STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RICE THIRD JUDICIAL DISTRICT

Rodney LeVake,

Plaintiff,

vs.

ORDER GRANTING DEFENDANTS' MOTION for SUMMARY JUDGMENT and MEMORANDUM

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

Defendants.

Court File No. CX-99-793

The motion of Defendants for Summary Judgment came on for hearing before the Honorable Bernard E. Borene, Judge of District Court, on May 8, 2000, at the Rice County Courthouse in Faribault, Minnesota. Plaintiff Rodney LeVake appeared in person and through counsel, Wayne B. Holstad, Esq., St. Paul, Minnesota, and Francis J. Manion, Esq., New Hope, Kentucky. Defendants appeared through their counsel, Erich L. Koch, Esq., Minneapolis, Minnesota. The Court took the matter under advisement at the conclusion of the hearing. Now, based upon the pleadings, affidavits, partial depositions, arguments of counsel and written submissions of counsel, the Court

DOES HEREBY ORDER:

1. Defendants' Motion for Summary Judgment is GRANTED.

2. All claims against Defendants are DISMISSED WITH PREJUDICE on the merits.

3. Defendants are awarded their costs and disbursements to be taxed herein.

4. Judgment of dismissal herein is STAYED until July 20, 2000.

5. The following MEMORANDUM is incorporated herein by reference.

Dated: June 20, 2000

BY THE COURT

Bernard E. Borene
Judge of District Court

MEMORANDUM

FACTS

Plaintiff Rodney LeVake is a citizen of the United States and of the State of Minnesota. Prior to the 1997-98 academic year, Plaintiff was employed by Defendant Independent School District #656 ("District") as a natural sciences teacher at the Faribault High School. During the 1997-98 academic year, Plaintiff was assigned to teach biology at the high school. Toward the end of that academic year, he was reassigned to teach ninth grade science at the high school. The District is a school district organized pursuant to Minn. Stat. §123B.02 with general charge of the business of the district including Faribault High School. Defendant Keith Dixon ("Superintendent Dixon") was at all relevant times the Superintendent of Schools for the District. Defendant Dave Johnson ("Principal Johnson") was at all relevant times the Principal of Faribault High School. Defendant Cheryl Freund was at all relevant times Executive Director of Curriculum and Instruction for the District.

Plaintiff graduated from St. John's University in Collegeville, Minnesota, where he majored in natural science and social science. In 1984, Plaintiff received a Master's Degree in Biology from Mankato State University. There is no dispute that Plaintiff is qualified to teach high school biology. There is also no dispute that the contract between the District and its teachers gives the District a managerial right to assign a teacher to any teaching position for which that teacher has licensure.

A position teaching biology became available for the 1997-1998 academic year at the high school upon the retirement of one of the school's biology teachers. Plaintiff was offered that position. Before accepting the position, Plaintiff discussed it with Ken

Hubert and Dave Wieber, fellow teachers and the co-chairmen of the high school's science department, as well as with Principal Johnson. Plaintiff stated in his deposition that he knew, at the time of discussing the position, that evolution was part of the course, and he expressed no reservations about teaching evolution. (LeVake depo., p. 101). Plaintiff knew that the course textbook was Biology, Visualizing Life, and he "more than likely" knew that the textbook did not contain what he considered to be the criticisms of evolution. (Id.). Chapters nine, ten and eleven of the text deal with evolution. Plaintiff admitted knowing that, although chapters ten and eleven of the textbook were optional, chapter nine, which concerned natural selection, was required. (Id. at 107).

Plaintiff was appointed to the biology teaching position for the 1997-98 academic year. According to Plaintiff's own deposition, during that year, he covered chapters one through eight "very rigorously", spent one day on chapter nine, skipped chapters ten and eleven, and then taught "compressed" versions of the textbook's remaining chapters. (Id. at 108). The only thing in chapter nine that Plaintiff remembered covering was a worksheet on the peppered moth. Plaintiff prepared no teaching outline for chapter nine. (Id. at 40). Plaintiff usually prepared outlines for the next two to three weeks in the course when he was finishing up the end of a chapter in the textbook. (Id. at 38).

