

STATE OF MINNESOTA

DISTRICT COURT

RICE COUNTY

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THIRD JUDICIAL DISTRICT  
CASE TYPE: OTHER CIVIL  
Civil File No. CX-99-793

Rodney LeVake,

Plaintiff,

v.

Independent School District #656;  
Keith Dixon, Superintendent;  
Dave Johnson, Principal; and  
Cheryl Freund, Curriculum Director,

Defendants.

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**DEFENDANTS' REPLY MEMORANDUM  
IN SUPPORT OF MOTION  
FOR SUMMARY JUDGMENT**

**INTRODUCTION**

Defendants submit this reply brief to clarify the issues before this Court and to focus on the issues in this matter. Contrary to Plaintiff's characterization, this case is about the District's right to assign teachers to teach courses within their licensure. The District exercised that right and assigned Plaintiff, licensed to teach math and science, to teach 9<sup>th</sup> grade natural science when it became clear he had not taught the established 10<sup>th</sup> grade biology curriculum during the 1997/98 school year and would not do so in subsequent years. Contrary to Plaintiff's pronouncements, his "reassignment" was not in violation of any of his constitutional rights.

Plaintiff has not meet his burden in overcoming Defendants' motion for summary judgment. Not only has Plaintiff failed to establish the law applicable to his claims, he has failed to come forward with admissible evidence of material facts to support the essential elements of his claims against Defendants. In his response, Plaintiff has done nothing more than attempt to create a metaphysical doubt as to the material facts and has merely recited sound bites of law in his attempt to persuade this Court that he should prevail. This Court must not be so persuaded.

If Plaintiff were to prevail, public school teachers, not school boards, will control the curriculum, and public school teachers, not administrators, will decide teacher assignments. Plaintiff's position is wholly contrary to prevailing state and federal law.

## ARGUMENT

### I. PLAINTIFF CANNOT AVOID SUMMARY JUDGMENT BY CREATING METAPHYSICAL DOUBTS AS TO THE MATERIAL FACTS.

To overcome a motion for summary judgment, the non-moving party must “do more than simply show that there is some metaphysical doubt as to the material facts.” DLH, Inc. v. Russ, 566 N.W.2d 60, 70 (Minn. 1997). The non-moving party must come forward with substantial evidence demonstrating a genuine issue for trial. Id.; A.& J. Builders, Inc. v. Harmes, 288 Minn. 124, 179 N.W.2d 98 (1970)(to overcome summary judgment a present showing of specific facts establishing a genuine issue for trial required). Citing the 1986 “trilogy” of U.S. Supreme Court cases, the Minnesota Supreme Court has held,

the party resisting summary judgment must do more than rest on mere averments ... there is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party’s case to permit reasonable persons to draw different conclusions.

DLH at 71.

A “material fact” is one that will affect the outcome or result of the case depending upon how it is resolved. Zappa v. Fahey, 310 Minn. 555, 245 N.W.2d 258 (1976). Self-serving affidavits offered to contradict earlier damaging testimony or which contain no fact but mere conclusory statements are insufficient to defeat summary judgment. Banbury v. Omnitrition Intern., Inc., 533 N.W.2d 876 (Minn. Ct. App. 1995); Nowicki v. Benson Properties, 402 N.W.2d 205 (Minn. Ct. App. 1987); Urbaniak Implement Co. v. Monsrud, 336 N.W.2d 286 (Minn. 1983) (affidavits must set out specific facts which create an issue for trial).

Plaintiff bears the burden of proving each element of his claims. In his response, Plaintiff fails to identify specific facts, material to the elements of his claims, that are in dispute. Rather, he asserts conclusions he believes the Court should reach based upon his twist of the facts. Plaintiff’s twist, however, misrepresents the facts, takes them out of context or only provides half of the facts. Additionally, he attempts to refute his earlier sworn testimony by submitting an affidavit which does nothing more than present conclusory statements and immaterial matters that do not support the elements of his claim. An

affiant who submits an affidavit contradicting the affiant's prior sworn testimony creates a sham issue, not a genuine fact issue. Canfield Times v. Michelin Tire Corp., 719 F.2d 1361, 1365 (8<sup>th</sup> Cir. 1983). He has not sustained his burden.

