee's memorandum provides a well-reasoned and articulated basis for affirming the decision of the Board and for the trial court to accept the recommendation of the referee.

{23} In *Graziano* the Supreme Court said that the "report *and recommendation* undertaken by the referee pursuant to R.C. 3319.16 must be considered and weighed by the board of education. [Emphasis added.] * * * [D]ue deference must be accorded to the findings and recommendations of the referee * * * who is best able to observe the demeanor of the witnesses and weigh their credibility." 32 Ohio St.3d at 293, 513 N.E.2d at 285. *Graziano* noted that the board is not bound by the recommendations rendered by the referee, but that the board "should, in the spirit of due process, articulate its reasons therefore" if it rejects the recommendations. *Id.*; *Aldridge v. Huntington School Dist.*, 38 Ohio St.3d at 157, 527 N.E.2d 291.

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{24} In the case at bar, this court rejects appellant's contentions as to issues involving the sufficiency of the evidence and the credibility of certain witnesses. There was sufficient evidence to support both the referee and appellee's findings, and we do not determine issues involving credibility.

{25} Next, we find it is within the trial court's discretion to determine whether additional hearings should be conducted. Although the common pleas court's review of a board's decision is not *de novo*, R.C. 3319.16 does empower the court to weigh the evidence, hold additional hearings if necessary, and render factual determinations. *Graziano*, 32 Ohio St.3d at 293, 513 N.E.2d at 285. However, nothing in the statute absolutely requires the reviewing court to do so. See R.C. 3319.16 (stating that the court "shall hold such additional hearings *as it considers advisable*, at which it *may* consider other evidence in addition to the transcript and record.") (Emphasis added.) If there exists "substantial and credible evidence" in support of the charges of the Board, and "a fair administrative hearing is had, the [common pleas court] cannot substitute its judgment for the judgment of the administrative authorities." *Bertolini v. Whitehall City Sch. Dist. Bd. of Edn.*, 139 Ohio App.3d 595, 604, 744 N.E.2d 1245(10th Dist. 2000), quoting *Strohm v. Reynoldsburg City School Dist. Bd. of Edn.*, 10th Dist. No. 97APE07-972, 1998 WL 151082 (Mar. 31, 1998). *Accord Elsass v. St. Mary's City School Dist. Bd. Of Edn.*, 3d Dist. No. 2-10-30, 2011-Ohio-1870, ¶ 43.

{26} Appellant's main contention in the case sub judice is that the conduct found did not rise to the level of good and just cause sufficient to terminate his contract. [Appellant's Brief at 7].

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{27} The Supreme Court has defined "good and just cause" as a "fairly serious matter." *Hale* at 98–99, 234 N.E.2d 583. The referee in the case at bar found appellant's conduct to constitute a "fairly serious matter,"

> Without question, the repeated violation of the Constitution of the United States is a "fairly serious matter" and is therefore, a valid basis for termination of John Freshwaters contract(s). Further, he repeatedly acted in defiance of direct instructions and orders of the administrators - his superiors. These defiant acts are also a "fairly serious matter" and, therefore, a valid basis for termination of John Freshwater's contract.

Referee's Report at 13.

{28} The referee did not use the Tesla Coil incident as a reason to terminate appellant's contract. The referee found that incident had been dealt with by the administration and that case was closed.

{29} The referee further found that "the multiple incidents which gave rise to the numerous and various bases/grounds more than suffice in support of termination." Referee's Report at 12. The referee found that appellant had repeatedly violated the U.S. Constitution; acted in defiance of direct instructions and orders of his superiors, and refused and/or failed to employ objectivity in his instruction of a variety of science subjects. Id.

{30} The common pleas court found that appellee's order was not against the manifest weight of the evidence and that appellant's conduct constituted good and just cause to terminate appellant. Therefore, it affirmed appellant's termination.

{31} A review of the record shows that a hearing spanning nearly two years was conducted, testimony from over 80 witnesses was received, a transcript of over 6,000 pages was produced, and approximately 350 exhibits were admitted into evidence.

{32} During the proceedings appellant was represented by a competent attorney, he was permitted to fully explain his actions, he presented witnesses on his behalf, and he had a full opportunity to challenge the Board's key witnesses. R.C. 3319.16 does not contain any requirement that a teacher be afforded an opportunity to refute the contents of a referee's report in the period between the filing of the report and its acceptance or rejection by the board of education, nor does it provide for an additional hearing before the board if the teacher does not like the results of the hearing before the referee. *Elsass v. St. Mary's City School Dist. Bd. Of Edn.*, 2011-Ohio-1870, ¶ 60.

{33} Appellant has failed to demonstrate any due process violation. The trial court did not abuse its discretion by overruled his request to conduct additional hearings.

{34} We further find that appellee's determination as to the significance of appellant's conduct—that such constituted a fairly serious matter—is explicable and reasonable. Further, the common pleas court's affirmance of that determination was not an abuse of discretion and, therefore, will not be disturbed by this court.

{35} In *Oleske v. Hilliard City School Dist. Bd. Of Edn.*, the Court observed,

> It is not within the province of this court to second-guess appellee's determination of the significance of appellant's conduct. We do not sit as a

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super-school board. Given the circumstances presented herein, we simply cannot find an abuse of discretion on the part of the common pleas court in affirming appellee's order. To do so would simply be to substitute our judgment for that of the common pleas court and/or appellee, and this is not our role.

146 Ohio App.3d 57, 65, 764 N.E.2d 1110 (10th Dist. 2001).

{36} Accordingly, appellant's sole Assignment of Error is overruled in its entirety.

{37} The judgment of the Court of Common Pleas, Knox County, Ohio is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Farmer, J., concur

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

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IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO

FIFTH APPELLATE DISTRICT

JOHN FRESHWATER

Plaintiff-Appellant

-vs-

MOUNT VERNON CITY SCHOOL DISTRICT BOARD OF EDUCATION

Defendant-Appellee

JUDGMENT ENTRY

CASE NO. 2011-CA-000023

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Knox County, Ohio is affirmed. Costs to appellant.

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

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IN THE COURT OF COMMON PLEAS, KNOX COUNTY OHIO

JOHN FRESHWATER,		
Plaintiff,		**CASE NO. 11AP02-0090**
vs.	:	**JUDGE OTHO EYSTER**
MOUNT VERNON CITY SCHOOL DISTRICT BOARD OF EDUCATION	:	**JOURNAL ENTRY**
Defendant.	:	

This matter came before the Court as an original action filed by Plaintiff ("Freshwater") pursuant to Ohio Revised Code §3319.19.16. Freshwater is appealing the Defendant's ("Board of Education") January 10, 2011, Resolution terminating Freshwater's employment contract.

At Freshwater's request and pursuant to the provisions of O.R.C.§3319.16, a public hearing was held before Referee R. Lee Shepard, Esq. The Referee presided over thirty-eight (38) days of witness testimony from over eighty (80) witnesses generating six thousand three hundred forty four (6,344) pages of transcript. The Referee also admitted approximately three hundred fifty (350) exhibits into evidence. The Referee issued a Report on January 7, 2011, recommending the Board of Education terminate Freshwater's contract(s) for "good and just cause."

Based on the number of witnesses and exhibits presented at the Referee's hearing held over a period of over twenty-one (21) months, the Court finds Freshwater's request that the Court conduct additional hearings is not well taken.

The Court, having reviewed the certified transcript of the testimony and the evidence admitted at the hearing before the Referee, the transcript of original papers filed with the

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Board of Education, a certified copy of the minutes of the Board of Education meetings, the Board of Education Resolutions, and having considered the applicable law, finds there is clear and convincing evidence to support the Board of Education's termination of Freshwater's contract(s) for good and just cause, and

IT IS ORDERED, ADJUDGED, AND DECREED that Freshwater's request that the Court conduct additional hearings is denied, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED the Complaint filed in this matter is denied and the Resolution of the Board of Education dated January 10, 2011, terminating any and all contracts with Freshwater is affirmed, and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED Freshwater is to pay the costs of this proceeding within 30 days of receipt of the cost bill.

IT IS SO ORDERED.

JUDGE OTHO EYSTER

Close Code: 18

cc:
John Freshwater, Plaintiff
David Kane Smith, Esq.
Krista Keim, Esq.
Paul Deegan, Esq.

MOUNT VERNON CITY SCHOOLS
300 Newark Road
Mount Vernon, Ohio 43050-4510
Phone (740) 397-7422

1/11/2010

Mr. John Freshwater
7760 New Delaware Road
Mount Vernon, Ohio 43050

Dear Mr. Freshwater,

The Mount Vernon Board of Education voted to terminate your contract last night at the regular Board meeting. I have enclosed the termination resolution for you. Your health insurance will be cancelled on January 31, 2011. After termination of your health insurance, you will receive COBRA insurance forms if you are interested in purchasing health insurance through COBRA.

