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NOTE

Community Standards v. Teacher Rights: What is “Immoral Conduct” Under Missouri’s Teacher Tenure Act?

Homa v. Carthage R-IX School District, 345 S.W.3d 266 (Mo. App. S.D. 2011).

CONOR NEUSEL*

I. INTRODUCTION

Most people would agree that a school board has a substantial interest in guarding the school community from anything that would distract it from accomplishing its purpose of educating each child enrolled in its schools. Of course, a very plausible source of distraction would be a misbehaving teacher. But how inappropriately must a teacher behave in order for the school board to take action? And when may a school board terminate a teacher for his or her inappropriate behavior?

Across the country, almost every state legislature has enacted a statute that allows school boards to terminate a tenured public school teacher’s contract for reasons related to his or her character.¹ In Missouri, a tenured teacher may be fired for engaging in “immoral conduct.”² However, the Missouri legislature has not defined what type of behavior this phrase encompasses. Consequently, the ambiguous statutory language presents teachers, school boards, and courts with an obvious dilemma: what conduct constitutes immoral conduct? In any state, dismissing a teacher on the basis of “immorality” can present some difficulty, not only because “immorality” is difficult to define, but because “immoral” conduct can occur anywhere, not only

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¹ See CONN. GEN. STAT. § 10-151(d)(3) (West, Westlaw through May 14, 2012); GA. CODE ANN. § 20-2-940(a)(4) (West, Westlaw through May 1, 2012); 105 ILL. COMP. STAT. 5/10-22.4 (West, Westlaw through P.A. 97-692, with the exception of P.A. 97-688 and P.A. 97-689, of the 2012 Reg. Sess.); W. VA. CODE § 18A-2-8 (West, Westlaw through 2012 First Extraordinary Session).

2. MO. REV. STAT. § 168.114(1)(2) (2000).

within the schoolhouse gate.³ As written, “moral” teacher statutes have the potential to greatly limit a teacher’s activity, including activity in his or her private life.⁴ However, when drafting statutes, lawmakers must consider interests other than those of the teachers. School boards and the communities they represent have an interest in overseeing their public employees, who have such a huge influence on their children.⁵ Thus, courts must strike a balance between these contrasting interests when defining the phrase “immoral conduct.”

In a recent Missouri case, *Homa v. Carthage R-IX School District*, the Court of Appeals for the Southern District upheld the Carthage School District’s decision to terminate one of its program directors for engaging in “immoral conduct.”⁶ The Carthage school board terminated Lynda Homa, a teacher, and the director of its Parents-as-Teachers program, after it found that Homa authorized a parent-educator to visit an incarcerated program participant to convince the participant to put her child up for adoption.⁷ Interestingly, the court did not base its determination solely on the inappropriate adoption discussion. In its opinion, the court put greater emphasis on Homa’s deceit and dishonesty in covering up the incident.⁸

Of course, reasonable people might disagree about whether this behavior was so “immoral” that it merited Homa’s termination. Whether the *Homa* court reached the correct result depends upon how one defines immoral conduct. Therein lies the real issue: Missouri’s appellate courts have not definitively agreed upon what “immoral conduct” means, and the Supreme Court of Missouri has yet to define the phrase.⁹ In *Homa*, the three-judge panel for the

3. Jason R. Fulmer, *Dismissing the “Immoral” Teacher for Conduct Outside the Workplace – Do Current Laws Protect the Interests of Both School Authorities and Teachers?*, 31 J.L. & EDUC. 271, 278 (2002).

4. Marka B. Fleming, Amanda Harmon Cooley & Gwendolyn McFadden-Wade, *Morals Clauses for Educators in Secondary and Postsecondary Schools: Legal Applications and Constitutional Concerns*, 2009 BYU EDUC. & L.J. 67, 102 (2009).

5. See *Adler v. Bd. of Educ.*, 342 U.S. 485, 493 (1952) (“A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teacher, and employees as to their fitness to maintain the integrity of the schools as part of ordered society, cannot be doubted.”).

6. *Homa v. Carthage R-IX Sch. Dist.*, 345 S.W.3d 266, 279 (Mo. App. S.D. 2011), *transfer denied*.

7. *Id.* at 274-75.

8. See *id.* at 277.

9. Compare *Ross v. Robb*, 662 S.W.2d 257, 259 (Mo. 1983) (en banc) (declining to define “immoral conduct”), with *Homa*, 345 S.W.3d at 276 (contemplating immoral conduct to mean behavior “sufficiently contrary to justice, honesty, modesty or good morals . . . to support the inference that the teacher consciously comprehended the wrongful nature of the conduct.” (quoting *Youngman v. Doerhoff*, 890 S.W.2d 330, 341 (Mo. App. E.D. 1994))) and *Kimble v. Worth City R-III Bd. of*

Southern District adopted the definition of “immoral conduct” previously applied by the Eastern District, which focuses on a teacher’s intent.¹⁰ This Note argues that *Homa* was correctly decided, and that by incorporating a mens rea into the definitional understanding of “immoral conduct,” the Southern District has provided teachers, school boards, and lower courts in Missouri with a better understanding of what sort of behavior is “immoral” under the statute.