At some point in the second semester of the academic year, Ken Hubert noticed that, while he and Mr. Koehler had covered chapter nine, Plaintiff appeared to have skipped that chapter. Mr. Hubert was concerned by this because he believed evolution was part of the state graduation standards, and, in his opinion, a failure to teach it amounted to a problem with the curriculum. Sometime in February or March of 1998, Mr. Hubert approached Plaintiff and asked him how he was going to handle the topic of

evolution. In his own deposition, Plaintiff stated that he "in essence...said to him I can't teach evolution. That's what I said to him." (Id. at 64). Mr. Hubert expressed his concern to Principal Johnson that Plaintiff was not teaching evolution. Principal Johnson informed Ms. Freund of Mr. Hubert's concerns.

A meeting was held on April 1, 1998, and was attended by Plaintiff, Mr. Hubert, Principal Johnson and Ms. Freund. The purpose of this meeting was to discuss how Plaintiff was handling the topic of evolution in his biology class. Plaintiff stated in his deposition that felt that the others at the meeting assumed he had an internal conflict regarding evolution. However, he could not remember ever having told them his specific beliefs, although he had given Mr. Hubert a pamphlet about alternative explanations for things existing in nature, and thereby assumed that Mr. Hubert knew he was a creationist. (Id. at 139). Plaintiff stated that he had not told Ms. Freund or Principal Johnson what his specific beliefs were. (Id.). During the meeting, Ms. Freund asked Plaintiff whether he mentioned God or the Bible in class, or whether his students knew he was a Christian. However, Plaintiff himself agreed that Ms. Freund was merely checking to ensure that Plaintiff was not discussing religion in class. (Id. at 140). Plaintiff said in his deposition, "She was getting at if I...tried to convert my class into my way of thinking or." (Id.).

Another meeting was held on April 7, 1998, that included Plaintiff, Ms. Freund, Principal Johnson, Mr. Hubert and the rest of the high school's science department. At this meeting, Principal Johnson asked Plaintiff to write a position paper on how he proposed to teach evolution in his biology class. Plaintiff completed this position paper on April 15, 1998.

In the paper, Plaintiff refers to the difficulties of documenting the "high points of the creation/evolution debate." Plaintiff raised two challenges to evolution: 1) that the process of evolution was impossible and has no evidence to show that it happened; and 2) that the complexity of life testifies against evolution. Plaintiff elaborated upon those two themes. Plaintiff stated that, while natural selection is supported by evidence and that he would teach it without reservation, he did not regard natural selection as a basis for "macroevolution" [defined by Plaintiff as the process causing life to arise from a non-living ancient pond to develop into the creatures that exist today]. Plaintiff stated that his goals were to 1) teach real and practical knowledge that students could use in their role as educated citizens; and 2) to kindle in students an appreciation for the complexities and subtleties of the various forms of life and their systems. Plaintiff averred that, if the department wished, he would teach evolution, but would accompany his teaching with an "honest look" at the difficulties and inconsistencies of evolution without turning the class into a religious one. Finally, Plaintiff stated that proper religious treatment of the creation/evolution debate should be left with a student's family and place of worship.

On April 28, 1998, Ms. Freund, Principal Johnson, Superintendent Dixon and Ron Spies met with Attorney Ann Goering of the Ratwick Law Firm. The participants at the meeting decided that Plaintiff should be reassigned from teaching biology to teaching natural science to ninth graders. Plaintiff was informed of this decision on the following day.

Ms. Freund wrote a memorandum about this decision to the members of the school board. In the memo, Ms. Freund mentioned that Mr. Hubert had contacted her

and stated that the science department suspected that Plaintiff was not following the biology curriculum agreed upon by the science department and believed that he was reluctant to teach evolution as presented in the textbook. Ms. Freund related that Plaintiff asserted at the April 1st meeting that he did not regard evolution to be a viable scientific concept because he believed it could not be proven. Ms. Freund further related that, at the April 7th meeting, members of the science department affirmed the importance of teaching evolution. Finally, Ms. Freund stated that the participants at the April 28th meeting had determined that:

> 1) the District is responsible for ensuring that the district's prescribed curriculum is taught;
>
> 2) evolution is a central, unifying concept of the District's prescribed biology curriculum;
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> 3) the District has the managerial right to assign teachers to teaching positions according to licensure;
>
> 4) positions other than biology, for which he [Plaintiff] is qualified, are available within the district.