If you have any questions pertaining to your health insurance, please feel free to call me at 740-397-7422 between the hours of 7:30 a.m. to 4:00 p.m.

Sincerely,

/Barbara J. Donohue

Barbara J. Donohue
Treasurer

Enclosure

RESOLUTION

The Board of Education of the Mount Vernon City School District, Knox County, Ohio (hereinafter the "Board) met in regular session on January 10, 2011, with the following members present:

Mrs. Paula Barone

Mrs. Sharon Slane-Fair

Mrs. Jody Goetzman

Mr. Steve Thompson

Dr. Margie Bennett

Mrs. Barone moved and Mrs. Goetzman seconded the adoption of the following resolution:

RESOLUTION TO TERMINATE ANY AND ALL EMPLOYMENT CONTRACTS OF JOHN FRESHWATER WITH THE BOARD OF EDUCATION EFFECTIVE 11:59 P.M. ON JANUARY 10, 2011

WHEREAS, John Freshwater ("Mr. Freshwater") is currently employed by the Board as an eighth grade science teacher as Mount Vernon Middle School;

WHEREAS, as a result of his position with the Board, Mr. Freshwater is a member of the bargaining unit represented by the Mount Vernon Education Association ("MVEA") and is governed by the terms and conditions of employment set forth in the collective bargaining agreement between MVEA and the Board (the "Agreement");

WHEREAS, the Board has promulgated reasonable policies, rules and standards for the management and control of its workforce and for the safe and efficient governance of its employees, in compliance with State and Federal law;

WHEREAS, the Board not only expects, but requires, its employees to adhere to the reasonable policies, rules and standards promulgated by the Board, as well as State and Federal law;

WHEREAS, Mr. Freshwater is an employee and charged with and compensated for not only his performance while at work but also for his knowledge of and adherence to the aforementioned Board policies, rules and standards, as well as State and Federal law;

WHEREAS, Ohio Revised Code §3319.16 sets forth that a teacher employed by the Board of Education may be terminated for "good and just cause;"

WHEREAS, under the Agreement and the statutory law of Ohio, Mr. Freshwater is subject to R.C. §3319.16 and may be terminated for "good and just cause;"

WHEREAS, under Section 3319.16, Mr. Freshwater was provided notice, signed by the Treasurer, of the Board's intention to consider the termination of his teaching contract(s);

WHEREAS, Mr. Freshwater filed a written statement with the Treasurer on June 30, 2008, requesting a public hearing before the Board;

WHEREAS, the Board requested that a Referee preside over the hearing, as appointed by the State of Ohio Superintendent of Public Instruction, pursuant to Section 3319.16 of the Revised Code;

WHEREAS, a Referee conducted a public hearing, commencing October 2, 2008 and extending through June 22, 2010, with testimony and evidence offered by Mr. Freshwater and the Board;

WHEREAS, the Referee issued a Report on Friday, January 7, 2011, recommending "the Board of Education of the Mount Vernon City School District ... terminate John Freshwater's contract(s) for "good and just cause;"

WHEREAS the Board adopts the Referee's Report, finding the following conduct as "good and just cause" under Revised Code Section 3319.16 for the termination of Mr. Freshwater's teaching contract(s):

- Mr. Freshwater injected his personal religious beliefs into his plan and pattern of instructing his students. In doing so, he exceeded the bounds of all the pertinent Bylaws/Policies of the Mount Vernon City School District;
    - In 2003, Mr. Freshwater unsuccessfully petitioned the Board to allow him "to critically examine the evidence both for and against evolution." Despite the Board's rejection of this proposal, Mr. Freshwater undertook the instruction of his eighth grade science students, as if the suggested policy had been implemented;
    - On more than one occasion, Mr. Freshwater was reminded by his superiors that he must abide by the Bylaws & Policies, as they related to religion in the curriculum;
    - Mr. Freshwater's "evidence" against evolution was based, in large part, upon the Christian religious principals of Creationism and Intelligent Design;
    - Mr. Freshwater's use of "against evolution" materials ran afoul of the District's Bylaws/Policies;
    - Mr. Freshwater used unauthorized handouts to challenge evolution, based in large part upon the Christian religious principals of Creationism and Intelligent Design;
    - Mr. Freshwater used motion pictures (Expelled; No Intelligence Allowed) and videos (the Watchmaker) to challenge evolution, which were based in large part upon the Christian religious principals of Creationism and Intelligent Design;
    - Mr. Freshwater taught his students to use the code word "here" when teaching students to question printed materials from science textbooks, which were approved and provided by the Board;

- Mr. Freshwater taught his eighth grade students that homosexuality is a sin, so anyone who chooses to be a homosexual is a sinner. Mr. Freshwater also taught his students that science and scientists can be wrong when they declare that there is a genetic predisposition to homosexuality;

- Mr. Freshwater not only injected his subjective, biased, Christian religion based, non-scientific opinion into the instruction of eighth grade science students but also gave those students reason to doubt the accuracy and or veracity of scientists, science textbooks, and/or science in general;

- Mr. Freshwater acted in defiance of direct instructions and orders of the administrators (Insubordination);

  - Mr. Freshwater was directed to remove or discontinue the display of all religious articles in his classroom, including all posters of a religious nature, and whereas, Mr. Freshwater has failed to comply with that directive and, further, has brought additional religious articles into his classroom, in a direct act of insubordination;

WHEREAS, the Referee's Report has determined that the multiple incidents described above, in total, represent a sufficient bases/grounds for termination; the Board further determines that each individual action independently constitutes "good and just cause" for the termination of Mr. Freshwater's teaching contract(s), whether considered individually or jointly;

NOW THEREFORE BE IT RESOLVED, that the Board terminates any and all employment contracts of Mr. Freshwater with the Mount Vernon City School District Board of Education. The Treasurer shall furnish Mr. Freshwater with written notice, denoting the Board's termination of his employment contract "for other good and just cause," in accordance with Ohio Revised Code §3319.16 and the collective bargaining agreement.

BE IT FURTHER RESOLVED, that Mr. Freshwater's termination shall take effect at 11:59 p.m. on January 10, 2011.

BE IT FURTHER RESOLVED, that it is hereby found and determined that all formal actions of the Board of Education concerning and relating to the adoption of this Resolution were adopted in an open meeting of the Board, and that all deliberations of the Board and any of its committees that resulted in such formal action were open to the public when required by law, in full compliance with the law.

UPON ROLL CALL AND THE PASSAGE OF THE FOREGOING RESOLUTION, the vote was as follows:

	Yea	Nay
Mrs. Paula Barone	X	
Mrs. Jody Goetzman	X	
Mrs. Sharon Slane-Fair	X	
Mr. Steve Thompson		X
Dr. Margie Bennett	X	

The foregoing is a true and correct excerpt from the minutes of a meeting of the Board of Education of the Mount Vernon City School District conducted on January 10, 2011

Barbara J. Donohue
Treasurer

IN THE MATTER
OF JOHN FRESHWATER

Mount Vernon City School
District Board of Education,

Employer

R. LEE SHEPHERD, REFEREE

vs.

REPORT

John Freshwater,

Employee

In June 2008, the Board of Education of the Mount Vernon City School District determined that it was necessary to initiate proceedings to consider the termination of the employment contract of John Freshwater. In furtherance of its decision, the Board passed an "Amended Resolution of Intent to Consider the Termination of the Teaching Contract(s) of John Freshwater". Said document set forth the Board's bases for consideration of termination "with full specification of the grounds for such consideration" (ORC 3119.16). This report shall review each of the specified grounds in the order in which they appear in the Amended Resolution.

I. SPECIFIED GROUND NO. 1 (a) and (b) (Tesla Coil)

The Board alleged that John Freshwater used a Tesla Coil to mark the shape of a cross into the arms of eighth grade students and, in so doing, acted in derogation of the operating instructions for the device. It was further alleged that at least one of the students to whom the

Tesla Coil was applied suffered red welts, blistering, swelling, and blanching in the area surrounding the application. The Board alleged the application of the Tesla Coil to have been "very painful" and to have created a mark which remained visible for three or four weeks (on the same student who allegedly suffered the hereinabove listed symptoms)

Due to the sensational and provocative nature of this specified ground, it and the facts and circumstances surrounding it became the focus of the curious, including those in the video, audio, and print media. Once sworn testimony was presented, it because obvious that speculation and imagination had pushed reality aside. There was a plausible explanation for how and why the Tesla Coil had been used by John Freshwater. Further, and more crucial to a review of the Amended Resolution, the use of the Tesla Coil by John Freshwater did not seem to be a proper subject for the Amended Resolution. By letter of January 22, 2008 as authorized by Principal William White (Board Exhibit 6 – Attachment 16) the Tesla Coil matter had been concluded. John Freshwater was instructed to cease and desist the use of the device "for purposes of shocking students". No evidence was presented that John Freshwater used the Tesla Coil for any purpose thereafter. The issue and incident was dealt with by the administration. That case was closed.