II. FACTS & HOLDING

Carthage R-IX School District (District) is a Missouri public school district.¹¹ Employed as a tenured teacher in the District, Homa was the director of the Parents as Teachers (PAT) program for twenty years.¹² Her main responsibility as the director was to supervise PAT employees.¹³

PAT is a free, voluntary education program offered by the District to parents with children that have not yet started kindergarten.¹⁴ Some of the program’s goals are to “increase parent confidence, give parents an understanding of their child’s developmental progress, and to provide children with early developmental screening.”¹⁵ PAT employees, called “parent-educators,” have various responsibilities, including making personal visits, conducting group meetings, offering resources, and providing developmental screening for children.¹⁶

The Missouri Department of Elementary and Secondary Education (DESE) funds the PAT program.¹⁷ According to DESE guidelines, each school district must maintain records of program activities.¹⁸ DESE’s Early Childhood Development Act¹⁹ *Program Guidelines and Administrative Manual* (ECDA guidelines)²⁰ states, “[P]arent educators must keep educational records of each personal visit and group meeting. Records must include . . . the content of the visit [and] outline issues raised by the parent. . . . Only visits that have a completed personal visit record will be counted for reimburse-

Educ., 669 S.W.2d 949, 953 (Mo. App. W.D. 1984) (noting that conduct that rendered the teacher “unfit to teach” met the test for immoral conduct).

10. *Homa*, 345 S.W.3d at 276-78.

11. *Id.* at 269. As such, it is a political subdivision of the State of Missouri. *Id.*

12. *Id.* at 269-70.

13. *Id.* at 270.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. MO. REV. STAT. §§ 178.691-.699 (2000).

20. MO. DEP’T OF ELEMENTARY & SECONDARY EDUC., EARLY CHILDHOOD DEVELOPMENT ACT PROGRAM GUIDELINES AND ADMINISTRATIVE MANUAL (2010), available at <http://dese.mo.gov/eel/el/pat/documents/ECDAProgramGuidelines.pdf>.

ment.”²¹ Furthermore, ECDA guidelines maintain that the goal of PAT educators in making personal visits is for “the child to be present during the personal visit. There may be instances where this is not possible. . . . These special instances must be approved by DESE.”²² Also, parent-educators “are not expected to serve in the role of a counselor or social work[er].”²³

In September 2007, PAT parent-educator Laura Davenport asked Homa if she could visit Encarnacion Bail at the St. Clair County Jail in Osceola, Missouri.²⁴ Bail, an undocumented immigrant from Guatemala and former participant in the District’s PAT program, was awaiting deportation.²⁵ Homa approved Davenport’s visit to the jail.²⁶ Homa knew Bail’s child would not be present during the visit;²⁷ however, she failed to notify her supervisor or DESE of Davenport’s visit.²⁸

After Davenport’s trip to the jail, Davenport informed Homa that she had a discussion with Bail about putting Bail’s son up for adoption.²⁹ Homa did not have Davenport complete a personal visit record for her trip to visit Bail,³⁰ yet authorized payment of Davenport’s full salary for that day, even though DESE would not reimburse the money expended for the visit because no personal visit record was completed.³¹ On September 19, 2007, Davenport referred to her visit with Bail in her “Daily Visit Record,” when she wrote “I went to jail today, I did not pass go – I did not collect \$200.”³²

In October 2008, Davenport received a subpoena to testify in an adoption hearing regarding Bail’s son.³³ Homa knew Davenport was subpoenaed in October; however, she did not notify the District’s superintendent, Dr. Blaine Henningsen, that there was a potential situation developing with Bail

21. *Id.* at 18 (emphasis omitted).

22. *Id.* at 13.

23. *Homa*, 345 S.W.3d at 270 (alteration in original) (quoting PARENTS AS TEACHERS, SUPERVISOR’S MANUAL AND PROGRAM ADMINISTRATION GUIDE, BORN TO LEARN COMPONENTS: ETHICAL CONSIDERATIONS FOR PARENT EDUCATORS 259-69 (2005)). The court further noted that when dealing with clients, “[i]t is important for the ‘parent educator’ to be clear about appropriate professional and personal boundaries[.]” *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 271. Homa also told Davenport she would reimburse her for one-half of the mileage for her trip. *Id.*

27. *Id.* At the time of Davenport’s visit, Bail’s eleven-month-old son was staying with family members in Carthage. *Id.* at 270-71.

28. *Id.* at 271.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

until early March 2009.³⁴ Upon learning of the adoption hearing, Henningsen asked Davenport to meet with him on April 15, 2009, and requested that she bring Bail's case file with her.³⁵ During the meeting, Davenport told Henningsen that she went to the jail "to get [Bail] to put [her son] up for adoption."³⁶ Henningsen then asked Homa and Davenport to each "write down in chronological order everything that they remembered about the circumstances surrounding the situation."³⁷ In their respective written statements, which were submitted to Henningsen several days later, Homa and Davenport each individually stated that the primary purpose for Davenport's trip to the jail was to take a birth certificate application form to Bail.³⁸

On April 21, 2009, the District put Homa on administrative leave until an investigation into allegations of improper behavior by Davenport were completed.³⁹ On June 16, 2009, Homa was charged with engaging in "immoral conduct" relating to her participation in the adoption of Bail's child.⁴⁰ On August 13, 2009, the school board convened for a hearing to consider the charges against Homa.⁴¹ At the hearing, Homa, Davenport, and Henningsen testified.