For example, Plaintiff concludes that Superintendent Dixon's letter of May 14, 1998, Cheryl Freund's deposition testimony and Principal Johnson's testimony all demonstrate that Plaintiff was "reassigned because of defendant's desire to suppress his viewpoint on evolution in the future and because of the defendants' religious bias". (Plt's brief, p. 3). To support this conclusion, he states that Dixon's letter "focuses on what Dixon believes LeVake's views are" and "what Dixon thinks LeVake proposes to do with the curriculum in the future." These statements are not substantial admissible facts demonstrating an issue for trial. Further, they misstate the content of Dixon's letter.

In Dixon's letter there is no reference to LeVake's views, religious beliefs or what Dixon thinks LeVake will do in the future. The letter simply explains that he, Dixon, supports Plaintiff's reassignment because despite Plaintiff's assertion that he could teach the prescribed curriculum, he continued to "justify why it is appropriate not to follow the curriculum." (Dixon Letter). Dixon states, "Your explanation compels me to believe that you fundamentally differ with the commonly held principles of the curriculum as outlined." (Id.). These statements do not demonstrate a desire to suppress Plaintiff's viewpoint or defendants' religious bias. They simply reflect the opinion that Plaintiff will not teach the curriculum.

Similarly, Plaintiff asserts that "Defendants' actions were motivated by religious considerations" and refers to Ms. Freund's "questioning of him about religion" as his proof. However, Plaintiff fails to put Freund's questions in their proper context. In his deposition, when asked if Freund inquired as to his mention of religion in class, Plaintiff responded as follows:

Q: You had indicated that Cheryl [Freund] asked you whether you had mentioned the Bible or God in class?

A: Yeah.

Q: You understood of course that as a public school teacher you can't discuss religion in class?

A: Right.

Q: Okay. You understood that that was what she was concerned about as a possibility when she asked this question?

A: That was what she was asking, yeah.

Q: Similarly, when she asked whether – do your students know that you’re Christian, you also understood that’s what she was getting at?

A: She was getting at if I – my interpretation of her question was that had I ever, you know, tried to convert my class into my way of thinking or,

Q: Right, she was just checking to make sure that you weren’t discussing religion in class?

A: Right.

(LeVake depo., pp. 140-141). Based upon Plaintiff’s testimony of his understanding of Freund’s questions, it is disingenuous for him to suggest to this Court that Freund’s questions demonstrate Defendants’ actions were religiously motivated. Even Plaintiff knew Freund was making sure that he was not putting the District in a possible position of violation of the Establishment Clause.

Further, Plaintiff’s citations to deposition testimony by Wieber and Hubert do not, as Plaintiff contends, demonstrate that they are willing to “admit the obvious” that defendants’ actions were “motivated by religious considerations”. (Plt’s brief, p. 7). When asked by Plaintiff’s counsel if fellow teachers at school mentioned Plaintiff’s religion, Mr. Wieber replied, “No”. (Wieber depo., p. 23). He admits that he had heard someone, but is unsure who, mention the word “creation” in the context of talking about Plaintiff and the issue of his teaching biology. Hubert testified that he and Plaintiff never discussed Plaintiff’s religious views. (Hubert depo., p. 12). These statements certainly do not demonstrate that Defendants Dixon, Johnson and Freund were motivated by religious considerations in reassigning Plaintiff.

Plaintiff has spent pages expounding “facts” as to non-issues. For example, his entire argument regarding “What is the curriculum?” is a non-issue and obviously interjected to deflect this Court’s focus. There is no dispute that evolution was part of the 10<sup>th</sup> grade biology curriculum. Plaintiff’s attempt to make an issue out of what specific document reflects the curriculum is nonsense. Defendants clarified in their Supplemental Response to Request for Production of Documents, that the statement of the curriculum can

be found in the course description of “Biology (grades 10-11-12)” and Visualizing Life, the textbook. See Defendants’ Supplemental Response to Request for Production of Documents, Ex. 23, Suppl. Affidavit of Sheila A. Bjorklund). Brad Covert, a school board member, further clarified that the course syllabus was not the “curriculum”. (Ex. 24).

Plaintiff cannot ignore his testimony that he knew evolution was a part of the curriculum when he accepted the biology teaching position. (LeVake depo., pp.101-102). He knew the textbook to be used in the course and knew that the text did not contain the criticisms he wanted to teach. (Id.). He knew that Chapter 9 of the text was required but that Chapters 10 and 11 were optional. (Id., pp. 40, 107, 108). Plaintiff clearly knew what the biology curriculum was. The Courts are not to challenge the School Board’s established biology curriculum.

