

powers regarding suspension, reassignment and other personnel actions concerning teachers, thus, making Defendant Vaszauskus a policy maker for purposes of section 1983; and (2) Judge Means' decision in *Devlin v. Gill*, 857 F.Supp.2d 849 (N.D. Tex. 2012).

Bailey filed her Response to Defendants 12(b)(6) Motion on November 2, 2018. Sometime around the week of November 12, 2018, Counsel for Bailey became aware of Defendant Mansfield I.S.D. policy DFBA (LOCAL)(attached hereto as Exhibit B). On November 20, 2018, Counsel for Bailey shared the policy via email with Tom Myers, Counsel for Defendant, and subsequently discussed its applicability. On or about December 8, 2018, Bailey became aware of Defendant Mansfield I.S.D. policy DK (LOCAL)(attached hereto as Exhibit C).

Defendants have failed to disclose to the Court legal authority directly related to whether Defendant Vaszauskas is a policy maker with regard to the suspension, investigation, transfer and other personnel actions, to wit, Defendant Mansfield I.S.D. Policy DFBA (LOCAL) and DK (LOCAL).

Defendant Mansfield I.S.D.'s Policy DFBA (LOCAL) provides a "term contract employee may be suspended with pay and placed on administrative leave by the Superintendent" during an investigation or when the Superintendent determines it is in the best interest of the District. Mansfield I.S.D. Board Policy DFBA (LOCAL).

Defendant Mansfield I.S.D. policy DK (LOCAL) provides all personnel is subject to assignment and reassignment by the Superintendent determines the assignment or reassignment is in the best interest of the District. Mansfield I.S.D. Board Policy DK (LOCAL).

"A lawyer shall not fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." ABA Model Rule 3.3(a)(2); Tex. Disciplinary R. Prof. Conduct Rule 3.03(a)(4)

Counsel for Bailey has great respect for the integrity of Defendants' counsel Tom Myers and refuses to believe he was aware of this provision prior to filing Defendants' 12(b)(6) motion. However, counsel for Bailey made Defendants' counsel aware of DFBA (LOCAL) prior to filing Defendants' Reply. Defendants did not disclose this Board policy to the Court in its Reply even though it arguably has direct bearing on whether Defendant Vaszauskas is a policy maker.¹

Bailey is not seeking to sanction counsel or Defendant Mansfield I.S.D. for not disclosing. But these policies are controlling legal authority that should be analyzed in determining the Superintendent was a policy maker, at least with regard to the personnel actions taken against Bailey.

Whether a government official has been delegated authority as a policy maker for purposes of section 1983 is a question of law. *Jett v. Dallas I.S.D.*, 491 U.S. 701, 737 (1989). The policies of Defendant Mansfield I.S.D. have the effect of law and answer the legal question that whether Defendant I.S.D. delegated to Defendant Vaszauskas policymaking for purposes of the personnel actions taken against Bailey.

Surreplies are routinely granted to fully address arguments raised by the parties, or to bring forth newly discovered controlling authority. *See Woods v. Peters*, No. 4:05-CV-724-Y, 2007 U.S. Dist. LEXIS 69234, at *15 n.4 (N. D. Tex. Sept. 19, 2007)(permitting supplemental appendix filed with reply brief when response raised new argument); *Lynch v. Union Pac. R.R. Co.*, No. 3:13-CV-2701-L, 2015 WL 6807716, at *1 (N.D. Tex. Nov. 6, 2015)(because evidence submitted with defendant's reply was responsive to arguments raised and evidence relied on by plaintiff in

¹ When counsel for Bailey discussed the discovery of DFBA (LOCAL), Counsel Myers indicated he would not address the Mansfield I.S.D. policy in Defendants Reply, but suggested it could be addressed by Bailey in a surreply. Curiously, Defendants oppose the filing of this surreply.

It would be fair to conclude that Defendants do not want the Court to know about its own policies that appear to make Defendant Vaszauskas a policymaker for purposes of section 1983.

his summary judgment response, it was not new evidence raised for the first time and did not require that the court strike it).