A. Homa's Testimony

At the school board hearing, Homa testified that Davenport asked for permission to visit Bail so she could deliver a birth certificate application.⁴² Homa never suggested that Davenport mail the application and admitted that it "possibly" would have been sensible to mail the application instead of visiting Bail in person while using District funds.⁴³ Homa also admitted that she knew the jail was outside of the District's county.⁴⁴

Homa was aware of the DESE and ECDA guidelines with regard to PAT personal visits. She knew the goal was to have the child present⁴⁵ and also knew that in order for a visit to be considered "personal," the parent-

34. *Id.*

35. *Id.*

36. *Id.* Although uninvited, Homa went to the meeting and stayed until its conclusion. *Id.*

37. *Id.*

38. *Id.* Homa and Davenport admitted to having spoken to each other prior to writing their respective statements. *Id.*

39. *Id.*

40. *Id.* On June 16, 2009, Henningsen issued Homa a "Statement of Charges," pursuant to MO. REV. STAT. § 168.118 (2000). *Id.*

41. *Id.* at 272.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* Homa also admitted that she did not notify her supervisor or call DESE to get approval before Davenport went to the jail. *Id.*

educator had to bring developmental materials on the visit.⁴⁶ Moreover, Homa acknowledged that she made a “mistake” in sending Davenport without developmental information.⁴⁷ Homa claimed that she did not think Davenport’s trip to the jail was a “personal visit,”⁴⁸ and instead considered the visit to be “family support,” which required no recording.⁴⁹ Homa admitted that it was also a “mistake” not to have Davenport report the visit and that about \$181.00 of District funds were spent on Davenport’s trip.⁵⁰

When asked about the nature of the trip, Homa stated that she was not “shocked” that Davenport spoke with Bail about adoption.⁵¹ She thought it would be fine for parent-educators to talk to clients about adoption.⁵² In regards to Davenport’s daily record entry from her jail visit, Homa thought the comment about not collecting \$200 was “rather clever.”⁵³ However, Homa also acknowledged that someone in Bail’s position might be vulnerable.⁵⁴ Furthermore, she admitted she did not inform anyone about the nature of Davenport’s discussion with Bail during the March 12, 2009 meeting, the April 15, 2009 meeting, or in her own written statement.⁵⁵

B. Henningsen’s Testimony

At the school board hearing, superintendant Henningsen testified that when he first asked Davenport why she went to the jail to visit Bail, Davenport immediately stated, “[T]o get [Bail] to put [her son] up for adoption.”⁵⁶ Henningsen testified that when Davenport responded in this way, Homa did not correct or react to the statement.⁵⁷ Homa’s lack of response indicated to Henningsen that Homa knew Davenport’s true purpose for visiting the jail – to discuss adoption.⁵⁸ “Henningsen also testified Davenport said that ‘this was the worst case of neglect that she had ever seen.’”⁵⁹

Henningsen confirmed that Davenport changed her reason for going to the jail once she was asked to put it in writing a few days after their initial

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 272-73.

50. *Id.* at 273. Homa said it was her decision to reimburse Davenport for her mileage for the trip to the jail. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* Homa admitted that she was “a mandatory reporter of suspected child abuse and neglect under Missouri law.” *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

meeting.⁶⁰ Henningsen stated that it was not until after a couple of meetings that Davenport and Homa “remembered” and indicated the original purpose for going to the jail was to try to get Bail to sign birth certificate papers for her son.⁶¹

C. Davenport’s Testimony

While testifying in front of the school board, Davenport stated that her purpose for going to the jail was to take a birth certificate application to Bail and that she had asked Homa for permission to go for that reason.⁶² When asked whether she discussed adoption with Bail, Davenport said, “I mentioned adoption to her or the possibility of adoption to her.”⁶³

Davenport admitted that her written statement explaining her reason for going to the jail was not the same as what she told Henningsen in their meeting.⁶⁴ “Davenport testified [that once] Henningsen requested written statements, she and [Homa] ‘realized practically simultaneously . . . that we had – I had gone because of the – the papers for the application for the birth certificate.’”⁶⁵

D. Post School Board Hearing Procedural History

On September 10, 2009, Homa filed a petition in the Circuit Court of Jasper County to review the school board’s decision to fire her for “immoral conduct”.⁶⁶ After another hearing, the trial court affirmed the school board’s decision.⁶⁷ Homa then filed an appeal with the Court of Appeals for the Southern District.⁶⁸ On appeal, Homa alleged that the school board erred in terminating her employment for “immoral conduct” because the decision was not supported by competent and substantial evidence, and her conduct did not

60. *Id.*

61. *Id.* Henningsen believed the accuracy of the charges against Homa because Davenport did not get fully reimbursed for the visit, yet claimed this was a legitimate visit to a parent. *Id.* According to Henningsen, “‘family support’ means refer and recommend services, not what we [did] here.” *Id.*

62. *Id.* at 273-74. Davenport wanted to do this because the child could not receive immunizations and Women, Infants and Children (WIC) benefits. *Id.* at 274.

63. *Id.* Davenport said, “It was just presented lightly as a: ‘Well, you know, you don’t know how long you’re going to be in here in jail. You have – you don’t know what your future holds. Have you ever thought about the selfless act of adoption?’” *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 275.