Plaintiff’s argument that whether or not he taught evolution as prescribed by the curriculum is in dispute is contrary to his sworn testimony. Plaintiff admitted that he did not teach Chapters 9, 10 or 11 of the text. (LeVake depo., p. 40, 107, 108). He testified that he prepared outlines for each chapter he taught. (Id., pp. 38-39). There is no chapter outline for Chapter 9, the only required chapter dealing with evolution. Moreover, Plaintiff told his class at the beginning of the year that he would not cover evolution because he was not allowed to cover the criticisms and weaknesses of the theory. (Benbrooks Aff.). The overwhelming evidence demonstrates Plaintiff did not teach the curriculum as prescribed.

Plaintiff argues Defendants are making an issue out of the information sources Plaintiff used in formulating his list of “discrepancies,” (Plt’s brief, pp. 11-13), and have misstated the record as to these references. Plaintiff’s argument is without merit.

All of the evidence material to Plaintiff’s claims demonstrates that at the time of his reassignment, none of the Defendants were aware of Plaintiff’s religious views, nor considered religion in making the determination. (Freund depo., p. 71, Hubert depo., p. 11, Johnson depo., p. 19, Weiber depo., p. 22, Dixon depo., pp. 22, 32). Plaintiff admits he never made his religious beliefs known to the Defendants and affirms

that he was never asked what his religious or world beliefs were. (LeVake depo., pp. 99, 139, 143, 159).

Plaintiff now acknowledges that a pamphlet questioning evolution, which he gave to fellow science teachers, is presented to support the Bible and disprove the theory of evolution. (LeVake depo., p. 173).<sup>1</sup>

Plaintiff also accuses Defendants of “egregiously misrepresenting” the record by stating Mr. Hubert noticed “Life-How Did We Get Here?” on Plaintiff’s desk during the school year. Mr. Hubert did in fact see this book on Plaintiff’s desk. As he explains in his attached affidavit, he saw this book open on Plaintiff’s desk in the common prep room during the school year. In his deposition he was only asked if he saw the book in the classroom. See Ken Hubert Affidavit.

**II. PLAINTIFF HAS NOT ESTABLISHED THAT HIS FIRST AMENDMENT RIGHTS HAVE BEEN VIOLATED.**

Plaintiff apparently concedes that Defendants have not violated his right to free exercise of his religion or the Establishment Clause by requiring him to teach evolution. (Plt’s brief, p. 19). It now appears he is asserting Defendants have violated his First Amendment rights to academic freedom, have impermissibly attempted to impose prior restraints on his speech because of his viewpoint on evolution and have discriminated against him because of his religious views. (Plt’s brief, pp. 15, 20). Plaintiff has failed to produce any admissible evidence to establish the elements of these claims.

Plaintiff cannot blatantly ignore the well established legal principle that a public school is not a public forum. Thus, the First Amendment rights of students as well as teachers can be reasonably restricted by the school. Perry Educ. Association v. Perry Local Educators’ Association, 460 U.S. 37, 47, 103 S. Ct. 948, 956 (1983); Hazelwood School Dist. V. Kuhlmeier 484 U.S. 260, 267, 108 S. Ct. 562, 603 (1987). Plaintiff similarly ignores well established law that a teacher’s academic freedom is not absolute. Keyishian v. Board of Regents of University of State of N.Y., 385 U.S. 589, 603, 87 S. Ct. 675, 683 (1967); Webster v. New Lenox Sch. Dist. No. 122, 917 F.2d 1004, 1007 (7<sup>th</sup> Cir. 1990).

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<sup>1</sup>Defendants cited this acknowledgment in their memorandum at pages 11, and 20-21. The cite is correctly identified on p. 11 but erroneously identified in the body of Defendant’s brief at page 20 as “LeVake depo., p. 163”. The latter was clearly a typographical error, and, contrary to Plaintiff’s statement, is not an attempt by Defendants to misrepresent the record.

