UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOELLE SILVER,

Plaintiff,

Case No. 1:13-cv-00031

v.

CHEEKTOWAGA CENTRAL SCHOOL DISTRICT; **BRIAN J. GOULD**, in his official capacity as President, Board of Education, Cheektowaga Central School District; and **DENNIS KANE**, individually and in his official capacity as Superintendent of Schools, Cheektowaga Central School District,

Defendants.

PLAINTIFF'S REPLY IN SUPPORT OF OBJECTIONS TO U.S. MAGISTRATE JUDGE FOSCHIO'S REPORT AND RECOMMENDATION REGARDING DEFENDANTS' MOTION TO DISMISS

On June 24, 2014, U.S. Magistrate Judge Foschio issued his Report and Recommendation (Doc. No. 17) (hereinafter "Report and Recommendation"), recommending that the court grant in part and deny in part Defendants' motion to dismiss. On July 8, 2014, Plaintiff filed her objections (Doc. No. 18) to the Report and Recommendation, and later that same day, Defendants filed their objections (Doc. No. 19). On July 18, 2014, Plaintiff filed her response (Doc. No. 20) to Defendants' objections. *See* Fed. R. Civ. P. 72(b)(2) (requiring a response "to another party's objections" to be filed "within 14 days after being served with a copy"). However, on July 22, 2014, the court issued a "text order," which, *inter alia*, set forth a briefing schedule for the filing of responses and replies to the previously filed objections. (*See* Doc. No. 21). Pursuant to this order, the court required "response papers" to be filed by August 6, 2014, and "reply papers" to be filed by August 13, 2014. (Doc. No. 21).

On August 6, 2014, Defendants filed a "Reply in further Support of Defendants' Objections to Report and Recommendation." (Doc. No. 22 [hereinafter "Defs.' Reply"]). And while captioned as a "reply," in their filing Defendants specifically reference Plaintiff's objections, (Defs.' Reply at 9 n.21),[1] and they repeat their erroneous assertion that the

[1] Here, Defendants erroneously assert that Plaintiff "does not squarely address" their argument that the Report and Recommendation relied upon the incorrect standard for determining whether Defendant Kane enjoys qualified immunity. (Defs.' Reply at 9 [stating that "Silver does not squarely address the argument that the R&R erred in relying on a generalized right against selective enforcement. Rather, she advocates for an (sic) generalized right against unequal application of board policies," and citing to Plaintiff's Objections (Doc. No. 18)]). Defendants are wrong. Indeed, it is Defendants' argument that is contrary to established law. Under Defendants' proposed standard, *unless the very action in question has previously been held unlawful*, then the offending official enjoys qualified immunity. But that is not the standard. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent."). The facts in this case demonstrate that Defendants selectively enforced their policies and regulations against Plaintiff on account of religion. In light of pre-existing law, such discrimination, as the Magistrate Judge found, violates the equal protection guarantee of the

Establishment Clause shields them from all liability (*see* Defs.' Reply at 2, 3, 4, 6, 10)—the principal basis for the Magistrate Judge's recommendation that the court dismiss certain claims advanced by Plaintiff and the principal basis for Plaintiff's objections to the Report & Recommendation (*see* Pls.' Objections at 2-13 [Doc. No. 18]).

Consequently, in addition to *briefly* addressing Defendants' argument regarding the proper standard for qualified immunity by way of a simple footnote (*see supra* n.1), Plaintiff will *briefly* reply here to Defendants' assertion that the Establishment Clause required them to censor her speech and to selectively enforce School District policies and regulations against her on account of religion. And while Plaintiff has thoroughly briefed the Establishment Clause issues presented by this case, a few pointed highlights by way of this short and concise reply are in order. Indeed, Plaintiff contends that this concise analysis will assist the court with reaching a just and proper conclusion in this matter.

We begin with an *uncontestable* principle of law upon which this case must be viewed: Plaintiff, a public employee, does not surrender her constitutional rights upon accepting employment with the School District. *See Lane v. Franks*, No. 13-483, 2014 U.S. LEXIS 4302, at *6 (U.S. June 19, 2014); *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006); *Connick v. Myers*, 461 U.S. 138, 142 (1983); *Rankin v. McPherson*, 483 U.S. 378, 383 (1987); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-06 (1967). And this includes Plaintiff's constitutional right to freedom of speech. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (stating that it has been "the unmistakable holding" of the Court for decades that neither

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Fourteenth Amendment. *Le Clair v. Saunders*, 627 F.2d 606, 609-10 (2d Cir. 1980) (stating that to advance an equal protection claim based on selective enforcement the plaintiff must show that she "was selectively treated" and "that such selective treatment was based on impermissible considerations such as . . . religion"). In short, the "contours" of the right were apparent, and thus clearly established, under existing law.