II. SPECIFIED GROUND NO. 2 (a) – (g) (Failure to Adhere to Established Curriculum)

Initially, it must be noted that a wealth of evidence was presented to substantiate that John Freshwater was a successful eighth grade science teacher. Many, possibly most of his students seemed to enjoy his class and remember it fondly. On the average, Freshwater students performed at or above the state requirements and expectations for eighth grade science

students. The state test score results for his students often exceeded the state test score results of other eighth grade science teachers. On more than one occasion, John Freshwater was recognized by his peers for his outstanding teaching skills.

The Amended Resolution of the Board took exception to the fact that John Freshwater "taught additional subject areas that are not included in the eighth grade Academic Content Standards". Had the additional subject areas been taught to the exclusion of the mandatory subject areas, this specified ground may have carried more weight. However, the evidence did not establish such. As has been pointed out hereinabove, John Freshwater's students learned and tested well with regards to the mandatory subject areas.

Unfortunately, John Freshwater was not satisfied with the positive results of his teaching in terms of successful state test scores and the development of a love for the subject of science in the minds of his students. John Freshwater was determined to inject his personal religious beliefs into his plan and pattern of instruction of his students. In so doing, he exceeded the bounds of all of the pertinent Bylaws and/or Polices of the Mount Vernon City School District – "Religion In The Curriculum"; "Controversial Issues"; "Religious/Patriotic Ceremonies And Observances"; "Religious Expression In The District"; and "Academic Freedom Of Teachers".

The District's Bylaw/Policy regarding religion in the curriculum (2270 - Employee Exhibit #9) contains specific and detailed language (4th ¶) which appears to have been developed as and for teachers of the sciences – especially those teaching a general science course (as opposed to specific science courses e.g. chemistry or physics). That policy

specifies..."Students should receive unbiased (emphasis added) instruction in the schools, so they may privately accept or reject the knowledge thus gained, in accordance with their own religious tenets". A great deal of evidence was presented, both as testimony and as exhibits, detailing John Freshwater's biased instruction. Webster defines bias as a particular tendency or inclination that prevents impartial consideration of a question. John Freshwater's bias grew from his fervent and deep seated Christian beliefs. Such beliefs and convictions, while admirable character traits in other settings, proved to be John Freshwater's downfall as an eighth grade science teacher in a public school. Time after time after time he injected his beliefs as associated with his own religious tenets into his science instruction.

In 2003, John Freshwater petitioned the Board asking for the implementation of a new Board policy. His proposed policy was titled "Objective Origins Science Policy". He advised the Board (through the proposal)..."much of the evidence that supports the Darwinian Evolution Theory which is taught in our public schools is controversial". His proposed solution was the addition of a Board policy "that allows teachers/students to critically examine the evidence both for and against evolution". John Freshwater's proposal was rejected and his suggested policy was not adopted. Nonetheless, he undertook the instruction of these eighth graders as if the suggested policy had been implemented. Both overtly and covertly, John Freshwater began to instruct his eighth grade students in such a way that they were examining evidence both for and against evolution. The evidence for evolution was the material(s) contained within the science textbooks as approved and provided by the Board. The evidence against evolution was in the form of handouts (e.g. Board Exhibit 6 Attachment 10); motion

pictures ("Expelled – Ben Stein"); videos ("The Watchmaker"); as well as a shortcut method of citing passages in printed materials that could be questioned (students needed only say "here").

Exacerbating this situation was the fact that the evidence against evolution was based, in large part, upon the Christian religious principals of Creationism and Intelligent Design. Thus, John Freshwater's instruction, in these "against evolution" instances, ran afoul of the District's Bylaw/Policy regarding "Religion In The Curriculum" (2270 – Employee Exhibit #9) – "Instructional activities shall not be permitted to advance or inhibit any particular religion". Further, the District's Bylaw/Policy regarding "Religious/Patriotic Ceremonies And Observances" was violated as pertains to that portion of said Bylaw/Policy which states "Decisions of the United States Supreme Court have made it clear that it is not the province of a public school to advance or inhibit religious beliefs or practices".

On more than one occasion, John Freshwater was reminded by his superiors that he must abide by the Bylaws & Policies as they related to religion in the curriculum. His principal, Jeff Kuntz, attached a copy of "Religion In The Curriculum" to John Freshwater's "Teacher Evaluation Summary Form" of January 2003 (Board Exhibit 16; Employee Exhibit 96).

Principal Kuntz testified that he had received complaints from other science staff members as well as from a parent regarding John Freshwater's science instruction. Principal Kuntz investigated and determined that John Freshwater was not adhering to policy 2270 ("Religion In The Curriculum" TR3830). Consequently, Principal Kuntz attached a copy of

the policy to John Freshwater's "Teacher Evaluation Summary Form" (Board Exhibit 16). He testified that he didn't recall having ever attached a policy to an evaluation before or after this particular incident (TR3808). Principal Kuntz also made it perfectly clear that his act of attaching the policy to the evaluation was intended to point out a deficiency in John Freshwater's method of instruction (TR3812). Principal Kuntz perceived a problem... teaching in opposition to a Board Policy/Bylaw and took corrective action by meeting with John Freshwater face to face and by attaching the copy of the policy to the evaluation. It is doubtful there was any confusion or misunderstanding. Principal Kuntz "spoke with John about it and encouraged him to stay with the subject matter that was board-approved and related to his textbook (TR 3807). But this would not be the only time that John Freshwater's superior(s) had to communicate with him with reference to inappropriate science instruction.

Superintendent Jeff Maley testified about three occasions (during his superintendency) wherein he investigated and/or took action when John Freshwater made use of materials in his class "that may not be appropriate for science" (TR2243). On of the three incidents referred to by Superintendent Maley is detailed hereinabove (Principal Kuntz attaching the Policy/Bylaw to the evaluation). Another incident occurred prior to John Freshwater's 2003 "Objective Origins Science Policy" proposal. Superintendent Maley testified (in answer to the question "And what material was Mr. Kuntz directing John not to use any longer?")....it was material about intelligent design. A parent had come in with the material" (TR 2244). The third incident took place in the spring of 2006. Again, a parent complained that John Freshwater was including non textbook anti-evolution materials in his course of instruction for

eighth grade science (Board Exhibit 6; Attachment 10). Both the complaining parent and a committee of John Freshwater's educational staff peers associated the materials with inappropriate sources i.e. All about God Ministries and several Intelligent Design websites. Once again, this time by direct communication from the Superintendent, John Freshwater was admonished for having made use of inappropriate materials in the teaching of eighth grade science.

Perhaps the most egregious example of John Freshwater's "failure to adhere to established curriculum" took place in the fall of 2006. This particular incident was witnessed by Jim Stockdale. Mr. Stockdale was then employed by the Mount Vernon Board of Education as a substitute teacher. On that fall day in 2006, he was substituting for Carrie Mahon (the inclusion teacher for John Freshwater's eighth grade science class). Mr. Stockdale had taught special education for more than thirty years. His experience had made him aware of prejudice toward students who were different and led him to be sensitive to such prejudice.

Mr. Stockdale testified that he "was more than surprised I was – I was in a state of disbelief" (TR 4154) when John Freshwater told his 13 and 14 year old public school students that the Bible states that homosexuality is a sin, so anyone who chooses to be a homosexual is a sinner. Mr. Stockdale described how Mr. Freshwater attempted to relate this comment to the subject of science by advising his students that science and scientists can be wrong – as when they (the scientists) declare that there is a genetic predisposition to homosexuality. Thus, in one incident, witnessed by an experienced and seasoned educator, John Freshwater not only injected his subjective, biased, Christian religion based, non-scientific opinion into the

instruction of eighth grade science students but also gave those students reason to doubt the accuracy and or veracity of scientists, science textbooks, and/or science in general.