“The first amendment is not a teacher’s license for uncontrolled expression at variance with established curricular content.” Webster at 1007. Under Minnesota law, the school boards of each independent school district are entrusted to establish public school curriculum. Minn. Stat. § 123B.09, subd. 8 (1999). Because of the immature stage of intellectual development of secondary school students, the courts have held that school boards have a heightened responsibility to control the curriculum. Webster at 1007. Plaintiff’s assertion that he had a “right” to “accompany his teaching of evolution with an honest look at the inconsistencies and weaknesses” (Plt’s brief, p. 17) cannot prevail as a matter of law.

Plaintiff has failed to establish that Defendants’ actions constituted unlawful viewpoint discrimination. (Plt’s brief, p. 18). He has not established that the speech at issue (teaching discrepancies of evolution) was constitutionally protected or that the alleged protected speech motivated an adverse employment decision. See, Mount Healthy City Sch. Dist. Bd. Of Educ. v. Doyle, 429 U.S. 274, 97 S. Ct. 568 (1977). He simply asks this Court to “infer” that Defendants reassigned him because they disagreed with his viewpoint on evolution and sought to censor it. (Id., p. 19). Plaintiff cannot establish the elements of this claim based upon speculation. He must come forward with specific, admissible facts that establish each element of this claim. Plaintiff has not done so and thus this claim must be dismissed.

Both cases cited by Plaintiff - Lamb’s Chapel v. Center Moriches Union Free School District, 508 U.S.384, 113 S. Ct. 2141, 2148 (1993) and Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 115 S. Ct. 2510 (U.S. 1995) - are inapplicable to the facts of this case. In Lamb’s Chapel, the public school had opened its campus to use by non-school groups and then attempted to limit the speech of a religious group using the campus. In Rosenberger, a university attempted to deny funds to a campus student organization because it’s newspaper expressed religious viewpoint. Here, the District is merely enforcing its right to assure its teachers teach the assigned curriculum. To meet this objective, a district may permissibly limit a teacher’s class room speech. Miles v. Denver Public Schools, 944 F.2d 773 (10<sup>th</sup> Cir. 1991).

A school district's interest in avoiding an Establishment Clause violation trumps a teacher's free speech rights. Peloza v. Capistrano Unified School Dist., 37 F.3d 517, 522 (9<sup>th</sup> Cir. 1994). The court in Peloza noted,

While at the high school, whether he is in the classroom or outside of it, during contract time, [a teacher] is not just any ordinary citizen. He is a teacher. He is one of those especially respected persons chosen to teach in the high school's classroom. He is clothed with the mantle of one who imparts knowledge and wisdom. His expression of opinion are all the more believable because he is a teacher. The likelihood of high school students equating his views with those of the school is substantial. To permit him to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment.

Id. Plaintiff has failed to produce any material facts that establish impermissible viewpoint discrimination by Defendants.

Plaintiff similarly has failed to establish that he was discriminated against on the basis of his religion. Again, Plaintiff invites this Court to speculate and to adopt his factually unsupported conclusion that defendants "concluded that his religious beliefs disqualified him from teaching evolution" and thus reassigned him. (Plt's brief, p. 20). As previously discussed, the record clearly establishes that none of the Defendants knew Plaintiff's religion or his religious beliefs at the time of his reassignment. The record clearly demonstrates that Plaintiff was reassigned because he did not teach the curriculum as established and unequivocally told Defendants he would not teach it unless he could teach his perceived inconsistencies in the theory of evolution. Plaintiff's religious discrimination argument must fail.

Plaintiff appears to concede that his claims for violation of free speech under the Minnesota state constitution are governed by the federal law. (Plt's brief, p. 28). He argues, however, that the Defendants have somehow violated the state's freedom of conscience clause because their actions demonstrate an "intolerance to different religions." This argument is wholly unsupported by law or the facts of this case. Plaintiff has produced no evidence that Defendants were intolerant of Plaintiff's religious views or in any way violated Minnesota's constitution Art. 1 § 16.

Kaplan v. Independent School District of Virginia, 214 N.W.18, 171 Minn. 142 (1927), cited by Plaintiff to support his “tolerance” argument is wholly inapplicable. That case dealt with a 1927 Virginia Minnesota school board proclamation requiring each teacher to open the school day with a reading from the Bible. While the court noted that many of the precepts underlying both the federal and state constitutions addressed historical religious intolerance, state actions must uphold as inviolate separation of church and state and the right of individuals to freely practice their religion. Id. The court noted there should be “no effort made [by the public schools] to teach or induce any pupil to adopt” a certain religious tenet. Id. at 20. The practice advocated in Kaplan would be unconstitutional under recent U.S. Supreme Court holdings. See Abington Sch. Dist. V. Schempp, 374 U.S.203, 83 S. Ct. 1560 (1963) (daily reading of Bible in public schools violates constitution).