67. *Id.*

68. *Id.*

constitute immoral conduct as a matter of law.⁶⁹ In opposition, the District argued that Homa's conduct was immoral as a matter of law, and that the school board's determination was supported by sufficient and competent evidence.⁷⁰ The Southern District agreed with the District, holding that a tenured teacher engages in immoral conduct when he or she authorizes a district employee to visit a program participant for an improper purpose, uses school funds to support the visit, and intentionally attempts to conceal the nature of the visit.⁷¹

III. LEGAL BACKGROUND

This section will begin with a discussion about Missouri's Teacher Tenure Act as it relates to the instant decision. Next, this section will discuss the various approaches courts across Missouri have taken when defining the phrase "immoral conduct" under Missouri's Teacher Tenure Act. Finally, this section will conclude with a short discussion of how other states have interpreted similar statutory language in teacher termination cases.

A. Missouri's Teacher Tenure Act

In 1970, the Missouri state legislature enacted Missouri Revised Statutes sections 168.102 to 168.130, also known as the "Teacher Tenure Act."⁷² The purpose of the Teacher Tenure Act is "to provide substantive and procedural safeguards with respect to tenured teachers."⁷³ According to the statutes, a teacher becomes tenured once he or she has been employed as a teacher for five successive years in the same school district and then remains employed in the same school district.⁷⁴ Once a teacher is tenured, he or she is considered a "permanent teacher," and is employed pursuant to an indefinite con-

69. *Id.* The court was also faced with several other issues, such as (1) "did substantial and competent evidence support the Board's decision, notwithstanding the transcript?" and (2) "did the admission of the transcript constitute reversible error?" *Id.* Those issues will not be discussed in this Note. The court eventually addressed these issues in its opinion and determined that the transcript was inadmissible hearsay. *Id.* at 282. However, the court held that this finding did not dictate reversal because there was "sufficient competent evidence to sustain the decision, notwithstanding the exclusion of the transcript as substantive evidence." *Id.*

70. *Id.* at 275.

71. *Id.* at 277-78.

72. Teacher Tenure Act, 1969 Mo. Laws 275 (codified at MO. REV. STAT. § 168.102 (2000)).

73. *Lindbergh Sch. Dist. v. Syrewicz*, 516 S.W.2d 507, 512 (Mo. App. E.D. 1974).

74. MO. REV. STAT. § 168.104(4). The five-year period is shortened by one year if the teacher has two or more years of teaching experience in another school system. *Id.* § 168.104(5).

tract that continues from year to year.⁷⁵ A teacher who is not tenured is given a one-year contract that may be “non-renewed” at the end of the school year upon timely notice to the teacher.⁷⁶ However, before a school district may terminate a tenured teacher, it must provide a number of procedural rights to the teacher, including a hearing before the school board.⁷⁷

Additionally, the Act limits the reasons for which a tenured teacher’s indefinite contract may be terminated to the following:

- (1) physical or mental condition unfitting him to instruct or associate with children; (2) immoral conduct; (3) incompetency, inefficiency, or insubordination in line of duty; (4) willful or persistent violation of, or failure to obey, the school laws of the state or the published regulations of the board of education of the school district employing him (5) excessive or unreasonable absence from performance of duties; or (6) conviction of a felony or a crime involving moral turpitude.⁷⁸

B. Interpretation of the Phrase “Immoral Conduct” in Missouri

In Missouri, the scope of the phrase “immoral conduct” has been the subject of frequent and impassioned controversy. In *Thompson v. Southwest School District*, a federal district court case decided in 1980, a plaintiff-teacher alleged that the language “immoral conduct” was impermissibly vague and denied her due process of law.⁷⁹ The court found that the Teacher Tenure Act confers upon permanent teachers a protected property interest, which cannot be deprived without adequate notice.⁸⁰ The court agreed with the plaintiff that, in the abstract, the phrase “immoral conduct” was constitutionally suspect under the strict standards of construction employed in criminal and First Amendment contexts.⁸¹ However, the court went on to say that the phrase is “capable of being given a more precise judicial construction so as to avoid the vagueness issue.”⁸² In the end, the court concluded that immoral conduct relates to “conduct rendering [a teacher] unfit to teach”⁸³ and laid out eight factors to aid in this determination:

- (1) the age and maturity of the students of the teacher involved; (2) the likelihood that the teacher’s conduct will have adversely af-

75. *Id.* §§ 168.108.1, 168.101(3)-(4).

76. *Id.* § 168.126.

77. *Id.* § 168.118.

78. *Id.* § 168.114.1.

79. *Thompson v. Sw. Sch. Dist.*, 483 F. Supp. 1170, 1178-80 (W.D. Mo. 1980).

80. *Id.* at 1179.

81. *Id.*

82. *Id.* at 1180.

83. *Id.* at 1181.

fects students or other teachers; (3) the degree of the anticipated adversity; (4) the proximity or remoteness in time of the conduct; (5) extenuating or aggravating circumstances surrounding the conduct; (6) the likelihood that the conduct may be repeated; (7) the motives underlying the conduct; (8) whether the conduct will have a chilling effect on the rights of the teachers involved or of other teachers.⁸⁴

Four years later, the Supreme Court of Missouri was presented with a state constitutional challenge in *Ross v. Robb*.⁸⁵ In *Ross*, the plaintiff-teacher stated that the phrase “immoral conduct” failed to provide “a standard against which conduct [could] be judged and thus [failed] to give a person of ordinary intelligence a reasonable opportunity to know what acts are prohibited.”⁸⁶ Although the Supreme Court of Missouri was not bound by the district court’s decision in *Thompson*, it nonetheless agreed with *Thompson*’s analysis and denied plaintiff’s constitutional challenge.⁸⁷ Thus, the “unfit to teach” standard and the eight-factor test were adopted in Missouri.