III. SPECIFIED GROUND NO. 3 (Fellowship of Christian Athletes)

Although there is evidence that John Freshwater was provided a copy of the guidelines for the conduct of Fellowship of Christian Athletes on more than one occasion (TR 497; TR 3827), John Freshwater did not follow the guidelines implicitly. The testimony of Father Mark Hammond (TR 6066) indicated that John Freshwater had asked him (Father Hammond) to speak at the FCA. The testimony of Ruth Frady (TR 5194) indicated that John Freshwater moved from the back of the room toward a prayer circle which had formed to pray for Pastor Zirkle. She further testified that John Freshwater instituted a "concluding prayer" in order to get the students moving toward their next class. Ruth Frady testified that the concluding prayer, though innocuous, ended with an "amen". The testimony of former Assistant Principal Brad Ritchey (TR 5945) indicated that John Freshwater admitted to having "put my hands up" during the prayer for Pastor Zirkle. The testimony of Principal White (TR 503) indicated that John Freshwater admitted that he (John Freshwater) "probably did pray for him to be feeling better and well....".

Each of these acts by John Freshwater represented violations of the mandates as contained within the FCA Handbook For Public Schools (Board Exhibit 10; Employee Exhibit 1). At page 9 it is clearly stated that the clubs must be voluntary and student initiated. Further employees or agents of the school are to be present at religious meetings only in a nonparticipatory capacity. At page 16 it is clearly stated that as a faculty sponsor, the teacher

is still acting in his official capacity as a school employee and, therefore, cannot participate in religious speech with students. There is ample evidence that John Freshwater knew or should have known of these mandates and restrictions and that he knowingly or recklessly violated them.

IV. SPECIFIED GROUD NO. 4 (Disobedience of Orders)

By the spring of 2008, there was an atmosphere of tension within the Mount Vernon School District. Specifically, this tension pervaded the middle school and the board offices. Legal counsel had been retained by the parents of a John Freshwater's eighth grade science student. Allegations were made that John Freshwater had caused physical harm to students and that he was in violation of the First Amendment of the United States Constitution (commonly referred to as the Establishment Clause). The administration of the Middle School in conjunction with the Superintendent began an investigation into the allegations. After investigating, the administrators began implementing a plan of corrective action in hopes of forestalling legal action against the Mount Vernon Schools.

The initial focus of the corrective plan concerned the room in which John Freshwater instructed his eighth grade science students. The administration had concerns with the manner in which the room was decorated - the materials attached to the door windows, cupboards, walls, and bulletin boards. There were also concerns with items which were in plain view to the students both as they entered the room and as observed from their assigned seats. The materials with which the administrators were concerned included handwritten Bible verses, videos, posters, and a Living Bible.

The Middle School Principal, William White, was assigned the task of implementing the plan of corrective action. Beginning on April 7, 2008 he had several contacts with John Freshwater both in person and in writing. Principal White testified that "there were several meetings and several conversations in April" (TR 506). He further testified that multiple contacts with John Freshwater became necessary "because the things that I had asked to happen on April 7th were not attended to" (TR 507). Granted, there may have been some confusion about the instructions, orders, and directives which Mr. White gave John Freshwater. However, it is abundantly clear that what may have begun as confusion soon transformed into defiance.

Between April 7th and April 16 2008, Mr. White clarified and reiterated the directives. Finally, he was forced to set a deadline for compliance – April 16, 2008. Two days prior (April 14, 2008), Mr. White and John Freshwater had a discussion about whether his disobedience would constitute insubordination. He (Freshwater) was told that it would be (TR 513). Nevertheless, John Freshwater decided to comply only in part. To make matters worse he (Freshwater) also decided to add another element to the controversy. He checked out religious texts from the school library and added them to the array on his classroom desk. John Freshwater's explanation for this act included the phrases "it was a curiosity" and "it's my inspiration" (TR 447). These explanations seem questionable. The act appears to have been one of defiance, disregard, and resistance.

When Mr. White returned to John Freshwater's classroom on April 16, 2008 to see if his directives had been followed, he discovered that they had not been. His testimony recounts

his observations "Almost everything had been removed, but there was still the Colin Powell poster....out of the school library he had checked out the Bible and had a book called Jesus of Nazareth" (TR 513 & 514). John Freshwater admitted that he had not removed the Colin Powell poster. He explained..."with that poster, that's a patriotic poster of our Commander and Chief"...."and I don't recall being told to remove it" (TR 444).

V. CONCLUSION

Initially, I must note that none of the references to any federal court case(s) involving the Mount Vernon City School District or John Freshwater (pending or since settled or dismissed) whether in the transcript, as an exhibit, or as a part of a brief were in any way influential in the drafting of this Report. I have considered any such references to have been immaterial to my task.

Secondly, the debate concerning the level of proof required in this matter need not be argued further. After a thorough review of the evidence as presented to me, I am satisfied and do so determine this matter by either and both a preponderance of the evidence and clear and convincing evidence.

Thirdly, as concerns the applicability of the pre or post 2009 version of Ohio Revised Code § 3316.19, my determination rests upon the standards established for termination in either of those versions. Each version permits termination for "good and just cause". The Ohio Supreme Court provided some clarification of the phrase "good and just cause" in it's 1968 case Hale v. Board of Education 13 Ohio St. 2d 92. Therein, the Court notes that the

conduct of the teacher in question must constitute a "fairly serious matter" in order to cross the threshold of "good and just cause".

John Freshwater's conduct as set forth hereinabove represents a "fairly serious matter" and is, therefore, a valid basis for his termination in accordance with ORC 3319.16 based upon "good and just cause". It is not herein determined whether any one of the bases/grounds for consideration of termination would be sufficient in and of itself. However, the multiple incidents which gave rise to the numerous and various bases/grounds more than suffice in support of termination.

> "Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable, and their attendance is involuntary." Edwards v. Aguillard 482 U.S. 578 (1968) (at pg. 584)

John Freshwater was given ample opportunity to alter or adjust his content and style of teaching so as to avoid running headlong into the Establishment Clause and the Policy/Bylaws of the Mount Vernon Board of Education. Instead, he persisted in his attempts to make eighth grade science what he thought it should be – an examination of accepted scientific curriculum with the discerning eye of Christian doctrine. John Freshwater ignored the concept of in loco parentis and, instead, used his classroom as a means of sowing the seeds of doubt and confusion in the minds of impressionable students as they searched for meaning in the subject of science.

John Freshwater purposely used his classroom to advance his Christian religious views knowing full well or ignoring the fact that those views might conflict with the private beliefs of

his students. John Freshwater refused and/or failed to employ objectivity in his instruction of a variety of science subjects and, in so doing, endorsed a particular religious doctrine. By this course of conduct John Freshwater repeatedly violated the Establishment Clause. Without question, the repeated violation of the Constitution of The United States is a "fairly serious matter" and is, therefore, a valid basis for termination of John Freshwater's contract(s). Further, he repeatedly acted in defiance of direct instructions and orders of the administrators – his superiors. These defiant acts are also a "fairly serious matter" and, therefore, a valid basis for termination of John Freshwater's contract (s). My recommendation to the Board of Education of the Mount Vernon City School District is that the Board terminate John Freshwater's contract(s) for "good and just cause".

R. Lee Shepherd

R. Lee Shepherd, Referee (0007798)

Not Reported in F.Supp.2d, 2009 WL 4730597 (S.D.Ohio)
(Cite as: 2009 WL 4730597 (S.D.Ohio))

Only the Westlaw citation is currently available.

United States District Court,
S.D. Ohio,
Eastern Division.
John **FRESHWATER**, et al., Plaintiffs,
v.
MOUNT VERNON CITY SCHOOL DISTRICT BOARD OF EDUCATION, et al., Defendants.

No. 2:09–cv–464.
Dec. 8, 2009.

West KeySummary**Civil Rights 78 1736**

78 Civil Rights
78V State and Local Remedies
78k1734 Persons Protected, Persons Liable, and Parties
78k1736 k. Employment Practices. Most Cited Cases

Teacher could not maintain an action against school district's director of teaching and learning for religious harassment and hostile work environment under Ohio law. Teacher did not allege that the director acted in any supervisory capacity regarding the board of education's passing of a resolution to consider his termination due to religious influences in his teaching of science. Specifically, teacher did not allege that director had any authority to hire, fire, supervise, evaluate, or manage. R.C. § 4112.02.

Raymond Kelly Hamilton, Grove City, OH, for Plaintiff.

David Kane Smith, Krista Keim, Sarah J. Moore, Britton Smith Peters & Kalail Co LPA, Cleveland, OH, Nicole M. Donovsky, Richard Wayne Ross, Stacy Virginia Pollock, Means Bichimer Burkholder & Baker, Columbus, OH, C. Joseph McCullough, White Getgey & Meyer, Cincinnati, OH, for Defendants.

OPINION AND ORDER

GREGORY L. FROST, District Judge.