(Freund memo. of April 29, 1998). Ms. Freund did not mention any religious concerns in this memo or even any concerns that Plaintiff had some sort of "conflict" between his beliefs and evolution.

Plaintiff argues that Principal Johnson did not make the decision to reassign Plaintiff until after reading the position paper. In his deposition, Principal Johnson admitted that he made the decision after the position paper and that he had previously had an open mind on the question of whether Plaintiff would continue on as a biology teacher in the 1998-1999 academic year. Principal Johnson stated that he and the others at the April 7th meeting were concerned about the extent to which Plaintiff would teach about

the possible holes in the theory of evolution, at the expense of "diluting the concept itself." (Johnson depo., p. 33). Principal Johnson asserted concern that "a cornerstone"/"basic concept" of biology would be diluted and that students would "lose the gist" of the theory. (Id. at 34). Principal Johnson stated that he was concerned with how Plaintiff would balance teaching evolution with his "hobby" of investigating the weaknesses of evolution. (Id. at 36). For that reason, Principal Johnson requested that Plaintiff do the position paper.

Plaintiff appealed his reassignment to Superintendent Dixon, and the two met on May 5, 1998. Superintendent Dixon affirmed Principal Johnson's decision and wrote Plaintiff a letter, dated May 14, 1998, explaining his decision to affirm. In the letter, Superintendent Dixon admitted, as he also did in his deposition, that Plaintiff had avowed that he could teach the curriculum. Superintendent Dixon then referred to Plaintiff continuing "to justify why it is appropriate not to follow the curriculum by pointing out the 'discrepancies' that you believe to exist." According to Superintendent Dixon, Plaintiff's explanations compelled him to believe that Plaintiff differed fundamentally with the "commonly held principles of the curriculum as outlined." Superintendent Dixon continued that Plaintiff had made it clear that he could not teach the curriculum and that Plaintiff proposed to use the curriculum as a basis for discussing his disagreement with the curriculum and why the curriculum was incorrect. Superintendent Dixon concluded by stating that Plaintiff's approach could not be described as teaching the approved curriculum. Superintendent Dixon made no reference to religion or a conflict of beliefs in the letter.

In his memorandum in opposition to summary judgment, Plaintiff asserts that Superintendent Dixon discussed a "conflict" with Plaintiff that would prevent him from teaching biology and that Superintendent Dixon concluded that Plaintiff's wish to present criticisms of evolution was connected to Plaintiff's religious beliefs. In his deposition, Superintendent Dixon admitted that, during their May 5th meeting, he was trying to determine if Plaintiff had a conflict with the curriculum. (Dixon depo., p. 29). In response to the question of whether it occurred to him that Plaintiff's views were related to his religious beliefs, Superintendent Dixon stated, "It could very well be, but that's not my issue." (Id. at 33). Superintendent Dixon stated that Plaintiff was always the person who brought up his religious nature. Superintendent Dixon disputed that Plaintiff said that he [Plaintiff] was a religious person and had trouble with evolution because of that. (Id.). Rather, Superintendent Dixon remembered Plaintiff saying that he had done a lot of study "under this topic" and that he wanted to "bring those things in" and use them in class as part of the discussion of evolution. (Id.).

Plaintiff asserted in his deposition that Mr. Covert, a school board member, told Plaintiff that Ms. Freund had visited Mr. Covert and discussed Plaintiff's reassignment. Ms. Freund ostensibly told Mr. Covert that Plaintiff was being reassigned because he had an internal conflict about teaching religion because of his beliefs in God. (LeVake depo., p. 162). Plaintiff was not present at this meeting between Ms. Freund and Mr. Covert to hear what exactly was said. In the parts of Mr. Covert's deposition that have been submitted to the Court, Mr. Covert did not say that Ms. Freund told him that Plaintiff's difficulties with the curriculum stemmed from religious beliefs. For her part, Ms. Freund denied telling Mr. Covert that Plaintiff had a conflict between teaching evolution and his

religious beliefs. (Freund depo., p. 80). Ms. Freund admitted telling Mr. Covert that Plaintiff had a "deep conflict" and "struggles with the curriculum." (Id.). Ms. Freund stated that she told Mr. Covert that Plaintiff had strong reservations about evolution. (Id.).

