996 F.2d 448
United States Court of Appeals,
First Circuit.

Toby Klang WARD, Plaintiff, Appellant,
v.
Carol HICKEY, et al., Defendants, Appellees.
Toby Klang WARD, Plaintiff, Appellee,
v.
Carol A. HICKEY, et al., Defendants, Appellees.
The School Committee of the Town of Belmont,
Defendant, Appellant.
Toby Klang WARD, Plaintiff, Appellee,
v.
Carol A. HICKEY, et al., Defendants, Appellants.
Toby Klang WARD, Plaintiff, Appellant,
v.
Carol HICKEY, et al., Defendants, Appellees.

Nos. 92–1883, 92–2240, 92–2241, 92–2271.
|
Heard April 5, 1993.
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Decided June 15, 1993.

Synopsis
Teacher brought action against school committee alleging violation of First Amendment rights in failure to rehire her. The United States District Court for the District of Massachusetts, Robert E. Keeton, J., entered judgment on jury verdict in favor of school committee, and teacher appealed. The Court of Appeals, Torruella, Circuit Judge, held that: (1) school may limit classroom speech to promote educational goals; (2) school may not retaliate against teacher for speech unless it has informed teacher that the speech is prohibited; (3) because teacher never requested special interrogatory on the issue of whether she had given notice, she was not entitled to new trial to resolve that issue; and (4) court did not apply proper test in determining to deny attorney fees to school committee.

Affirmed and remanded.

[redacted]

Opinion

TORRUELLA, Circuit Judge.

Toby Klang Ward, a nontenured biology teacher in the Belmont, Massachusetts public schools, sued the School Committee of the Town of Belmont and three members of the Committee as individuals for violation of her First Amendment rights by the Committee's decision not to reappoint her on the basis of a classroom discussion. Defendants Mary Tinkham, Carol Hickey, and the late Margaret Gibson cast the deciding votes against Ward's reappointment. Based on a jury's answers to various special questions, the district court entered judgment in favor of defendants, but denied defendants' subsequent request for attorneys' fees. We affirm the district court's judgment, albeit on different grounds. In addition, we affirm part of the attorneys' fees judgment and remand the rest for a determination of whether any of Ward's litigation was frivolous.

BACKGROUND

The dispute arose out of a discussion in Ward's ninth grade biology class concerning abortion of Down's Syndrome fetuses.[1] Defendant Tinkham learned of this discussion from a parent of a student in that class.

In June 1982, the School Committee voted on Ward's reappointment for the 1982–83 school year. A favorable vote would have granted Ward tenure. By a deadlocked vote of 3–3, however, the School Committee decided to deny reappointment.

As a result of this decision, Ward sued, alleging: (1) defendants retaliated against her for discussing abortion by voting against her reappointment; (2) defendants conspired to deny her constitutional rights by deciding not

to rehire her; (3) defendants acted arbitrarily and capriciously in violation of the ***451** Fourteenth Amendment; and (4) defendants wrongfully terminated her in violation of the School Committee's internal policies.

[redacted]

DISCUSSION

I. FIRST AMENDMENT

In general, as Ward was a nontenured teacher the School Committee could have refused to rehire her without any reason at all. *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283, 97 S.Ct. 568, 574, 50 L.Ed.2d 471 (1977). However, a school committee violates the First Amendment, applicable to the states through the Fourteenth Amendment, if it denies rehiring in retaliation for a nontenured teacher's exercise of

constitutionally protected speech. *Id.* at 283–84, 97 S.Ct. at 574–75; *Perry v. Sinderman,* 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972).

To establish a First Amendment violation, Ward had to show that (1) her discussion of abortion of Down's Syndrome fetuses was constitutionally protected; and (2) the discussion was a motivating factor in the decision not to rehire her. *Mount Healthy City Sch. Dist. of Educ.,* 429 U.S. at 287, 97 S.Ct. at 576; *see also Miles v. Denver Public Schs.,* 944 F.2d 773, 775 (10th Cir.1991). If Ward made that showing, defendants had to establish by a preponderance of the evidence that they would not have rehired Ward even if she had not made the controversial statements. *Id.*

We begin with the proposition that teachers retain their First Amendment right to free speech in school. *Tinker v. Des Moines Indep. Community Sch. Dist.,* 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969). On the other hand, it is well-settled that public schools may limit classroom speech to promote educational goals. *See id.* at 507, 89 S.Ct. at 736. Courts have long recognized the need for public school officials to assure that their students "learn whatever lessons [an] activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 271, 108 S.Ct. 562, 570, 98 L.Ed.2d 592 (1988).