The Surreply raises arguments regarding Defendant Mansfield I.S.D.'s policies that they previously had not disclosed to the Court, Defendants will not be prejudiced by its filing because the policies are their policies. *See Hijek v. Menlo Logistic, Inc.*, No. 3:07-cv-0530-G, 2008 WL 465274 at *5 n.3 (N.D. Tex. Feb. 21, 2008).

III.

CONCLUSION AND PRAYER

Plaintiff should have the opportunity to respond to make the Court aware of legal authority enacted by Defendant Mansfield I.S.D. that delegates policymaking authority to its Superintendent.

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests that the Court grant it leave to file her Surreply to Defendant's Reply to Plaintiff's Response to Defendants' Rule 12(b)(6) Motion to Dismiss For Failure to State a Claim and Brief in Support, and award any further relief to which she may be entitled.

Respectfully submitted,

/s/ JASON C.N. SMITH
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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF CONFERENCE

I hereby certify that on December 10, 2018, I conferred with Thomas E. Myers, attorney for Defendant regarding this motion. Mr. Myers indicated Defendant is opposed to this motion. Therefore, such motion is submitted to the Court for determination.

/s/ JASON C.N. SMITH
JASON C. N. SMITH

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2018, I electronically filed the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court and in accordance with the Federal Rules of Civil Procedure. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means: Thomas E. Myers.

/s/ JASON C.N. SMITH
JASON C. N. SMITH

district has impeded her teaching career and the teacher is stuck at a school district that took her for task for merely referencing her future spouse as other heterosexual teachers had.

These actions, if proven, demonstrate a violation of a clearly established rights under the Constitution.

Plaintiff files this Surreply and would show: (1) Defendants Reply and Motion fails to cite and discuss applicable legal authority in the form of Defendant ISD policy that delegates policy making authority to Defendant Vaszauskas relating to sweeping powers regarding suspension, reassignment and other personnel actions concerning teachers; and (2) Judge Means' decision in *Devlin v. Gill*, 857 F.Supp.2d 849 (N.D. Tex. 2012).

Bailey's extensive pleading easily meets the threshold set by *Twombly*. Likewise, Bailey's pleading sets forth a custom and policy which meets the threshold set by *Monell*.

II.

DEFENDANT MANSFIELD I.S.D. POLICY SUPPORTS THE LEGAL CONCLUSION THAT IT DELEGATED POLICYMAKING AUTHORITY TO DEFENDANT VASZAUSKAS FOR PURPOSES OF EMPLOYMENT ACTIONS TAKING AGAINST BAILEY

Defendant Mansfield ISD's own policies as well as state law demonstrate Defendant Vaszauskas is a policy maker with regard to the suspension, transfer and other actions taken against Bailey.

A governmental entity may be held liable under action 1983 if it delegated policymaking authority to a governmental official such as a superintendent. Whether a governmental entity delegated authority to a government official as a policymaker for purposes of section 1983 is a question of law. *Jett v. Dallas I.S.D.*, 491 U.S. 701, 737 (1989). Whether a particular official has "final policymaking authority" is a question of state and local law. *Worsham v. City of Pasadena*, 881 F.2d 1336, 1342 (5th Cir. 1989).

The policies of Defendant Mansfield I.S.D. have the effect of law and answer the legal question that whether Defendant I.S.D delegated to Defendant Vaszauskas policymaking authority for purposes of the personnel actions taken against Bailey.

The Texas Education Code vests the superintendent with the responsibility for the assignment, supervision and evaluation of all personnel of the school district. Tex. Educ. Code § 11.201(d)(2, 4).

The Texas Education Code also provides the superintendent may recommend or be delegated the authority to make all personnel decisions. Tex. Educ. Code §11.1513(a)(2).

Defendant Mansfield ISD failed to disclose to the Court its own policy it enacted making Defendant Vaszauskas as policy maker for purposes of suspending employees, as he suspended Bailey.