Plaintiff has not suffered any reduction in salary or benefits, or any demotion in seniority at Faribault High School, following his reassignment to teaching 9th grade science. Plaintiff has suffered no monetary loss or loss of earning capacity. Plaintiff has not sought any medical or psychological treatment for problems stemming from the reassignment. Plaintiff continues to attend the same church as he attended before the reassignment. Plaintiff's main motivation is to recover his job as a biology teacher.

Plaintiff has since filed a lawsuit against Defendants. The Complaint is dated May 24, 1999. Plaintiff is suing Defendants under 42 U.S.C. §1983, alleging violations of the Free Exercise of Religion Clause and Free Speech Clause of the First Amendment to the United States Constitution. Plaintiff also alleges a violation of his academic freedom as a §1983 cause of action. Plaintiff alleges a violation of the Establishment Clause of the First Amendment. Plaintiff alleges that Defendants denied him due process under the federal and state constitutions. Plaintiff further alleges violation of his free speech right under the Minnesota State Constitution and violation of his right to freedom of conscience guaranteed by the Minnesota State Constitution.

Plaintiff requested the following relief in his Complaint:

> 1. A declaratory judgment that the District's policy of excluding from biology teaching positions persons whose religious beliefs conflict with acceptance of evolution as an unquestionable fact, to be unconstitutional and illegal under both the United States and Minnesota Constitutions.

2. A declaratory judgment that the action of removing Plaintiff from his biology teaching position was illegal and unconstitutional.

3. A Court Order that Defendants restore Plaintiff to his biology teaching position.

4. Compensatory damages in excess of $50,000.

5. Reasonable costs in this action.

Cable News Network ("CNN") interviewed Plaintiff as part of a segment entitled "In the Beginning" that aired on March 12, 2000. This was after Plaintiff's reassignment and after Plaintiff commenced his lawsuit. The segment dealt with the ongoing debate over evolution and the criticisms of evolutionary theory. In the interview, Plaintiff asserted that he was not willing to teach evolution as a fact but was willing to teach it critically and to take a look at both sides of the issue. Ultimately, this video segment has little evidentiary value because it was created and aired almost two years after Plaintiff's reassignment and thus does not address the main issue in this case. That issue is whether Defendants, when making the decision to reassign Plaintiff, violated Plaintiff's constitutional rights by taking improper considerations into account.

ANALYSIS

I. Summary Judgment Standard

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [the] party is entitled to judgment as a matter of law." *Minn.R.Civ.Proc. 56.03.* The moving party carries the burden of persuasion. Ahlm v. Rooney, 143 N.W.2d 65, 68 (Minn. 1966). The Court

views the evidence in the light most favorable to the nonmoving party. Grondahl v. Bulluck, 318 N.W.2d 240, 242 (Minn. 1982); Valletta v. Reckfidler, 355 N.W.2d 314, 316-17 (Minn.Ct.App. 1984).

When the moving party makes out the prima facie case, the burden of producing facts that raise a genuine issue shifts to the opposing party. Thiel v. Stich, 425 N.W.2d 580, 583 (Minn. 1988)(citing Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). The nonmoving party may not rest upon mere averments or denials of the moving party's pleading. *Minn.R.Civ.Proc. 56.05.* The nonmoving party may also not rely on mere general statements of fact or conclusory allegations as to right to trial. Phillips-Klein Companies, Inc. v. Tiffany Partnership, 474 N.W.2d 370, 373 (Minn.Ct.App. 1991). It is also not enough for the party resisting summary judgment to "simply show that there is some metaphysical doubt as to the material facts." Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn.Ct.App. 1989). The nonmoving party must demonstrate, at the time the motion is made, specific facts in existence which create a genuine issue for trial. Tiffany Partnership, 474 N.W.2d at 373, *Minn.R.Civ.Proc. 56.05.* Hearsay is inadmissible evidence and must be disregarded on a motion for summary judgment. Blackwell v. Eckman, 410 N.W.2d 390, 391 (Minn.Ct.App. 1987).

