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Academic Freedom Claim Nixed

Arthur S. Leonard
New York Law School, arthur.leonard@nyls.edu

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Teacher, fired after assigning “Heather Has Two Mommies,” can’t sue.

By By: ARTHUR S.LEONARD | A high school English teacher who claims that her year-to-year contract was not renewed because her suggested list of supplementary readings for a classroom unit on censorship included controversial books such as Leslea Newman’s “Heather Has Two Mommies” suffered a setback in her First Amendment lawsuit on July 30.

US District Judge Walter Herbert Rice, in Dayton, Ohio, found that the school board’s prerogative in controlling the curriculum outweighed the teacher’s academic freedom interest in selecting reading materials for her students.

In the fall of 2001, Shelley Evans-Marshall was in her second year of teaching at Tippecanoe High School when the controversy arose. She decided to supplement the district’s ninth-grade English textbook with Hermann Hesse’s classic novel “Siddhartha,” whose themes include Buddhism, spirituality, family and romantic relationships, and personal growth. For a unit on censorship whose approved assignment was Ray Bradbury’s “Fahrenheit 415,” she asked students to select a book from the American Library Association’s list of the 100 “most challenged books in the United States.” Several selected “Heather Has Two Mommies,” a children’s novel about family diversity that includes families headed by same-sex couples along with single-parent and stepparent families.

Even though “Siddhartha” was on the school’s approved reading list, and the district had purchased copies in the past, several parents raised objections at a school board meeting to their children being assigned that book. Later, the choice of several students to read “Heather” also became a flashpoint. As a result of these controversies and Evans-Marshall’s outspoken independence on curricular matters, her relationship with the principal became tense, and eventually the school board accepted the principal’s recommendation not to renew her contract. The stated reason was that she “refused to communicate with the administration and refused to be a team player.”

Evans-Marshall believed her dismissal stemmed directly from her controversial supplemental reading choices, which she had not cleared in advance with the principal, and she contended in her lawsuit that the non-renewal for this reason violated her First Amendment rights to academic freedom in exercising her professional judgment. The school board strongly argued that the decision did not have to do with the specific reading assignments, but rather with the deterioration of her working relationship with the principal.

In considering the school district’s motion to throw out the suit, Judge Rice confronted the fact that a 2006 Supreme Court decision, Garcetti v. Ceballos, had generated doubt about whether the First Amendment even applies to a public school teacher’s decisions about reading assignments, a point that had previously seemed well established. The 2006 case involved a deputy district attorney who complained he received a less desirable post after voicing concerns about the validity of a search warrant. The high court rejected his claim that he had First Amendment protection since his comment related to a matter of public interest, ruling that when a public employee speaks as part of his job, as opposed to in his capacity as a citizen, there is no such protection. The court found that government employers have the prerogative to control the job-related speech of those who work for them.

Justice David Souter dissented that this ruling could damage First Amendment protections in academic freedom cases brought by public university instructors, but the majority merely acknowledged that such a situation might deserve special consideration, without drawing a firm conclusion.

Subsequent to the 2006 ruling, the Chicago-based 7th Circuit found that public school teachers had, as a result, lost their First Amendment academic freedom protection, while the Richmond-based 4th Circuit came to the opposite conclusion when the teacher's speech involves issues of public concern.

Dayton is in the 6th Circuit, where the Court of Appeals has not yet addressed the question, so Rice had to pick between these competing views. He decided that the 4th Circuit had the more persuasive view, and so applied First Amendment analysis to Evans-Marshall's claim.

That analysis, however, involves a test balancing the interest of the government employer in carrying out its functions with the employee's free speech interest in commenting on matters of public concern.

Rice quickly determined that Evans-Marshall's actions involved First Amendment issues. Not only did she place "Heather Has Two Mommies" on a supplemental reading list; she also assigned two essays by former students – one graphically describing a rape, the other detailing the murder of a priest accompanied by desecration of sacred artifacts. The themes of all three raised "matters of public concern," Rice concluded.

However, Rice concluded that the balance of interests favored the prerogative of the school district in exercising control over the curriculum, rejecting Evans-Marshall's argument that under the First Amendment an individual high school teacher has total freedom in selecting what to assign. He pointed out that the elected school board is accountable to the public for such decisions, and empowered by the state to make them.

The judge also found convincing evidence that Evans-Marshall's relationship with the principal, rather than her specific reading assignments, were the cause for non-renewal of her contract, even if the disagreement about those assignments aggravated their relationship.