*1 This matter is before the Court on the Motion of Defendant Lynda Weston to Dismiss ("Weston's Motion to Dismiss") (Doc. # 14), Plaintiff Freshwater's Memorandum Contra to Weston's Motion to Dismiss (Doc. # 36), and the Reply of Defendant Lynda Weston to Plaintiffs' Memorandum Contra to Weston's Motion to Dismiss (Doc. # 42). For the reasons that follow, the Court **GRANTS in part** and **DENIES in part** Weston's Motion to Dismiss.

I. Background

Plaintiff John Freshwater filed the complaint in this action on June 9, 2009, and an amended complaint on June 18, 2009, which added his wife as a plaintiff. (Docs.# 1, 4.) Freshwater named as defendants the Mount Vernon City School District Board of Education ("Board of Education"), several individual members of the Board of Education, including the Director of Teaching and Learning Lynda Weston, several Mount Vernon City School District employees, David J. Millstone, Thomas J. Herlevi, Julia F. Herlevi, and H.R. on Call, Inc. Freshwater sued Weston in her "professional and personal capacities." (Doc. # 4 ¶ 10.) The following allegations were taken from the amended complaint.

Freshwater was hired by the Board of Education in 1987 and was employed by them as an eighth grade science teacher until the incidents pertaining to this lawsuit occurred. For 16 of the 20 years that Freshwater taught, he was the faculty appointed facilitator, monitor, and supervisor of the eighth grade group called the Fellowship of Christian Athletes. For his entire teaching career, Freshwater kept a Bible on his desk. Several other teachers employed by the Board of Education also kept Bibles on their desks. Freshwater has been engaged as a private citizen in promoting certain religious activities and liberties in the Mount Vernon, Ohio community.

Throughout Freshwater's employment, he was given performance evaluations on at least twenty occasions, each of which was positive. Freshwater had never been disciplined before the events relevant to the instant action.

During the 2007–2008 school year, Freshwater's students, as a group, earned the highest proficiency scores on the standardized Ohio Achievement Tests

when comparing Freshwater's students' scores to all of the other eighth grade groups taught by any other teacher employed by the Board of Education. Freshwater was the only Mount Vernon Middle School science teacher who achieved a "passing" score on the Ohio Achievement Test despite Freshwater having the most students with individualized education plans. Eighty-nine percent of Freshwater's students achieved a passing score on the topic of "Evolutionary Theory," a topic within the "Life Science" curriculum. *Id.* at ¶ 43.

In January 2008, the parents of one of Freshwater's students complained to the president of the Board of Education, Defendant Ian Watson, about an incident in which Freshwater used a device called a Tesla Coil to make a mark that lasted a week and one-half to two weeks on the student's arm. The mark is characterized by Defendants as the religious symbol of a Christian cross. Freshwater claims that, although he had used a Tesla Coil before, he did not expect it to leave a mark on the student nor did he believe that was even a possibility.

*2 As a result of this complaint, the Board of Education retained counsel, Defendant David Millstone, and requested an investigation of the charges made against Freshwater, which was performed by Defendant H.R. on Call, Inc. and Defendants Thomas J. and Julia F. Herlevi. The contract between the Board of Education and the Mount Vernon Education Association provided the authority for such an investigation. A report on the investigation was provided to the Board of Education. The report indicated that it had interviewed Weston and that "Dr. Weston stated that she has had to deal with internal and external complaints about his (Plaintiff Freshwater) failure to follow the curriculum for much of her 11 years at Mount Vernon." *Id.* at ¶ 114.

Freshwater claims that the way in which he was investigated was discriminatory and harassing based upon Defendants' perception of his religious beliefs and activities. Freshwater "made a public statement about the religious discrimination on April 16, 2008." *Id.* at ¶ 155.

An administrative hearing regarding the charges brought against Freshwater was held in which several Defendants testified. "Defendants Short, Weston and White testified in the hearing they had personal knowledge of or a perceived belief concerning Plaintiff Freshwater's personal religious activities as a result of actions taken by Freshwater during Freshwater's time outside of school duties." *Id.* at ¶ 113. At the hearing Weston testified that the statement in the report that she had received internal and external complaints for much of her eleven years of employment with the Board of Education was "inaccurate." *Id.* at ¶ 115.

On June 20, 2008, the Board of Education passed by vote a resolution titled *"Intent to Consider the Termination of the Teaching Contract of John Freshwater"* ("resolution"), which stated that Freshwater "consistently failed to adhere to the established curriculum under the American Content Standards for eighth grade as adopted by ... the Mount Vernon City School Board." *Id.* 4 ¶¶ 23, 24. On July 7, 2008, the Board of Education amended the resolution to correctly identify the curriculum standards as the "Academic Content Standards." *Id.* ¶ 25. The resolution stated that Freshwater taught creationism and intelligent design in his eighth grade science classes, which is not allowed by the Academic Content Standards.

Freshwater denies that he taught creationism and intelligent design. Freshwater claims that at all times since their adoption he followed the Academic Content Standards. Freshwater alleges that the investigation report upon which the Board of Education relied in issuing the resolution included false statements about Freshwater and statements that were taken out of context so that they were inflammatory against Freshwater. Freshwater contends that he was the target of intentional religious discrimination and harassment, being treated differently than his similarly situated coworkers, and that he was deprived of his constitutional rights to free speech and association, equal protection, and due process.

*3 Freshwater filed this action under 42 U.S.C. § 1983 ("Section 1983"), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), the Ohio Revised Code § 4112.02 *et seq.* ("Chapter 4112"), and the common law of Ohio. Freshwater alleges:

> Count 1—Section 1983 violation of the First and Fourteenth Amendments' rights to free speech, free association, and the exercise of religion—filed

against all of the defendants.

Count 2—Section 1983 violation of the First and Fourteenth Amendments' rights to equal protection—filed against all of the defendants.

Count 3—Section 1983 violation of the First and Fourteenth Amendments' rights to due process—filed against all of the defendants.

Count 4—Title VII religious discrimination—filed against the Board of Education, superintendent for the Board of Education Steve Short, and principal for the Board of Education William White.

Count 5—Title VII retaliation—filed against the Board of Education.

Count 6—Title VII religious harassment—filed against the Board of Education, Watson, Short, and Weston.

Count 7—Chapter 4112 religious harassment—filed against the Board of Education, Watson, Short, and Weston.

Count 8—Chapter 4112 hostile work environment—filed against all of the defendants.

Count 9—Ohio public policy prohibiting retaliation in employment—filed against the Board of Education.

Count 10—Civil conspiracy to violate Freshwater's civil rights—filed against all of the defendants.

Count 11—Defamation—filed against all of the defendants.

Count 12—Breach of contract—filed against the Board of Education, Short, White, Millstone, H.R. on Call, Inc., and Thomas and Julia Herlevi.

Count 13—Res judicata—filed against the Board of Education.

Count 14—Negligent retention, supervision, and failure to train—filed against the Board of Education.

Count 15—Malicious purpose, bad faith, or wanton or reckless behavior—filed against all of the defendants.

Count 16—Declaratory judgment.

Count 17—False light invasion of privacy—filed against all of the defendants.

Count 18—Loss of consortium—filed against all defendants by both Freshwater and his spouse.

Weston filed a motion to dismiss all of the claims filed against her and that motion is now ripe for review.

II. Analysis

Weston requests that the Court dismiss the claims filed against her based upon qualified and statutory immunity and/or because the claims fail to state a claim upon which relief can be granted.

A. Failure to State a Claim

Weston moves for dismissal of the Title VII, Chapter 4112, and defamation claims for relief filed against her for their failure to state a claim upon which relief can be granted.

1. Standard

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). In *Ashcroft v. Iqbal*, ——U.S. ——, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), the United States Supreme Court clarified the plausibility standard articulated in *Twombly*:

> *4 Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.*, at 555 (Although for the purposes of a

> motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)). Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.*, at 556.
>
> *Id.* at 1949–50.

The Court then gave direction on how to determine plausibility:

> Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. [*Iqbal v. Hasty,*] 490 F.3d [143] 157–158 [2d Cir.2007]. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).
>
> *Id.* at 1950.

2. Application

a. Title VII

Freshwater filed claims for relief against Weston in her individual and her official capacities alleging violations of Title VII. Weston argues that she is entitled to dismissal of these claims against her because individuals cannot be held liable in their personal capacities under Title VII and because official capacity liability cannot attach to her because she is not a supervisor as that term is defined in Title VII case law. This Court agrees.