"students [nor] teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"); *Morse v. Frederick*, 551 U.S. 393, 403 (2007) ("In *Tinker*, this Court made clear that 'First Amendment rights applied in light of the special characteristics of the school environment' are available to teachers and students."); *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 44 (1983) (stating that "[t]he First Amendment's guarantee of free speech applies . . . within the school"); *see also Roberts v. Madigan*, 921 F.2d 1047, 1056 (10th Cir. 1990) (beginning its analysis of a *teacher* speech case "by noting that 'neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate'") (quoting *Tinker*, 393 U.S. at 506); *Lee v. York Cnty. Sch. Divs.*, 484 F.3d 687 (4th Cir. 2007) ("[T]he School Board would not be able to regulate Lee's [a teacher] speech *if it was unrelated to the curriculum* and did not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.") (quoting *Tinker*, 393 U.S. at 509) (emphasis added).[2] And in case there were any doubt, *Marchi v. Board of Cooperative Educational Services of Albany*, 173 F.3d 469 (2d Cir. 1999), "unquestionably" resolves the issue in Plaintiff's favor. In *Marchi*, the Second Circuit acknowledged that the "directive" at

[2] The allegations in this case establish that Defendants, by policy and practice, permit teachers to display non-curriculum items in their classrooms, thereby creating a forum for non-curricular speech. (*See, e.g.*, Compl. ¶ 16 [Doc. No. 1]). That alone distinguishes the speech claims in this case from the claim in *Garcetti*, which did not involve a forum issue. *See, e.g., Perry Educ. Ass'n*, 460 U.S. at 44 (conducting a forum analysis involving a speech claim arising in a public school context and stating that "[t]here is no question that constitutional interests are implicated by denying [appellee] use of the interschool mail system"). Moreover, in a nonpublic or limited public forum—which, at a minimum, is the forum at issue here—restrictions on speech must be viewpoint neutral. *Perry Educ. Ass'n*, 460 U.S. at 46. Here, there is no question that Defendants' restrictions on Plaintiff's speech are viewpoint based. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993) (holding that the challenged restriction was viewpoint based and unconstitutional even though "all religions and all uses for religious purposes [were] treated alike").

issue—a directive that restricted the plaintiff teacher's speech—was "*unquestionably a restraint on* [*the teacher's*] *First Amendment rights*."[3] *Id*. at 475.

With these legal principles in mind, this court must therefore decide whether *each* of the *challenged restrictions*[4] on Plaintiff's speech—restrictions which "unquestionably" operate as "a restraint on [Plaintiff's] First Amendment rights"—are legally justified. Defendants claim that the restrictions are justified by the Establishment Clause. Plaintiff asserts that Defendants' compliance-with-the-Establishment-Clause defense is not only unfounded, *Lamb's Chapel*, 508 U.S. at 395 ("We have no more trouble than did the *Widmar* Court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded."), but in light of the facts of this case, it is absurd, *see also Marchi*, 173 F.3d at 477 (stating that "the school authorities could reasonably be concerned that communications of this sort would expose it to *non-frivolous* Establishment Clause challenges") (emphasis added).

A brief review of *each* of the speech restrictions at issue here is in order. And because Defendants' compliance-with-the-Establishment-Clause defense presents a "constitutional justification," which is "a claim that this [court] is well-equipped to evaluate, [the court need] not accord [Defendants] the same deference as in other cases involving issues that school officials are uniquely qualified to handle." *Roberts*, 921 F.2d at 1057.

The offending displays are as follows:

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[3] It is important to bear in mind that although the Second Circuit described the issue regarding the "thank you" letter the teacher wrote to a parent as presenting a "*closer question*"—a letter in which the teacher directly communicated the following message to a parent: "I thank you and the LORD for the tape [;] it brings the Spirit of Peace to the classroom. * * * May God Bless you all richly!," *Marchi*, 173 F.3d at 473—the court upheld the restriction because the letter "sufficiently intruded religious content *into a curricular matter*." *Id*. at 477 (emphasis added).

[4] As noted throughout, Plaintiff is not challenging Defendants' restrictions on her speech that relate to curricular matters (*i.e.*, limitations on guest speakers or other aspects of her science "instructional program"). (*See, e.g.*, Pls.' Objections at 2 n.3 [Doc. No. 18]; Pl.'s Opp'n to Defs.' Mot. to Dismiss at 13 n.10 [Doc. No. 10]).