### **III. PLAINTIFF HAS NOT ESTABLISHED A VIOLATION OF DUE PROCESS.**

Plaintiff argues his liberty interest “to teach his assigned subject free from state action”, not his property interest in his position as a biology teacher, have been deprived by Defendants’ actions. As discussed above, Plaintiff, as a public high school teacher, does not have an unfettered right to teach his assigned subject as he wants. The District may reasonably restrict his classroom speech to assure he is complying with the established curriculum. By Plaintiff’s own admissions he understood that by contract the District could assign him to teach any subject for which he held a license. (LeVake depo., pp. 92-93).

Plaintiff does not have a due process violation claim. Plaintiff concedes he received “process” before being reassigned. He now argues he does not challenge the “quantity of the process afforded him, but the quality of the process.” (Plt’s brief, p. 23). He argues he did not receive proper notice that he could be reassigned for his viewpoint on evolution. (Id.). Plaintiff’s argument is contrary to the record.

The testimony indicates that Plaintiff knew the curriculum and knew he could not teach his viewpoint or the discrepancies in the theory of evolution at the beginning of the school year. (Benbrooks Aff.) At each meeting between Plaintiff, administrators and his fellow science teachers the content of the

biology curriculum was discussed. He was aware his viewpoint was a minority viewpoint. Plaintiff cannot now argue he had no notice of what he was expected to teach. Plaintiff's argument fails.

**IV. PLAINTIFF HAS NOT ESTABLISHED DEFENDANTS ACTED PURSUANT TO A "POLICY".**

Plaintiff's argument that by affirming his reassignment, Superintendent Dixon has established a policy to reassign all teachers with certain religious beliefs from teaching 10<sup>th</sup> grade biology is without merit. There is no evidence that Plaintiff was reassigned because of his religious beliefs. The clear and overwhelming evidence is that Plaintiff was reassigned because he did not teach the biology curriculum as established by the School Board and demonstrated that he would not teach it unless he could also teach the "discrepancies" in the theory. As Plaintiff has acknowledged, the District had a discretionary right to assign teachers to any course for which the teacher is licensed. This does not equate to a policy of assigning teachers because of religious views.

**V. DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY.**

Qualified immunity is immunity from suit not just a defense to liability. Elwood v. Rice County, 423 N.W.2d 671, 675 (Minn. 1988). "Thus, qualified immunity questions should be resolved at the earliest possible stage" of litigation. Id. Plaintiff cannot merely avoid the application of immunity because, as here, he "contends that he was reassigned in violation of his constitutional rights." Stone v. Badgerow, 511 N.W.2d 747, 751 (Minn. Ct. App. 1994). Plaintiff must show that a reasonable official would have known that their specific action was in violation of clearly established law. Id. Qualified immunity applies to government officials when sued in their personal capacity. Harlow v. Fitzgerald, 457 U.S.800, 102 S. Ct. 2727 (1982). Here the individual defendants were named in their individual capacity, thus qualified immunity would apply to Plaintiff's claims against them.

The evidence developed during the course of this litigation clearly demonstrates that Defendants had a contractual right to reassign Plaintiff to teach any course for which he held a license. Defendants exercised this right because Plaintiff did not teach the 10<sup>th</sup> grade biology curriculum and demonstrated he

would not unless he could also teach “discrepancies” in the theory. Plaintiff has provided no case law to support his contention that the law was clearly established that reassigning him pursuant to contract is a violation of his constitutional rights. Plaintiff’s argument must fail and the individual defendants must be afforded qualified immunity.

**CONCLUSION**

Plaintiff has failed to meet his burden of coming forward with specific admissible evidence to support each element of his claims for which he will bear the burden of proof at trial. In opposing summary judgment, Plaintiff has done nothing more than attempt to create a metaphysical doubt as to the material facts of this case. Further, he has not grounded his claims in the applicable law. It is appropriate for this Court to grant Defendants’ motion for summary judgment.

Dated: April 18, 2000

LOMMEN, NELSON, COLE & STAGEBERG, P.A.

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