II. Civil Rights Actions

42 U.S.C. §1983 provides, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Two elements are necessary for recovery under §1983: a plaintiff must prove that defendant has deprived him of a right secured by the Constitution and laws of the United States, and that defendant deprived him of this right under color of law. Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Defendants' reassignment of Plaintiff was an act done under color of Minnesota law. See Keckeisen v. Independent School Dist., 509 F.2d 1062 (8th Cir. (Minn.) 1975). The Court now turns to analyze whether Defendants violated any of Plaintiffs' constitutional rights.

III. Free Exercise Claim

> The First Amendment to the United States Constitution provides that:
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> 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.

The First Amendment applies to actions by States and their subdivisions via the Fourteenth Amendment to the United States Constitution. The prohibition of the First Amendment against laws respecting an establishment of religion or prohibiting the free exercise thereof mandates governmental neutrality between one religion and another religion, and between religion and nonreligion. Epperson v. Arkansas, 393 U.S. 97, 104; 89 S.Ct. 266, 21 L.Ed.2d 228 (1968).

In the instant case, Plaintiff continues to practice his religion of choice and to belong to his religion of choice. Plaintiff makes no claim that Defendants presented him with some sort of quid pro quo whereby he was to alter his religious practices or to limit expression of his religious beliefs in order to retain the biology teaching position. Rather,

Plaintiff's claim boils down to an assertion that Defendants were aware of his religious beliefs and improperly considered his religious beliefs to reach a conclusion that he had a conflict between his beliefs and the theory of evolution that would prevent him from being an effective biology teacher. Therefore, asserts Plaintiff, Defendants penalized him for his religious beliefs because of their assumptions about those beliefs. Defendants deny this and assert that they reassigned Plaintiff solely because it became apparent to them that Plaintiff would not teach the District's established biology curriculum.[1]

The fact that Plaintiff's contract with the District provides that he may be reassigned to whatever position for which he holds licensure does not by itself vitiate his free exercise claim. Plaintiff's analogy to a black at-will employee who is fired for racial considerations is apt. However, the black employee would still have the burden of bringing forth specific facts to establish his racial discrimination claim. Plaintiff here has the burden of bringing forth specific facts that create a genuine issue of fact that Defendants may have considered Plaintiff's religious beliefs when making their decision to reassign him.

Plaintiff has not come forth with any facts demonstrating a genuine issue. In his deposition, Plaintiff stated that he had never told Ms. Freund or Principal Johnson what his specific beliefs were before the April 1st meeting. Regarding Ms. Freund's queries about whether he mentioned God or the Bible in class and whether his students knew he was Christian, Plaintiff admitted to understanding that Ms. Freund was merely ensuring

[1] Plaintiff has devoted a fair amount of energy to arguing that Defendants' actions did not just concern the past, that is, his alleged failure to teach the biology curriculum in the 1997-1998 academic year, but that Defendants also based their decision to reassign upon their concerns about what Plaintiff would do in the future. That may well be true, and is not dispositive in any event. The key issue is not whether Defendants were thinking about problems in the past or were concerned with potential problems in the future, or some combination. The key issue is whether Defendants made their reassignment decision based upon constitutionally invalid considerations.

that Plaintiff was not discussing religion in the classroom. Ms. Freund's memo to the school board members contained no references to Plaintiff's religious beliefs and reported that Plaintiff did not regard evolution to be a viable scientific concept. Plaintiff's statement that Mr. Covert told him that Ms. Freund had referred to Plaintiff having a conflict because of his belief in God may appear significant at first blush. However, in Mr. Covert's deposition, or at least in the pages submitted by Plaintiff to the Court, Mr. Covert makes no reference to Ms. Freund telling him that Plaintiff's religious beliefs were causing a conflict. Therefore, this information exists only in Plaintiff's deposition as a hearsay statement and is inadmissible as evidence to raise a fact issue. See Blackwell, 410 N.W.2d at 391. Finally, Superintendent Dixon, discussing his May 5th meeting with Plaintiff in his deposition, agreed that Plaintiff's views may have been linked to his religious beliefs and then said, "but that's not my issue." (Dixon depo., p. 33). This is not an admission on Superintendent Dixon's part that Plaintiff's religious beliefs were considered in the reassignment decision. It is simply an after the fact reflection that Plaintiff's difficulties with the curriculum may have been connected to his religious views.