In light of these competing principles, we find that a school committee may regulate a teacher's classroom speech if: (1) the regulation is reasonably related to a legitimate pedagogical concern, *id.* at 273, 108 S.Ct. at 571; and (2) the school provided the teacher with notice of what conduct was prohibited, *see Keyishian v. Board of Regents,* 385 U.S. 589, 604, 87 S.Ct. 675, 684, 17 L.Ed.2d 629 (1967).

Through varying tests courts have afforded schools great deference in regulating classroom speech. *Krizek v. Board of Educ.,* 713 F.Supp. 1131, 1138 (N.D.Ill.1989). *See, e.g., Zykan v. Warsaw Community Sch. Corp.,* 631 F.2d 1300, 1306 (7th Cir.1980) (abuse of discretion standard for analyzing school board's decision to remove books from curriculum); *Cary v. Board of Educ. Arapahoe Sch. Dist.,* 598 F.2d 535, 543 (10th Cir.1979) (local school boards may determine subjects taught, even if promoting particular viewpoint). Similarly, in this circuit, we have determined the propriety of school regulations by considering circumstances such as age and sophistication of students, relationship between teaching method and valid educational objectives, and context and manner of presentation. *Mailloux v. Kiley,* 448 F.2d 1242, 1243 (1st Cir.1971) (per curiam).

***453** Recently, the Supreme Court in *Kuhlmeier,* 484 U.S. at 273, 108 S.Ct. at 571, held that educators may limit the content of school-sponsored speech as long as the limitations are "reasonably related to legitimate pedagogical concerns." While the facts in *Kuhlmeier* differ from those in the present case, at least one court has applied this test to teachers' classroom speech. *See Miles,* 944 F.2d at 775–79; *cf. Krizek,* 713 F.Supp. at 1139.

In *Kuhlmeier,* a school principal prevented students from printing certain articles in a school newspaper. The students participated in the production of the newspaper as part of a journalism class. The Court found that because the school newspaper was not a public forum, the school could impose reasonable restrictions of expression through the paper. *Kuhlmeier,* 484 U.S. at 260, 108 S.Ct. at 562. The newspaper did not constitute a public forum because the school never exhibited that intent. Indeed, the Court's decision that a school newspaper is not a public forum also derived from the fact that it was part of the journalism class curriculum and a "regular classroom activity." *Id.* at 268, 108 S.Ct. at 568.

Similarly, a teacher's statements in class during an instructional period are also part of a curriculum and a regular class activity. Like *Kuhlmeier* 's school newspaper, the classroom is not a public forum, and therefore is subject to reasonable speech regulation. *See Miles,* 944 F.2d at 776 (ordinary classroom is not public forum); *Bishop v. Aronov,* 926 F.2d 1066, 1071 (11th Cir.1991).