A year later, in *Kimble v. Worth County R-III Board of Education*, the Western District adhered to the decision in *Ross*, denying a teacher’s claim that the school board’s decision to terminate her rested on an unconstitutionally vague statute.⁸⁸ In *Kimble*, a teacher-librarian was terminated for immoral conduct after the school board found she had stolen a tea pot used in a school play, twenty dollars in gate receipts collected at a school basketball game, and a set of books belonging to the school district, which she originally stated were never delivered by the vendor.⁸⁹ Describing the teacher’s inappropriate conduct, the *Kimble* court stated:

The taking of property belonging to another without consent, notwithstanding its return when confronted with such wrongdoing, breaches even the most relaxed standards of acceptable human behavior, particularly so with regard to those who occupy positions which bring them in close, daily contact with young persons of an impressionable age.⁹⁰

Then in 1986, the Western District stated in another case that *Ross* did not require a specific separate finding of “unfitness to teach,” but required that there be some “nexus” between the immoral conduct shown in the evi-

84. *Id.* at 1182.

85. 662 S.W.2d 257, 257-58 (Mo. 1983) (en banc).

86. *Id.* at 259.

87. *Id.*

88. 669 S.W.2d 949, 953 (Mo. App. W.D. 1984).

89. *Id.* at 952.

90. *Id.* at 953.

dence and fitness to teach.⁹¹ Likewise, in *Cochran v. Board of Education of Mexico School District*,⁹² the Eastern District adopted the “nexus” requirement.⁹³ In *Cochran*, a vocational school instructor was terminated because he violated federal regulations by falsely indicating in four reports that equipment was still owned by the school district and was on school property, when in fact it had been sold.⁹⁴ Additionally, the instructor filed an application that contained false personal information, causing the district to overpay him.⁹⁵

Although the phrase “immoral conduct” withstood the constitutional challenges in *Ross* and *Thompson*, neither of those courts fully resolved the more vexing issue of how “immoral conduct” is defined.⁹⁶ In the 1994 decision *Youngman v. Doerhoff*,⁹⁷ the Eastern District provided an in-depth analysis of how the phrase “immoral conduct” should be interpreted. In *Youngman*, a fourteen-year-old male student alleged that his male teacher had hugged him, rubbed his back, and kissed him twice on the neck.⁹⁸ The student was offended and interpreted the contact as a sexual advance.⁹⁹ However, there were numerous special circumstances that indicated the incident was not sexual in nature, and the matter was not viewed as sexual misconduct at all.¹⁰⁰ The school board fired the teacher for “immoral conduct.”¹⁰¹

91. *Schmidt v. Bd. of Educ. Raytown Consol. Sch. Dist. No. 2*, 712 S.W.2d 45, 48 (Mo. App. W.D. 1986) (noting that plaintiffs did not contest the board’s finding of immoral conduct). The “nexus” requirement is the majority stance of most states under statutes containing similar language. See *infra* Part III.C. In *Lile v. Hancock Place School District*, the Eastern District held that the statute gives the school board authority to terminate a teacher for conduct outside the school context if it can establish a sufficient nexus between such conduct and the board’s legitimate interest in protecting the school community from harm. 701 S.W.2d 500, 506 (Mo. App. E.D. 1985). The court stated that the school board was not required to show actual harm to the interests of the school community to permit termination; it was sufficient to establish that substantial harm was “likely to occur” if the individual remained as a teacher. *Id.* (quoting *Thompson v. Sw. Sch. Dist.*, 483 F. Supp. 1170, 1181 (W.D. Mo. 1980)).

92. 815 S.W.2d 55 (Mo. App. E.D. 1991).

93. *Id.* at 64.

94. *Id.* at 57-58. This behavior cost the school district thousands of dollars. *Id.* at 58.

95. *Id.*

96. In 1992, the Missouri Court of Appeals for the Eastern District attempted to fashion a definition in *Gerig v. Board of Education of Central School District*, holding that a teacher’s conduct was immoral because it was “more than an exercise of bad judgment, it violated ‘even the most relaxed standards of acceptable human behavior.’” 841 S.W.2d 731, 735 (Mo. App. E.D. 1992) (quoting *Kimble v. Worth Cnty. R-III Bd. of Educ.*, 669 S.W.2d 949, 953 (Mo. App. W.D. 1984)).

97. 890 S.W.2d 330 (Mo. App. E.D. 1994).

98. *Id.* at 332-33.

99. *Id.* at 333.