The pieces of evidence (i.e. deposition testimony, documents) to which Plaintiff points as support for his position actually support Defendants' position that they based Plaintiff's reassignment upon doubts concerning Plaintiff's efficacy as a biology teacher. Superintendent Dixon referred in his letter to Plaintiff to statements by Plaintiff in his position paper characterizing evolution as "impossible" and stating that he would teach evolution, but with an "honest look" at the difficulties and inconsistencies. Superintendent Dixon asserted that Plaintiff had made it clear that he could not teach the

curriculum. Principal Johnson, discussing the April 7th meeting, stated in his deposition that Defendants were concerned that Plaintiff would overemphasize the difficulties with the theory of evolution at the expense of allowing the theory itself to slip into obscurity. Ms. Freund's memo to the school board members made no reference to religious views but justified the decision to reassign Defendant based on fears that he would not properly teach the biology curriculum. Plaintiff has failed to adduce any specific disputed facts to justify a finding that Defendants reassigned him based, even in part, upon their attitudes toward his religious beliefs and their preconceptions of how those beliefs affected him as a biology teacher. Without any facts demonstrating religious factors in Defendants' decision-making, Plaintiff cannot make out a violation of the Free Exercise Clause in this case, and Defendants are entitled to judgment as a matter of law on that claim.

The case of Peterson v. Minidoka County School District No. 331, 132 F.3d 1258 (9th Cir. 1997) is not apposite. In that case, a public elementary school principal announced that he would be withdrawing his children from the public schools and would homeschool them so that their education would receive "an aspect of God being the creator." Peterson, 132 F.3d at 1262. The Board of Trustees exercised its right to reassign and removed Peterson, the principal, from his post, citing concerns about the effect on morale caused by a public school principal removing his children from the public schools. The Federal District Court for Idaho granted Peterson summary judgment on, inter alia, his claim that his freedom of religion had been violated. The Ninth Circuit affirmed. Peterson is not on point in the instant case for one major reason. Peterson implicated the fundamental right of parents, discussed by the United States Supreme Court in Wisconsin v. Yoder and Pierce v. Society of Sisters, to direct the education and

rearing of their children. Peterson had exercised his right to give his children a religious education. The instant case does not involve an exercise by Plaintiff of a religious right concerning his own children, but rather just Plaintiff's disagreement with the curriculum, which he was charged to teach to other people's children.

IV. Establishment Clause

The United States Supreme Court has devised a three-prong test to determine whether governmental action comports with the Establishment Clause of the First Amendment. To withstand an Establishment Clause challenge, a state statute, policy or action: 1) must have a secular purpose; 2) must, as its primary effect, neither advance nor inhibit religion; and 3) must not foster an excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111 (1971). The theory of evolution is not a religion and requiring it to be taught as part of a school curriculum does not constitute an establishment of religion. See Peloza v. Capistrano Unified School Dist., 37 F.3d 517 (9th Cir. 1994). Plaintiff's theory is essentially that Defendants denied him the biology post based upon his adherence to certain religious beliefs and thereby favored nonreligion over religion. The State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, thus preferring those who believe in no religion over those who do believe. School District of Addington Township v. Schemp, 374 U.S. 203, 225; 83 S.Ct. 1560; 10 L.Ed.2d 844 (1963).

Plaintiff's Establishment Clause claim suffers from the same infirmity that afflicts his Free Exercise claim. Plaintiff has not brought forth disputed material facts that could

establish that his reassignment was religiously motivated. The question to which the Lemon test must be applied then becomes one of whether Defendants created an establishment of religion by reassigning Plaintiff due to concerns about his ability to teach the curriculum. That was a secular purpose and thus met the first prong of Lemon. Second, Plaintiff's reassignment did not have the primary effect of advancing or inhibiting religion; as noted, teaching evolution is not a religious activity. Third, Plaintiff's reassignment did not excessively entangle the District with religion. The reassignment resulted simply in a personnel shift at the high school. Plaintiff's Establishment Clause claim fails, and Defendants are entitled to judgment as a matter of law.