As to the personal capacity claim, the United States Court of Appeals for the Sixth Circuit has held that "an individual employee/supervisor, who does not otherwise qualify as an 'employer,' may not be held personally liable under Title VII." *Wathen v. General Electric Co.*, 115 F.3d 400, 405 (6th Cir.1997). Consequently, even when accepting the facts alleged in the amended complaint as true, Freshwater has failed to state a Title VII personal capacity "claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

With regard to official capacity Title VII claims, the Sixth Circuit has explained:

> [T]here is support for the proposition that a supervisor may be held liable [under Title VII] in his or her official capacity upon a showing that he or she could be considered the "alter ego" of the employer. This Court has not clearly and definitively ruled on this issue and we need not do so today. Under the standards set forth in other circuits that allow supervisors to be sued in their official capacity, Plaintiff has failed to make a showing that Bruzina had significant control over Plaintiffs hiring, firing and working conditions such that he could be considered the "alter ego" of BP. *See, e.g., Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir.1993).

***5** *Little v. BP Exploration & Oil Co.*, 265 F.3d 357, 362 n. 2 (6th Cir.2001). This Court recently noted that the issue of whether a supervisor may be held liable under Title VII in his or her official capacity "apparently remains unresolved in this Circuit even eight years [after the *Little* court made this oberservation]." *Monsul v. Ohashi Technica U.S.A., Inc.*, Case No. 2:08–cv–958, 2009 U.S. Dist. LEXIS 68680, at *6, 2009 WL 2430959 (S.D.Ohio Aug. 6, 2009) (citing *Butler v. Cooper–Standard Auto. Inc.*, No. 3:08 CV 162, 2009 U.S. Dist. LEXIS 13448, 2009 WL 455337, at *17 (N.D.Ohio Feb.23, 2009) ("The Sixth Circuit, however, has left open the possibility that 'a supervisor may be held liable on his or her official capacity upon a showing that he or she could be considered the "alter ego" of the employer.' " (quoting *Little*, 265 F.3d at 362 n. 2))). "At least one district court in this Circuit has suggested that such an official capacity claim under Title VII can proceed." *Id.* at *7 (citing *Osman v. Isotec, Inc.*, 960 F.Supp. 118, 121 (S.D.Ohio 1997) ("In light of the overwhelming weight of recent authority, the Court finds that under Title VII a supervisor may be sued only in his or her official capacity as the agent of the employer ....")).

In the instant action, this Court need not decide whether a supervisor may be held liable under Title VII in his or her official capacity because, even if there were such liability none lies here. That is, Freshwater makes no allegations that Weston had significant control over hiring, firing, and working conditions such that she could be considered the "alter ego" of the Board of Education. Thus, the amended complaint does not permit the Court "to infer more than the mere possibility of misconduct" and has therefore failed to state a claim that can survive a motion to dismiss for failure to state a claim upon which relief can be granted. *Iqbal*, 129 S.Ct. at 1950.

Accordingly, the Court **GRANTS** Weston's Motion to Dismiss as it relates to all Title VII claims for relief filed against Weston.

b. Chapter 4112

Freshwater filed claims for relief against Weston for alleged violations Ohio's civil rights statute, Chapter 4112. Weston argues that she is entitled to dismissal of these claims against her because she is not a supervisor and that liability under Chapter 4112 does not extend to non-supervisory personnel. This Court agrees.

Unlike individual liability under Title VII, the Ohio Supreme Court has held "that for purposes of R.C. Chapter 4112, a supervisor/manager may be held jointly and/or severally liable with her/his employer for discriminatory conduct of the supervisor/manager in violation of R.C. 4112." *Genaro v. Central Transport, Inc.*, 84 Ohio St.3d 293, 703 N.E.2d 782, 787–88 (Ohio 1999); *see also Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 571 n. 2 (2000) (recognizing *Genaro's* holding). Liability, however, does not extend to employees who are not in a supervisory position. *See Minnich v. Cooper Farms, Inc.*, 39 Fed. Appx. 289, 296 n. 8 (6th Cir.2002) (co-employee was not manager or supervisor who could be held liable for harassment under Chapter 4112) (citing *Hale v. City of Dayton*, Montgomery App. No. 18800, 2002 WL 191588 at *2 (2nd Dist., Feb. 8, 2002) ("Ohio courts have refused to extend *Genaro* to non-supervisory employees")).

*6 Here, as stated above, Freshwater does not allege that Weston acted in any supervisory capacity. Freshwater does not allege that Weston had any authority to hire, fire, supervise, evaluate, or manage. Consequently, even when accepting the facts alleged in the amended complaint as true, Freshwater has failed to state a Chapter 4112 "claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

Thus, the Court **GRANTS** Weston's Motion to Dismiss as it relates to both Chapter 4112 claims for relief filed against Weston.

c. Defamation

Weston moves for dismissal of the defamation claim filed against her because it fails to state a claim that is plausible on its face and because, even if it did, Weston is entitled to a qualified privilege that requires dismissal. This Court disagrees.

In Ohio, "defamation occurs when a publication contains a false statement 'made with some degree of fault, reflecting injuriously on a person's reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business or profession.' " *Jackson v. City of Columbus*, 117 Ohio St.3d 328, 331, 883 N.E.2d 1060 (Ohio 2008) (quoting *A & B–Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Const. Trades Council*, 73 Ohio St.3d 1, 7, 651 N.E.2d 1283 (Ohio 1995)). Here, the amended complaint easily states a plausible claim for defamation against Weston. That is, Freshwater alleges that Weston made a false statement that affected him adversely in his profession, caused injury to his reputation and exposed him to "public hatred, contempt, ridicule, shame or disgrace." (Doc. # 4 at ¶ 185.) Freshwater alleges that the degree of fault was actual knowledge. That is, the amended complaint states that Weston intentionally made the statement knowing that it was false.

Weston next argues that she is entitled to a conditional or qualified privilege that requires dismissal of the defamation claim. " 'The essential elements of a conditionally privileged communication may accordingly be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.' " *Jackson*, 117 Ohio St.3d at 331, 883 N.E.2d 1060 (quoting *Hahn v. Kotten*, 43 Ohio St.2d 237, 243, 331 N.E.2d 713 (Ohio 1975)). " 'In a qualified privilege case, "actual malice" is defined as acting with knowledge that the

statements are false or acting with reckless disregard as to their truth or falsity.' " *Id.* (citing *Jacobs v. Frank*, 60 Ohio St.3d 111, 573 N.E.2d 609, paragraph two of the syllabus (Ohio 1991)).

In the instant action, Weston argues that Freshwater's allegations that she acted with actual malice are legal conclusions that are unsupported by factual allegations. This Court, however, disagrees. The amended complaint alleges that Weston knowingly made the false statements at issue here to H.R. on Call Inc. and that Weston herself admitted to doing so when she testified at the administrative hearing on Freshwater's potential termination. Freshwater alleges specifically the content of the false statement and alleges where and when the statement was made. These factual allegations are sufficient to support a claim of defamation and to prevent, at this juncture, Weston's entitlement to a qualified privilege.

*7 Accordingly, the Court **DENIES** Weston's Motion to Dismiss as it relates to the defamation claim for relief filed against Weston.

B. Immunity

Weston argues that she is qualifiedly immune from liability on all of the federal claims filed against her, *i.e.*, the Section 1983 and Title VII claims for relief. This Court disagrees.

1. Qualified Immunity

Qualified immunity is available to defendants who are sued in their individual capacity. *Anderson v. Creighton*, 483 U.S. 635, 638–39, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Qualified immunity is not a defense to the Section 1983 claims filed against Weston in her official capacity. *Everson v. Leis*, 556 F.3d 484, 501 n. 7 (6th Cir.2009) ("As qualified immunity protects a public official in his individual capacity from civil damages, such immunity is unavailable to the public entity itself or the official acting in his official capacity .") (citing *Hall v. Tollett*, 128 F.3d 418, 430 (6th Cir.1997). Weston does not move for dismissal of the official capacity claims on any basis other than qualified immunity. Thus, the Court **DENIES** Weston's Motion to Dismiss as it relates to the Section 1983 claims filed against Weston in her official capacity.

With regard to the Title VII claims filed against Weston, as this Court indicated above, Title VII imposes no liability on individuals in their personal capacity. Therefore, the doctrine of qualified immunity is irrelevant to Freshwater's Title VII claims against Weston. *See Montgomery County Comm'rs v. Montgomery County*, 215 F.3d 367, 372–73 (3d Cir.2000) ("Under Title VII, a public official may be held liable in her official capacity only, making the doctrine of qualified immunity, which protects only against personal liability, inapplicable."); *Harvey v. Blake*, 913 F.2d 226, 227–28 (5th Cir.1990) ("Because the doctrine of qualified immunity protects a public official from liability for money damages in her individual capacity only, the doctrine is inapplicable in the Title VII context.")). Consequently, the Court **DENIES** Weston's Motion to Dismiss as it relates to dismissal of the Title VII claims based upon qualified immunity. But, as previously stated, the Title VII claims did not survive Weston's Motion to Dismiss based upon failure to state plausible claims.