100. *Id.* at 334. The student had behavioral problems and was seen “teary eyed” by the teacher who offered a hug and encouragement in a brief encounter, which

In deciding to reverse the board's decision, the court in *Youngman* stated that, at a minimum, the term "immoral conduct" . . . contemplates conduct which is sufficiently contrary to justice, honesty, modesty or good morals, or involving baseness, vileness or depravity so as to support the inference that the teacher *consciously comprehended the wrongful nature* of the conduct."¹⁰² The court said:

[I]mmoral conduct is conduct which goes beyond a matter of judgment such that the teacher may properly be presumed to have prior notice of its wrongful character and thus may be properly held responsible for his conscious disregard of established moral standards. Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least *an inference of conscious intent*. To hold otherwise would vitiate the legislature's intent to provide stability and certainty in matters of teacher discipline and seriously undermine if not destroy the concept of prior notice that due process requires in teacher termination cases.¹⁰³

Therefore, the court found that the school board's determination that the teacher engaged in "immoral conduct" was improper because it was solely based on the student's reactions to the teacher's conduct.¹⁰⁴ According to the court, "teacher termination is justified as a means of enforcing existing policy or established moral standards that, by their nature, do not require codification."¹⁰⁵

A year later, in *Howard v. Missouri State Board of Education*, the Southern District decided a case in which a teacher challenged the State Board of Education's decision to revoke her license because it determined she had engaged in "immoral conduct."¹⁰⁶ The trial court originally accepted the teacher's argument that she did not engage in "immorality" because "she was acting under the influence of either a mental illness or medications associated with that illness at the time the acts complained of occurred and lacked *intent* to commit any immoral act."¹⁰⁷ On appeal, the teacher maintained her posi-

apparently included the touching and kissing mentioned. *Id.* at 333. The teacher was known to be physically demonstrative, and there was evidence that the faculty had in fact been encouraged to extend comforting gestures. *Id.* at 335. However, there had never been any guidelines given as to what kind of conduct was acceptable. *Id.*

101. *Id.* at 331.

102. *Id.* at 341 (emphasis added).

103. *Id.* at 342 (emphasis added).

104. *Id.*

105. *Id.* at 343 (emphasis omitted).

106. 913 S.W.2d 887, 890 (Mo. App. S.D. 1995). In *Howard*, the teacher's allegedly immoral conduct included numerous acts of sexual misconduct. *Id.* at 889.

107. *Id.* at 890 (emphasis added).

tion that based upon *Youngman*, she could not be deprived of her teaching certificate on the ground of immorality because there was not specific evidence of conscious intent to commit the acts alleged.¹⁰⁸ Unconvinced, the court distinguished *Youngman* based upon the fact that it was a teacher termination case, not a license revocation case.¹⁰⁹ Moreover, the court stated that *Youngman* was a case in which the teacher's behavior was not "plainly" or "patently immoral," and therefore the court in *Youngman* had to look to other rules to measure the teacher's intent.¹¹⁰ In the end, the *Howard* court held that, for purposes of the license revocation statute, there was "no necessity to prove intent in order to revoke [the teacher's] teaching licenses, there being 'satisfactory proof of . . . immorality.'"¹¹¹

However, one judge dissented and believed that that the trial judge correctly ruled.¹¹² The dissenting judge approved of the logic and analysis of the court in *Youngman* and thought that it should apply in this case as well.¹¹³ In his words, "[n]either [a]ppellant has satisfactorily explained . . . how you can be immoral without any intent to do so."¹¹⁴

In 1996, the Eastern District once again applied the definition of "immoral conduct" promulgated in *Youngman*.¹¹⁵ In the case *In re Thomas*, a teacher drove to her estranged husband's house and shot a woman in the leg with a revolver.¹¹⁶ The court agreed with the school board that the "intentional shooting of another without legal justification or excuse was sufficiently contrary to justice and good morals to meet the definition of immoral conduct."¹¹⁷

C. Defining "Immoral Conduct" in Other States

Relatively few jurisdictions around the country have statutes that define immoral behavior.¹¹⁸ Alaska is one of the few jurisdictions that is somewhat more explicit in defining immoral conduct as a basis for teacher termination. Alaska's statute defines "immoral conduct" as the "commission of an act that,

108. *Id.* at 891.

109. *Id.* at 892. Under Missouri law, the state board of education can refuse to renew a teacher's certificate or discipline the holder of a certificate when there is evidence of "immorality" presented against the certificate holder. MO. REV. STAT. § 168.071(3) (2000).

110. *Howard*, 913 S.W.2d at 892.

111. *Id.* at 893.

112. *Id.* at 894 (Prewitt, J., dissenting).

113. *Id.*

114. *Id.*

115. *In re Thomas*, 926 S.W.2d 163 (Mo. App. E.D. 1996).

116. *Id.* at 164-65.

117. *Id.* at 165.

118. *See, e.g.*, WYO. STAT. ANN. § 21-7-110(a) (West, Westlaw through 2012 budget season).

under the laws of the state, constitutes a crime involving moral turpitude.”¹¹⁹ Likewise, Louisiana limits its definition of immorality to “conviction of a felony offense affecting the public morals” as enumerated under Louisiana law.¹²⁰ Commonly, however, the state statutory provisions that govern teacher character and morality are “broad and undefined.”¹²¹ Regardless, very few have been held unconstitutional.¹²²

Like Missouri’s law, most of these statutes stand up to constitutional challenges because of the judicially imposed “nexus” requirement.¹²³ Because teacher tenure laws provide teachers with a property interest in their employment, “[t]eachers possess an important right under the Constitution – the right to procedural due process under the law.”¹²⁴ This right requires that the state action have a rational basis for depriving a person of life, liberty, or property.¹²⁵ Thus, the basis for “the deprivation may not be so [insufficient] that a [fact-finder] will characterize it as ‘arbitrary or capricious.’”¹²⁶ The nexus requirement “ensures that the teacher will only be dismissed for something truly related to [his or her job].”¹²⁷