Indeed, Policy DFBA (LOCAL) provides a “term contract employee may be suspended with pay and placed on administrative leave by the Superintendent” during an investigation or when the Superintendent determines it is in the best interest of the District. (Mansfield I.S.D. Board Policy DFBA (LOCAL) App. 001).

Furthermore, Defendant Mansfield I.S.D. policy DK (LOCAL) provides all personnel is subject to assignment and reassignment by the Superintendent determines the assignment or reassignment is in the best interest of the District. (Mansfield I.S.D. Board Policy DK (LOCAL) App. 2).

Thus, Defendant Mansfield I.S.D. has made the Superintendent with regard to suspensions and placing term contract employees like Bailey on administrative leave. Defendant Mansfield

I.S.D. policy, along with the Texas Education Code, invest the Superintendent with the power to make personnel decisions and reassign a teacher.¹

Defendant Mansfield I.S.D. delegated sweeping powers regarding suspension, reassignment and other personnel actions to the Superintendent, and, thus, is a policymaker for purposes of section 1983 for which Defendant Mansfield I.S.D. can be held liable.

III.

JUDGE MEANS DECISION IN *GILL* CONTROLLING AND INSTRUCTIVE

Defendants urge the Court to ignore Judge Means decision in *Devlin v. Gill*, 857 F.Supp.2d 849 (N.D. Tex. 2012) and mischaracterize its holding.

In *Gill*, Judge Means acknowledged that at least as of 2009, it was clearly established that the Constitution prohibited discrimination on the basis of sexual orientation. 857 F. Supp.2d at 856. Judge Means also recognized that the Supreme Court had held that there is no rational basis for discrimination based upon sexual orientation. 857 F. Supp.2d at 856.

In this case, Bailey never used age inappropriate language or discussed age inappropriate topics with students. Defendants seem to equate showing a photo of a same sex fiancé with discussing sexual orientation. But it is merely a discussing one's family and plans to be married does not constitute discussing sexual orientation. Defendants do not seem concerned with heterosexual couples showing photos to students of a spouse and future spouse who is of the opposite sex because this happens on a routine basis in classrooms in Mansfield. Teachers have long discussed their spouses, boyfriends and fiancées with their students. It's been a natural and innocent occurrence in daily interaction between teacher and students. Defendants position would deprive lesbian and gay teachers and their students that same natural, innocent interaction.

¹ Defendants reliance on *Jett v. Dallas I.S.D.*, 7 F.3d 1241 (5th Cir. 1993) and *Mohamed for A.M. v. Irving I.S.D.*, 252 F.Supp.2d 602 (N.D. Tex. 2017)(appeal pending) is misplaced because there was no policy of the school districts delegating policy making authority to the Superintendent as the law demonstrates in this case.

Indeed, in their Reply, Defendants appear to concede it took action against Bailey because of her sexual orientation. Instead, Defendants argue they only are required to show a rational basis for its action, arguing that “protecting the rights of parents to hold sexual-orientation related discussions with Kindergarten-through-Fourth Grade” bears a relation to a legitimate end. (Defendants’ Reply Brief, p. 9). However, discriminating on the basis of sexual orientation lacks a rational relationship to a legitimate government end.² *Gill*, 857 F. Supp.2d at 856 citing *See, e.g., Johnson*, 385 F.3d at 532; *Nabozny v. Podlesny*, 92 F.3d 446, 456 (7th Cir.1996); *Pratt*, 803 F.Supp.2d at 153 n. 12; *Massey*, 256 F.Supp.2d at 1095; *Park v. Trs. of Purdue Univ.*, No. 4:09–CV–087–JVB, 2011 WL 1361409, at *7 (N.D. Ind. Apr. 11, 2011); *Praylor*, 2005 WL 1528690, at *3; *cf. Milligan–Hitt v. Bd. of Trs. of Sheridan Cnty. Sch. Dist. No. 2*, 523 F.3d 1219, 1233–34 (10th Cir. 2008) (holding unconstitutionality of sexual-orientation discrimination not clearly established before *Lawrence* in June 2003).