V. Freedom of Conscience

The Court shifts here from analyzing the federal constitutional claims to analyze the Freedom of Conscience Clause in the state constitution because that clause deals with religion and is thus logically placed in sequence with the analysis of the federal religion clauses. Minn. Const. art. I, Sec. 16 provides:

> The right of every man to worship God according to the dictates of his conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state....

This language is broader and more emphatic than the religion clauses of the First Amendment to the United States Constitution. Murphy v. Murphy, 574 N.W.2d 77, 81 (Minn.Ct.App. 1998). While the First Amendment limits government action at the point

of prohibiting the exercise of religion, section 16 precludes even an infringement on or interference with religious freedom. Id. When reviewing a party's claim under the Freedom of Conscience Clause, courts ask whether: 1) the objector's belief is sincerely held; 2) the state regulation burdens the exercise of religious beliefs; 3) the state interest in the regulation is overriding or compelling; and 4) the state regulation uses the least restrictive means for effectuating its compelling interest. Id. Judicial intervention into the determination and interpretation of religious beliefs warrants caution, which favors recognizing an asserted religious belief as sincere. See Hill-Murray Federation of Teachers, St. Paul, Minn. v. Hill-Murray High School, 487 N.W.2d 857, 865 (Minn. 1992).

In the instant case, the Court will assume that Plaintiff's religious beliefs, whatever they may be exactly, are indeed sincere. Plaintiff then runs into difficulties under the second prong of the test. No matter how generous the law, the presence of material facts in dispute is still required to make out a claim. Plaintiff does not assert that his reassignment has affected his church attendance, personal religious practices or ability to discuss religious topics in any way. Plaintiff has failed to come forward with specific facts supporting his assertion that his religious beliefs were a factor in losing his biology teaching position. Therefore, the second prong of the test is unfulfilled. The District has a compelling interest in education, which is its specific duty. Because no burden on religion has been demonstrated, there is no need to ask whether Plaintiff's reassignment was the least restrictive means for the District to assuage its concerns about the biology curriculum. Defendants are entitled to judgment as a matter of law on this claim.

VI. Freedom of Speech

Plaintiff alleges that Defendants violated his First Amendment right to free speech by removing him from the biology position based on his views on evolution and his past expression of those views. The question of whether speech of a government employee is constitutionally protected expression entails striking a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern ant the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. Pickering v. Board of Education, 391 U.S. 563, 568; 88 S.Ct. 1731; 20 L.Ed.2d 811 (1968). Plaintiff's situation differs greatly from that of the public school teacher in Pickering. In that case, a teacher was dismissed after writing a letter to a local newspaper criticizing the way in the board of education and superintendent of schools had handled past proposals to raise new revenue for the schools. In the instant case, Plaintiff asserts a free speech right to teach the criticisms of evolution in the biology classroom. Plaintiff's position is wrong.

The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. Cox v. Louisiana, 379 U.S. 536, 554; 85 S.Ct. 453; 13 L.Ed.2d 471 (1965). In particular, a school classroom is a nonpublic forum and, like the private owner of property, the District may legally preserve the property [the classroom] under its control for the use to which it is dedicated. See Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 391; 113 S.Ct. 2141; 124 L.Ed.2d 352 (1993). Plaintiff's classroom at the high school is a nonpublic forum, and the District has the right to limit the speech in that classroom to the teaching of the

designated curriculum. The District bears the responsibility of assuring "that participants learn whatever lessons the activity is designed to teach." Miles v. Denver Public Schools, 944 F.2d 773, 777 (10th Cir. 1991)(quoting Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988)). In the District's 10th grade biology curriculum, one of those lessons is evolution. When Plaintiff is standing before his students in the classroom, he is not in the position of a citizen on the public square with a right freely to express his opinion as he sees fit. Rather, he is acting as an employee of the school charged with teaching the prescribed curriculum and is in a location which the District has reserved for the purpose of teaching students the prescribed curriculum. To rule that Plaintiff has a free speech right to teach the curriculum as he sees fit would be literally to make a federal case out of every dispute between a teacher and his superiors. This the Court will not do. Defendants are entitled to judgment as a matter of law on this claim.