- Very small (2 inches x 3 inches) "sticky notes" containing handwritten, inspirational Bible verses that were discreetly displayed on the *backside* of Plaintiff's desk (Compl. ¶ 31; Silver Decl. ¶ 5, Ex. D [Doc. No. 10-1]);

- A small poster (8.5 inches x 11 inches) with a non-proselytizing quotation ("Be on guard. Stand true to what you believe. Be courageous. Be strong. And everything you do must be done in love. 1 Corinthians 16:13-4") that is superimposed over an American flag and school books (Compl. ¶ 25; Silver Decl. ¶ 3, Exs. A, B [Doc. No. 10-1]);

- A small hand drawing (8.5 inches x 11 inches) "depicting three crosses on a hill" (Compl. ¶ 26; Silver Decl. ¶ 3, Exs. A, B [Doc. No. 10-1]);

- A very small posting (approximately 3 inches x 5 inches in 10 point font) of a quote from President Ronald Reagan stating, "Without God there is no virtue because there is no prompting of the conscience . . . without God there is a coarsening of the society; without God democracy will not and cannot long endure . . . If ever we forget that we are One Nation Under God, then we will be a Nation gone under." (Compl. ¶ 27; Silver Decl. ¶ 4, Ex. C [Doc. No. 10-1]);

- A small poster (which was a scanned, 5 inch x 7 inch greeting card) that depicts an antique telephone with the following script: "It's for you . . . GOOD MORNING, THIS IS GOD . . . I WILL BE HANDLING ALL YOUR PROBLEMS TODAY. I WILL NOT NEED YOUR HELP, SO HAVE A GOOD DAY." (Compl. ¶ 33; Silver Decl. ¶ 3, Exs. A, B [Doc. No. 10-1]); and

- Four nature scenes (each approximately 11 inches x 14 inches and which were taken from a standard calendar) that include the following messages (approximately 3 inch x 5 inch lettering): "Wash away all my iniquity and cleanse me from my sin. . . . Wash me and I will be whiter than snow. Psalm 51:2, 7"; "The Lord is my rock, and my fortress, and my deliverer; my god, my strength, and whom I will trust. Psalm 18:2"; "The heavens declare the glory of God; the skies proclaim the work of his hands. Psalm 19:1"; "Let them praise the name of the Lord, for His name alone is exalted, His splendor is above the earth and the heavens. Psalm 148:13." (Compl. ¶ 24).

In sum, to rule in Defendants' favor, this court would have to conclude that the posting of each of these items by a public school teacher pursuant to a school district policy that permits teachers to post private, non-curricular items in their classrooms violates the Establishment Clause[5]—a conclusion that finds no basis in fact or law.[6] *See, e.g., ACLU v. Mercer Cnty.*, 432

[5] Defendants also imposed upon Plaintiff the following overbroad restriction on *all other speech*, including non-curricular speech: "Except for wearing religious jewelry, such as a cross, I am also directing you to refrain from *all other forms of communication* with students during the school

F.3d 624, 638 (6th Cir. 2005) (upholding the display of the Ten Commandments on public property and stating, "Our concern is that of the *reasonable* person. And the ACLU, an organization whose mission is 'to ensure that . . . the government [is kept] out of the religion business,' does not embody the reasonable person") (emphasis added). And contrary to Defendants' claim, the Establishment Clause prohibits such hostility toward religion. *Am. Atheists, Inc. v. Duncan*, 637 F.3d 1095, 1119 (10th Cir. 2010) ("[G]overnments may not make adherence to a religion relevant in any way to a person's standing in the political community. And actions which have the effect of communicating governmental . . . disapproval, whether intentionally or unintentionally, make religion relevant, in reality or public perception, to status in the political community.") (emphasis added). Indeed, based on Defendants' view of "neutrality," the government is required to be hostile to *all things religion*. But that is not the law. *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 306 (1963) (concurring opinion) (noting that an "untutored devotion to the concept of neutrality" can lead to "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious"). The Constitution does not "require complete separation of church and state; it affirmatively *mandates accommodation*, not merely tolerance, of all religions, and *forbids hostility toward any*."[7] *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (emphasis added).

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day (whether verbal, email, texting, written, etc.) that would conflict with your duty to show complete neutrality toward religion and to refrain from promoting religion or entangling yourself in religious matters." (Compl. ¶ 36 [emphasis added]). Defendants similarly (and erroneously) assert that the Establishment Clause requires this draconian restriction on Plaintiff's speech.

[6] It should also be noted that the Bible Study Club's "prayer box" was a simple shoebox.

[7] Contrary to Defendants' assertion, this fundamental principle of Establishment Clause jurisprudence is not limited to just public forum cases. (*See* Defs.' Reply at 4 [improperly describing Plaintiff's reliance on this fundamental principle of law as "disingenuous"]). Indeed, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993), which was not a public forum case, the Supreme Court was quite clear: "In our Establishment Clause

In the final analysis, the clear effect of Defendants' actions is to convey a message of disapproval of religion in violation of the Establishment Clause (and the Free Speech Clause).

CONCLUSION

Defendants' motion to dismiss should be denied in full.

Respectfully submitted,

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cases we have often stated the principle that the First Amendment forbids an official purpose *to disapprove of a particular religion or of religion in general*." (emphasis added).

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2014, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system.

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