Moreover, Bailey pled Defendants failed to take the same action against employees who show photos of their opposite sex partners and spouses, demonstrating discrimination based upon sexual orientation. Defendants appear to assert that it can take issue with a lesbian disclosing her sexual orientation, even if it chooses not to do so with heterosexual employees. Bailey would assert that such disparate treatment is evidence of sexual orientation on its face, the kind that Judge Means held violated clearly established constitutional protections demonstrates the violation of equal protection.

The Constitution clearly protects same sex marriages. Moreover, the Constitution clearly prohibits discrimination by a government employer against an teacher based upon her sexual

² As Judge Means further observed in *Gill*, whether an employer had a legitimate non-discriminatory reason for an action may not be addressed by a motion to dismiss. 857 F. Supp2d at 857. Thus, at this stage, the Court’s role is not to determine whether Defendants had a legitimate basis for taking the action that is being challenged.

orientation. Both of these are clearly established rights that satisfy the requirements of section 1983.

IV.

PRAYER

Taking Bailey's pleading as a whole, it is clear Bailey has pled claims of discrimination based upon her sexual orientation and in violation of her right to marry against Defendants for which relief can be granted. Defendants actions have thrown daunting obstacles in her career that have not been visited upon teachers with opposite sex spouses.

Accordingly, because Bailey has stated a claim upon which relief can be granted, Defendants' Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim should be denied. Alternatively, Bailey should be granted an opportunity to amend her pleading to address any issues identified by the Court.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2018, I electronically filed the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court and in accordance with the Federal Rules of Civil Procedure. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of

record who have consented in writing to accept this Notice as service of this document by electronic means: Thomas E. Myers.

/s/ JASON C.N. SMITH
JASON C. N. SMITH

Mansfield ISD
220908

TERM CONTRACTS
SUSPENSION/TERMINATION DURING CONTRACT

DFBA
(LOCAL)

Suspension with Pay A term contract employee may be suspended with pay and placed on administrative leave by the Superintendent during an investigation of alleged misconduct by the employee or at any time the Superintendent determines that the District's best interest will be served by the suspension.

DATE ISSUED: 2/19/2017
UPDATE 107
DFBA(LOCAL)-A

ADOPTED:

1 of 1



App. 001

DK(LOCAL) - ASSIGNMENT AND SCHEDULES

Superintendent's Authority

All personnel are employed subject to assignment and reassignment by the Superintendent or designee when the Superintendent determines that the assignment or reassignment is in the best interest of the District. Reassignment shall be defined as a transfer to another position, department, or facility that does not necessitate a change in the employment contract of a contract employee. Any change in an employee's contract shall be in accordance with policy DC.

Any employee may request reassignment within the District to another position for which he or she is qualified.

Campus Assignments

The principal's criteria for approval of campus assignments and reassignments shall be consistent with District policy regarding equal opportunity employment, and with staffing patterns approved in the District and campus plans. [See BQ series] In exercising their authority to approve assignments and reassignments, principals shall work cooperatively with the central office staff to ensure the efficient operation of the District as a whole.

Supplemental Duties

Noncontractual supplemental duties for which supplemental pay is received may be discontinued by either party at any time. An employee who wishes to relinquish a paid supplemental duty may do so by notifying the Superintendent or designee in writing. Paid supplemental duties are not part of the District's contractual obligation to the employee, and an employee shall hold no expectation of continuing assignment to any paid supplemental duty.

Work Calendars and Schedules

Subject to the Board-adopted budget and compensation plan and in harmony with employment contracts, the Superintendent shall determine required work calendars for all employees. [See DC, EB]

Daily time schedules for all employees shall be determined by the Superintendent or designee and principals.

Mansfield ISD
DK(LOCAL)-A
UPDATE 73
DATE ISSUED: 7/22/2004