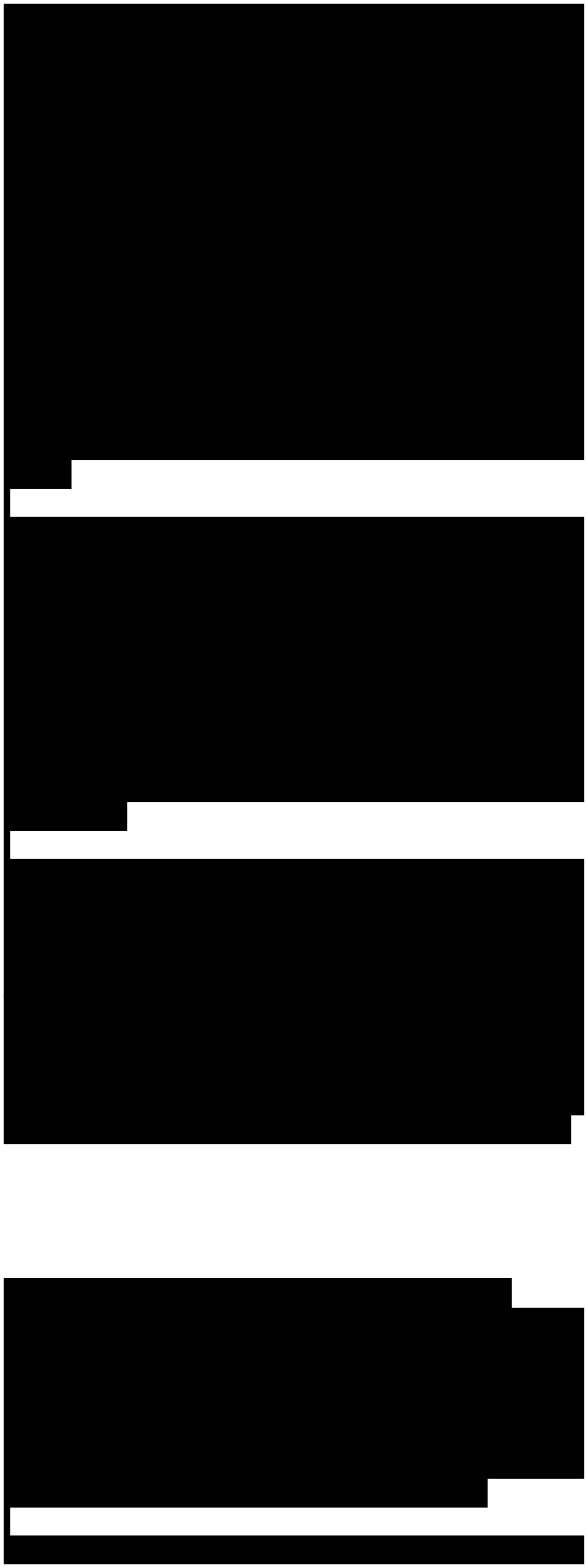
After determining that the newspaper was not a public forum, the Supreme Court reasoned that because the speech in the school newspaper was part of the school curriculum, and therefore school-sponsored, the school was entitled to more deference in speech regulation than it would be with respect to other "personal expression that happens to occur on the school premises." *Kuhlmeier,* 484 U.S. at 271, 108 S.Ct. at 570. The Court reasoned that schools cannot be required to sponsor inappropriate speech. *Id.*

Like the newspaper, a teacher's classroom speech is part of the curriculum. Indeed, a teacher's principal classroom role is to teach students the school curriculum. Thus, schools may reasonably limit teachers' speech in that setting. *See Miles,* 944 F.2d at 776.

This circuit's test of teachers' speech regulation, as set out in *Mailloux,* is consistent with the Supreme Court's test, as set out in *Kuhlmeier. Cf. Krizek,* 713 F.Supp. at

1139. It stands to reason that whether a regulation is reasonably related to legitimate pedagogical concerns will depend on, among other things, the age and sophistication of the students, the relationship between teaching method and valid educational objective, and the context and manner of the presentation.

Even if under the above test a school may prohibit a teacher's statements before she makes them, however, it is not entitled to retaliate against speech that it never prohibited. *Cf. Mount Healthy City Bd. of Educ.*, 429 U.S. at 284, 97 S.Ct. at 574 (classroom speech was constitutionally protected when school board did not suggest that teacher violated any established policy, or that the board's reaction to the communication was "anything more than an ad hoc response to [plaintiff's] communication...."). Few subjects lack controversy. If teachers must fear retaliation for every utterance, they will fear teaching. As the Supreme Court warned in *Keyishian*, 385 U.S. at 604, 87 S.Ct. at 684, "[t]he danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed."



beyond January 3, 1992 was frivolous. If there was any frivolous litigation, the district court should award fees to defendants accordingly.

CONCLUSION

We *affirm* the district court's judgment for defendants on the merits. We also *affirm* the district court's alternate fee ruling to the extent that it denies fees for the litigation prior to January 3, 1992. However, we *remand* for a determination of which, if any, of Ward's litigation

All Citations

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