Thus, there are three remaining Section 1983 claims for relief filed against Weston in her personal capacity that Weston argues should be dismissed against her based on the doctrine of qualified immunity. To state a claim under 42 U.S.C. § 1983, a plaintiff must allege the violation of a right secured by the federal Constitution or laws and must show that the deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir.1996). "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Pearson v. Callahan*, —— U.S. ——, ——, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). The Sixth Circuit explained:

> *8 Until recently, federal courts were required to conduct the qualified-immunity analysis using the two-step sequential inquiry set forth in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). The first step required courts to determine "whether the facts that a plaintiff has alleged ... or shown ... make out a violation of a constitutional right." *Pearson*, 129 S.Ct. at 816 (citations omitted). And

> if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right.

Id. (citation omitted).

In *Pearson fv. Callahan,* —— U.S. ——, ——, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009)], however, the Supreme Court held that the sequential *Saucier* protocol was no longer mandatory. *Id.* at 818. The Court reasoned that

> [t]he procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case. There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.

Id.

Waeschle v. Dragovic, 576 F.3d 539, 543–44 (6th Cir.2009) (alterations in original).

In the case *sub judice,* Weston's motion dictates the path of our analysis because she only argues that the facts alleged do not make out a violation of a constitutional right and makes no argument as to whether the right at issue was clearly established. Specifically, Weston argues that she is entitled to qualified immunity because:

> The Complaint and Amended Complaint do not identify any act taken by Defendant Weston that violated Plaintiffs' constitutional rights. Plaintiffs fail to make any allegation that would allow this Court to infer that Defendant Weston's knowledge of Plaintiff's religious activities violated Plaintiff's constitutional rights. Plaintiffs fail to make any allegation that would allow this Court to infer that Defendant Weston's statement in the H.R. On Call investigative report and her subsequent admission that the statement as published in the report was inaccurate violates Plaintiff's constitutional rights. Plaintiffs' conclusory allegations regarding a hostile work environment and religious harassment are unsupported by factual allegations, and do not provide a basis for this Court to consider them when evaluating the merits of this Motion to Dismiss.
>
> (Doc. # 14 at 6–7.)

Freshwater does not respond to these arguments. "Once the qualified immunity defense is raised, the burden is on the plaintiff to demonstrate that the officials are not entitled to qualified immunity." *Silberstein v. City of Dayton,* 440 F.3d 306, 311 (6th Cir.2006) (citing *Barrett v. Steubenville City Schools,* 388 F.3d 967, 970 (6th Cir.2004)). Indeed, as the Sixth Circuit makes clear:

> *9 "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell fv. Forsyth*], 472 U.S. [511,] 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 [(1985)]. Like absolute immunity, the qualified immunity privilege entitles a party to *"immunity from suit* rather than a mere defense to liability," and thus "is effectively lost if a case is erroneously permitted to go to trial." *Id.* (emphasis in original).

Moldowan v. City of Warren, 578 F.3d 351, 369 (6th Cir.2009).

Freshwater has utterly failed to meet his burden of indicating why his amended complaint sets forth constitutional violations that are plausible on their face and the amended complaint on its face simply does not permit the Court "to infer more than the mere possibility of misconduct." *Iqbal,* 129 S.Ct. at 1950. Thus, the Court **GRANTS** Weston's Motion to Dismiss as it relates to the Section 1983 claims for relief filed against Weston in her personal capacity.

2. Statutory Immunity

Under the Ohio Revised Code, employees of political subdivisions are statutorily immune from liability unless a statutory exception applies. Ohio Rev.Code § 2744.03. In the instant action, the only exception to employee immunity that could apply is the exception that "[t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." Ohio Rev.Code § 2744.03(A)(6)(b). Weston argues that, although Freshwater alleges that Weston's conduct was mali-

cious, that allegation is a conclusory statements that is unsupported by factual allegations and is, therefore, insufficient to survive a motion to dismiss. This Court disagrees.

In the amended complaint, Freshwater alleges that Weston knew of his religious activities and she acted with "intentional, malicious, reckless and or in gross disregard" of Freshwater's rights by lying during the investigation of Freshwater when she stated that she had to "deal with internal and external complaints about his (Plaintiff Freshwater) failure to follow the curriculum for much of her 11 years at Mount Vernon." Freshwater alleges that Weston's admittedly inaccurate statements were made in combination with an agreement with other defendants to harm Freshwater, were defamatory, and placed him in a false light before the public. Further, Freshwater alleges that Weston treated him differently than she treated his similarly situated coworkers. The Court finds that these factual allegations are sufficient at this juncture to place Weston within the exception to immunity provided for in the Ohio Revised Code § 2744.03(A)(6)(b).

Accordingly, the Court **DENIES** Weston's Motion to Dismiss as it relates to statutory immunity from all state law claims for relief filed against her. But again, the Ohio civil rights statute, Chapter 4112 claims did not survive Weston's Motion to Dismiss based upon failure to state plausible claims.

III. Conclusion

*10 For the reason set forth above, the Court **GRANTS in part and DENIES in part** Weston's Motion to Dismiss. (Doc. # 14.) Specifically, the Court:

***DENIES** the motion as it relates to dismissal of the Title VII claims filed against Weston based upon qualified immunity but **GRANTS** the motion as it relates to dismissal of those claims for failure to state a claim upon which relief can be granted;

***GRANTS** the motion as it relates to both Chapter 4112 claims for relief filed against Weston;

***GRANTS** the motion as it relates to the Section 1983 claims for relief filed against Weston in her personal capacity;

***DENIES** the motion as it relates to the Section 1983 claims filed against Weston in her official capacity;

***DENIES** the motion as it relates to statutory immunity from all state law claims for relief filed against Weston; and

***DENIES** the motion as it relates to the defamation claim for relief filed Weston.

IT IS SO ORDERED.

S.D.Ohio,2009.
Freshwater v. Mount Vernon City School Dist. Bd. of Educ.
Not Reported in F.Supp.2d, 2009 WL 4730597 (S.D.Ohio)

END OF DOCUMENT

ACADEMIC CONTENT STANDARDS

Grades 6-8

Scientific Ways of Knowing
Students realize that the current body of scientific knowledge must be based on evidence, be predictive, logical, subject to modification and limited to the natural world. This includes demonstrating an understanding that scientific knowledge grows and advances as new evidence is discovered to support or modify existing theories, as well as to encourage the development of new theories. Students are able to reflect on ethical scientific practices and demonstrate an understanding of how the current body of scientific knowledge reflects the historical and cultural contributions of women and men who provide us with a more reliable and comprehensive understanding of the natural world.

Benchmark A: Use skills of scientific inquiry processes (e.g., hypothesis, record keeping, description and explanation).

Grade Six

Nature of Science 1. Identify that hypotheses are valuable even when they are not supported.

Ethical Practices 2. Describe why it is important to keep clear, thorough and accurate records.

Grade Seven

No indicators present for this benchmark.

Grade Eight

Nature of Science 1. Identify the difference between description (e.g., observation and summary) and explanation (e.g., inference, prediction, significance and importance).

ACADEMIC CONTENT STANDARDS

Benchmark B: Explain the importance of reproducibility and reduction of bias in scientific methods.

Grade Six

No indicators present for this benchmark.

Grade Seven

Ethical Practices

1. Show that the reproducibility of results is essential to reduce bias in scientific investigations.
2. Describe how repetition of an experiment may reduce bias.

Grade Eight

Ethical Practices

2. Explain why it is important to examine data objectively and not let bias affect observations.

Benchmark C: Give examples of how thinking scientifically is helpful in daily life.

Grade Six

Science and Society

3. Identify ways scientific thinking is helpful in a variety of everyday settings.
4. Describe how the pursuit of scientific knowledge is beneficial for any career and for daily life.
5. Research how men and women of all countries and cultures have contributed to the development of science.

Grade Seven

Science and Society

3. Describe how the work of science requires a variety of human abilities and qualities that are helpful in daily life (e.g., reasoning, creativity, skepticism and openness).

Grade Eight

No indicators present for this benchmark.

2270 - RELIGION IN THE CURRICULUM

Based on the First Amendment protection against the establishment of religion in the schools, no devotional exercises or displays of a religious character will be permitted in the schools of this District in the conduct of any program or activity under the jurisdiction of the Board. Instructional activities shall not be permitted to advance or inhibit any particular religion.