Like the decision in *Youngman*, there are court decisions from other states that focus on the intent of the teacher.¹²⁸ In *Wright v. Superintendent School Committee*, the Maine Supreme Court overturned a school board’s decision to terminate a teacher’s contract when the teacher brought a revolver and ammunition to school.¹²⁹ The *Wright* court noted, “[i]t was not until [the teacher] hung [his] jacket in a small alcove in the classroom in which he taught that he realized the presence of the gun and shells.”¹³⁰ The court found “that a single, isolated instance of ‘grave lack of judgment’ . . . does not involve . . . moral impropriety[.]”¹³¹

In a California state court case, *San Francisco Unified School District v. Weiland*, the school board terminated a teacher who falsified class attendance records by fraudulently signing students’ names to the roster so she could

119. ALASKA STAT. § 14.20.170(a)(2) (West, Westlaw through 2012 2nd Reg. Sess.).

120. LA. REV. STAT. ANN. § 17:443(c) (West, Westlaw through 2011 First Extraordinary and Reg. Sess.).

121. Fleming, Cooley & McFadden-Wade, *supra* note 4, at 73.

122. Fulmer, *supra* note 3, at 273.

123. *Id.* at 283.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 284.

128. Amber Fischer, “Immoral Conduct”: A Fair Standard for Teachers?, 28 J.L. & EDUC. 477, 480 (1999).

129. 331 A.2d 640, 643 (Me. 1975).

130. *Id.* at 642-43.

131. *Id.* at 647.

keep her job.¹³² The court concluded that the teacher's termination was valid because "[h]er acts were deliberately designed to defraud the state and the district."¹³³ Moreover, the court said immorality "includes . . . willful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community."¹³⁴

IV. INSTANT DECISION

The Court of Appeals for the Southern District of Missouri found that Homa's conduct constituted immoral conduct under Missouri Revised Statutes section 168.114.¹³⁵ In reaching this conclusion, the court began its opinion by clarifying the meaning of the phrase "immoral conduct."¹³⁶ Citing *Ross*, the court stated "'immoral conduct' means conduct which renders a teacher unfit for the performance of her duties."¹³⁷ But "[t]hat the conduct renders the teacher unfit to teach is a limitation, not a definition."¹³⁸ The court noted that "[i]mmoral conduct" could be described as "sufficiently contrary to justice, honesty, modesty, or good morals, or involving baseness, vileness or depravity so as to support the inference that the teacher consciously comprehended the wrongful nature of the conduct."¹³⁹ Then, again quoting the Eastern District's opinion from *Youngman*, the court stated that "one can never be accidentally or unwittingly dishonest" because "immoral conduct requires at least an inference of conscious intent."¹⁴⁰ Finally, the court stated that "if conduct is found to be immoral, it must then be determined if such conduct renders the teacher unfit to teach."¹⁴¹

132. 179 Cal. App. 2d 808, 809-10 (Cal. Ct. App. 1960).

133. *Id.* at 812.

134. *Id.* at 811 (quoting *Orloff v. L.A. Turf Club*, 227 P.2d 449 (Cal. 1951)).

135. *Homa v. Carthage R-IX Sch. Dist.*, 345 S.W.3d 266, 276 (Mo. App. S.D. 2011), *transfer denied*.

136. *Id.* The court stated that the "six grounds upon which an indefinite contract with a permanent teacher may be terminated" are "designed to serve and protect" the community and "enable school districts to terminate teachers' contracts for conduct that endangers the welfare of students." *Id.* (citing *Hamm v. Poplar Bluff R-1 Sch. Dist.*, 955 S.W.2d 27, 29 (Mo. App. S.D. 1997)). "The paramount interest is the welfare of the students, and the authority of the Board should not be confined to such an extent that there may be no remedy for a situation having serious negative potential." *Id.* (citing *Hamm*, 955 S.W.2d at 29).

137. *Id.* (citing *Ross v. Robb*, 662 S.W.2d 257, 259 (Mo. 1983) (en banc)).

138. *Id.* (quoting *In re Thomas*, 926 S.W.2d 163, 165 (Mo. App. E.D. 1996)).

139. *Id.* (quoting *Youngman v. Doerhoff*, 890 S.W.2d 330, 341 (Mo. App. E.D. 1994)).

140. *Id.* (quoting *Youngman*, 890 S.W.2d at 342).

141. *Id.* at 277 (citing *In re Thomas*, 926 S.W.2d at 165).