Plaintiff also alleges that Defendants violated his state free speech rights under Article I, Section 3 of the Minnesota Constitution. The Minnesota Supreme Court has ruled that Article I, Section 3 does not offer more expansive protection of speech than does the First Amendment of the federal constitution. See State v. Wicklund, 589 N.W.2d 793, 799 (Minn. 1999). The federal and state provisions are therefore coextensive, and the foregoing First Amendment analysis applies with equal force to the state law claim. Defendants are entitled to judgment as a matter of law on this claim as well.

VII. Academic Freedom

Plaintiff's academic freedom claim has essentially the same flaws as his free speech claim. Though academic freedom is not one of the enumerated rights of the First Amendment, the preservation of the classroom as a "marketplace of ideas" is one of the safeguarded rights. Healy v. James, 408 U.S. 169, 180-181; 92 S.Ct. 2338; 33 L.Ed.2d 266 (1972)(quoted in Clark v. Holmes, 474 F.2d 928, 931 (7th Cir. 1972)). However, academic freedom is not a license for uncontrolled expression at variance with established curricular content. Clark, 474 F.2d at 931 (instructor had no constitutional right to override the wishes and judgment of his superiors and fellow faculty members as to content of required health course). Teachers have no unlimited liberty as to the structure and content of courses at the secondary level. Adams v. Campbell City School Dist., 511 F.2d 1242, 1247 (10th Cir. 1975)(teacher terminated for, inter alia, discussing current events in class rather than devoting full attention to English, the class she was assigned to teach). Plaintiff in the instant case has no constitutional right to teach his proposed criticisms of evolutionary theory, though they may be scientifically meritorious. The District has the right to control the science curriculum, and Defendants are entitled to judgment as a matter of law on this claim.

VIII. Due Process

The Fifth Amendment to the United States Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. As a tenured public school teacher, Plaintiff does have a property interest in his employment at the high school. However, it is undisputed that Plaintiff still has his employment at the high

school. Plaintiff has suffered no loss of pay, earning capacity, benefits or seniority. He was merely shifted to a different teaching post, an event which his contract with the District contemplates and expressly allows. Plaintiff has suffered no property deprivation and has no basis to allege a violation of due process with respect to any property interest.

A public employee also has a liberty interest in his employment, which is implicated when a public employer inflicts damage to the employee's reputation, thus impairing his future employment opportunities. See Siegert v. Gilley, 500 U.S. 226, 233; 111 S.Ct. 1789; 114 L.Ed.2d 277 (1991). Plaintiff is not alleging any defamation on Defendants' part and admits that there is nothing demeaning about teaching ninth graders rather than tenth graders. In any event, to rise to the level of a constitutional infraction, the defamation must be accompanied by termination or failure to rehire. Id. No such thing has happened in the instant case, and Plaintiff has no claim for violation of a liberty interest. Defendants are entitled to judgment as a matter of law on the federal due process claim.

Like the Fifth Amendment, the Minnesota Constitution's Article I, Section 7 forbids the deprivation of property or liberty without due process of law. The Court is unaware of any law that interprets the relevant language of Article I, Section 7 more broadly than the Due Process Clause of the Fifth Amendment. It is a significant undertaking for a state court to hold that a state constitution offers broader protection than similar federal provisions and should be done only if there is a sound reason to do so. Wicklund, 589 N.W.2d at 799. Plaintiff has not suggested any broader interpretation of the state constitution, and the Court will not create one. Defendants are entitled to judgment as a matter of law on the state due process claim.

IX. Qualified Immunity, Damages and District Liability

Because the Court has granted summary judgment as to all of Plaintiff's claims, it is unnecessary to consider the applicability of the qualified immunity defense. The granting of summary judgment as to all claims also renders unnecessary any need to consider damages and whether there is any reason for a jury trial. There is also no need to consider whether the actions of Superintendent Dixon can bind the District for purposes of §1983 liability under Pembauer v. Cincinnatti, 475 U.S. 469; 106 S.Ct. 1292; 89 L.Ed.2d 452 (1986). Without liability on the part of the individual defendants, no liability can adhere to the District on any of the claims. Summary judgment is granted as to all claims, and Plaintiff's suit is dismissed with prejudice.

Dated: June 20, 2000

Bernard E. Borene
Judge of District Court