An understanding of religions and their effects on civilization is essential to the thorough education of young people and to their appreciation of a pluralistic society. To that end, curriculum may include as appropriate to the various ages and attainments of the students, instruction about the religions of the world.

The Board acknowledges the degree to which a religious consciousness has permeated the arts, literature, music, and issues of morality. The instructional and resource materials approved for use in the District's schools frequently contain religious references or concern moral issues that have traditionally been the focus of religious concern. That such materials may be religious in nature shall not, by itself, bar their use in the District. The Board directs that professional staff members employing such materials be neutral in their approach and avoid using them to advance or inhibit religion in any way.

The Board recognizes that religious traditions vary in their perceptions and doctrines regarding the natural world and its processes. The curriculum is chosen for its place in the education of the District's students, not for its conformity or nonconformity to religious principles. Students should receive unbiased instruction in the schools, so they may privately accept or reject the knowledge thus gained, in accordance with their own religious tenets.

Accordingly, no student shall be exempted from attendance in a required course of study on the grounds that the instruction therein interferes with the free exercise of his/her religion. However, if after careful, personal review of the program's lessons and/or materials, a parent indicates to the school that either the content or activities conflict with his/her religious beliefs or value system, the school will honor a written request for his/her child to be excused from a particular class period for specified reasons. The student will be provided with alternate learning activities during the times of such parent requested absence.

No classroom teacher shall be prohibited from providing reasonable periods of time for activities of a moral, philosophical, or patriotic theme. No student shall be required to participate in such activities if they are contrary to the religious convictions of the student or his/her parents or guardians.

U.S. Consti. Amend. 1
R.C. 3313.601

Revised 1/6/03

Amendment 1 - Freedom of Religion, Press, Expression. Ratified 12/15/1791. *Note*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

de·vo·tion·al (dĭ-vō'shə-nəl)
adj.
Of, relating to, expressive of, or used in devotion, especially of a religious nature.
n.
A short religious service.

de·vo'tion·al·ly *adv.*

de·vo·tion (dĭ-vō'shən)
n.
1. Ardent, often selfless affection and dedication, as to a person or principle. See Synonyms at love.
2. Religious ardor or zeal; piety.
3.
a. An act of religious observance or prayer, especially when private. Often used in the plural.
b. devotions Prayers or religious texts: *a book of devotions.*
4. The act of devoting or the state of being devoted.

re·li·gious (rĭ-lĭj'əs)
adj.
1. Having or showing belief in and reverence for God or a deity.
2. Of, concerned with, or teaching religion: *a religious text.*
3. Extremely scrupulous or conscientious: *religious devotion to duty.*
n. pl. **religious**
A member of a monastic order, especially a nun or monk.

re·li·gion (rĭ-lĭj'ən)
n.
1.
a. Belief in and reverence for a supernatural power or powers regarded as creator and governor of the universe.
b. A personal or institutionalized system grounded in such belief and worship.
2. The life or condition of a person in a religious order.
3. A set of beliefs, values, and practices based on the teachings of a spiritual leader.
4. A cause, principle, or activity pursued with zeal or conscientious devotion.
Idiom:
get religion *Informal*
1. To become religious or devout.
2. To resolve to end one's immoral behavior.

2270 - RELIGION IN THE CURRICULUM

The Board of Education has adopted a policy favoring the understanding of religions by the students of this District and the contributions religions have made to the advancement of civilization. When developing or implementing any course of study in which religion is dealt with, the following guidelines should be followed:

A. Course content can neither inhibit nor advance any religion.
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B. No devotional practices shall be permitted or requested of the students.
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C. The use of art, literature, and music descriptive of the religion is permitted.
</

D. Complaints by students or the public regarding any such course of study will be handled in accordance with Board Policy **9130**.
</

Course(s) of study including instruction on religions shall be subject to the same administrative reviews as other course material and may not be implemented without prior Board approval.

2240 - CONTROVERSIAL ISSUES

The Board of Education believes that the consideration of controversial issues has a legitimate place in the instructional program of the schools.

Properly introduced and conducted, the consideration of such issues can help students learn to identify important issues, explore fully and fairly all sides of an issue, weigh carefully the values and factors involved, and develop techniques for formulating and evaluating positions.

For purposes of this policy, a controversial issue is a topic on which opposing points of view have been promulgated by responsible opinion.

The Board will permit the introduction and proper educational use of controversial issues provided that their use in the instructional program:

A. is related to the instructional goals of the course of study and level of maturity of the students;
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B. does not tend to indoctrinate or persuade students to a particular point of view;
</

C. encourages open-mindedness and is conducted in a spirit of scholarly inquiry.
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Controversial issues related to the program may be initiated by the students themselves provided they are presented in the ordinary course of classroom instruction and it is not substantially disruptive to the educational setting.

Controversial issues may not be initiated by a source outside the schools unless prior approval has been given by the principal.

When controversial issues have not been specified in the course of study, the Board will permit the instructional use of only those issues which have been approved by the principal.

No classroom teacher shall be prohibited from providing reasonable periods of time for activities of a moral, philosophical, or patriotic theme. No student shall be required to participate in such activities if they are contrary to the religious convictions of the student or his/her parents or guardians.

The Board also recognizes that a course of study or certain instructional materials may contain content and/or activities that some parents find objectionable. If after careful, personal review of the program lessons and/or materials, a parent indicates to the school that either the content or activities conflicts with his/her religious beliefs or value system, the school will honor a written request for his/her child to be excused from a particular class for specified reasons. The student, however, will not be excused from participating in the course and will be provided alternate learning activities during times of such parent requested absences.

R.C. 3313.601

Revised 1/6/03

2240 - CONTROVERSIAL ISSUES IN THE CLASSROOM

The following guidelines are designed to assist teachers in the instruction of controversial issues in the classroom, as defined in Policy **2240**.

A. When a controversial issue is not part of an approved course of study, its use must be approved by the Principal.
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B. Before introducing a controversial issue, teachers should consider:
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1. the chronological and emotional maturity of the students;
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2. the appropriateness and timeliness of the issue as it relates to the course and the students;
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3. the extent to which they can successfully handle the issue from a personal standpoint;
</
4. the amount of time needed and available to examine the issue fairly.
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C. When discussing a controversial issue, the teacher may express his/her own personal position as long as s/he makes it clear that it is only his/her opinion. The teacher must not, however, bring about a single conclusion to which all students must subscribe.
</

D. The teacher should encourage student views on issues as long as the expression of those views is not derogatory, malicious, or abusive toward other student views or toward a particular group.
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E. Teachers should help students use a critical thinking process such as the following to examine different sides of an issue:
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For each stated position:
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1. What is the person (group) saying?
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2. What evidence is there that what is being said is true?
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3. What is said that would lead you to think the position is valid?
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4. What are the strengths and weaknesses of this position?
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5. What do you think would happen if this point of view was accepted and was put into practice?

</

For reaching conclusions:

1. On balance, what do you think is the most reasoned statement? the most valid position?
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2. What is there in the statements that supports your conclusion? What other things, beside what is being said, leads you to your conclusion?

3218 - ACADEMIC FREEDOM OF TEACHERS

The freedom to speak and share ideas is an inherent precept of a democratic society governed by the will of the majority. Teachers and students need to be free to discuss and debate ideas.

When ideas that may be controversial are introduced, teachers, while having a right to their opinion on the subject, shall state it as such and they should be objective in presenting various sides of issues.

The First Amendment to the United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

R.C. § 3313.601

Baldwin's Ohio Revised Code Annotated Currentness
Title XXXIII. Education--Libraries
Chapter 3313. Boards of Education (Refs & Annos)
Administration of Schools
3313.601 Moment of silence; prohibitions

The board of education of each school district may provide for a moment of silence each school day for prayer, reflection, or meditation upon a moral, philosophical, or patriotic theme. No board of education, school, or employee of the school district shall require a pupil to participate in a moment of silence provided for pursuant to this section. No board of education shall prohibit a classroom teacher from providing in the teacher's classroom reasonable periods of time for activities of a moral, philosophical, or patriotic theme. No pupil shall be required to participate in such activities if they are contrary to the religious convictions of the pupil or the pupil's parents or guardians.

No board of education of a school district shall adopt any policy or rule respecting or promoting an establishment of religion or prohibiting any pupil from the free, individual, and voluntary exercise or expression of the pupil's religious beliefs in any primary or secondary school. The board of education may limit the exercise or expression of the pupil's religious beliefs as described in this section to lunch periods or other noninstructional time periods when pupils are free to associate.