Next, the court discussed two analogous cases, *Kimble v. Worth County R-III Board of Education*¹⁴² and *Cochran v. Board of Education of Mexico School District No. 59*,¹⁴³ stating that they were instructive in applying the unique facts of the instant case to the law because they addressed “similarly characterized conduct.”¹⁴⁴ With these cases in mind, the court determined that Homa’s conduct could be “similarly characterized as immoral” because “it [went] beyond poor judgment and [fell] outside the scope of acceptable behavior.”¹⁴⁵ In particular, the court recognized that the immoral conduct of Homa included her “authorization of Davenport to visit the jail for an improper purpose, the mishandling of school funds under the PAT program, and the silence involved in covering up the true purpose of Davenport’s trip to the jail.”¹⁴⁶

Next, the court addressed Homa’s argument that she lacked the requisite intent for her actions to constitute immoral conduct.¹⁴⁷ The court determined that Homa knew visiting an incarcerated immigrant facing deportation in order to solicit the adoption of her child was unacceptable under the PAT program because Homa concealed Davenport’s purpose for visiting the jail, approved only half of Davenport’s mileage, failed to send developmental material, failed to ask DESE for approval, failed to require a report of Davenport’s visit, and failed to inform the District of the subpoena served upon Davenport.¹⁴⁸

According to the court, Homa’s act of “ensuring there was no documentation of [Davenport’s] visit [was] continued deceit.”¹⁴⁹ Despite Homa’s characterization of these incidents as “mistakes,” the court found that Homa knew what she was doing was wrong and that using District funds for such purpose was also wrong.¹⁵⁰ The court reiterated that “strict recordkeeping and reimbursement requirements help . . . ensure [that] PAT educators are complying” with the program guidelines and goals, and that Homa knew these requirements.¹⁵¹ The court noted that Davenport’s “meeting with Bail to pressure her into adoption did not fall under any of PAT’s ‘Description of Services.’”¹⁵² Thus, Homa’s “actions reflect[ed] deceit and dishonesty.”¹⁵³

The court observed that Homa not only covered up the incident by maintaining silence, but that she also mishandled District funds when she author-

142. See 669 S.W.2d 949 (Mo. App. W.D. 1984).

143. See 815 S.W.2d 55 (Mo. App. E.D. 1991).

144. *Homa*, 345 S.W.3d at 277.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

ized an activity that did not comply with DESE/ESDA requirements.¹⁵⁴ Furthermore, the court recognized that Homa admitted she was aware of the requirements for DESE reimbursement, yet she did not comply to ensure the District was reimbursed.¹⁵⁵ In the end, the court was not concerned with the amount of money improperly spent on the visit and only took issue with Homa's use of taxpayer dollars for an improper purpose.¹⁵⁶

The court declined to restrict the school board's authority to act in a situation such as this, which "[was] completely contrary to the spirit and purpose of PAT."¹⁵⁷ The court recognized that "PAT is a state-funded program designed to help increase parent confidence and improve parenting skills."¹⁵⁸ The court emphasized that "the [school board's] decision to terminate [Homa's] employment for her immoral conduct must be considered in context of all the extenuating circumstances," i.e., a "vulnerable parent, misuse of funds, cover-up, failure to take responsibility, and the potential for disastrous consequences."¹⁵⁹ Once again the court mentioned that Homa knew Bail was possibly in a vulnerable state, noting that Bail was "incarcerated, did not speak English, was undocumented, and facing deportation."¹⁶⁰ The court mentioned in a footnote that a supervisor's awareness of a single incident in which a PAT educator discusses adoption with a PAT client will not always constitute immoral conduct.¹⁶¹ However, the presence of said extenuating circumstances, which in and of themselves demonstrated immoral conduct, made Homa's actions and inactions rise to the level required of immoral conduct.¹⁶²

The court then addressed Homa's contention that there was no evidence that her conduct rendered her unfit to teach, even if it was immoral.¹⁶³ Although a separate finding of "unfitness to teach" was not required, the court stated that there must be a nexus between the immoral conduct shown in the evidence and fitness to teach.¹⁶⁴ The court then considered the eight factors from *Thompson* that aid in this determination¹⁶⁵ and found the facts supported the school board's determination that Homa was unfit to teach.¹⁶⁶ The court agreed with the school board that Homa would likely repeat this conduct in

154. *Id.* at 278.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 278 n.10.

162. *Id.* at 278.

163. *Id.*

164. *Id.* (quoting *Cochran v. Bd. of Educ.*, 815 S.W.2d 55, 64 (Mo. App. E.D. 1991)).

165. *Id.*; see also *supra* note 84 and accompanying text.

166. *Homa*, 345 S.W.3d at 278.

the future.¹⁶⁷ The school board believed this because of “Homa’s casual [and unprofessional] attitude, which was supported by [her] testimony that it was okay for PAT educators to talk to clients about adoption, that [it] was not a mistake for Davenport to go to the jail, and the fact that [Homa] concealed her actions and Davenport’s actions by failing to keep a proper record.”¹⁶⁸ Furthermore, Homa’s careless attitude indicated to the court that she might not act differently in the future when presented with other vulnerable PAT clients who are in need of protection from “individuals interested in promoting their own agenda while acting under the authority of PAT educators.”¹⁶⁹ The court reasoned that Homa’s role as the director of PAT would continue to put her in situations in which she would deal with vulnerable parents and children, and that the potential for negative consequences was high.¹⁷⁰ Thus, the school board properly applied the instant “facts to the law in finding [Homa’s] conduct also rendered her unfit to teach.”¹⁷¹

V. COMMENT

In our society, reasonable employees would not be shocked if their boss fired them for failing to perform their duties at work.¹⁷² A computer programmer who missed a deadline or a bank teller who gave a customer an extra \$100 would expect to be in jeopardy of losing his or her job. Most employees know that fulfilling their specific job requirements is imperative to their future employment. In contrast, Missouri’s educators have relatively little guidance on what type of behavior their local school boards will consider “immoral.” On its face, Missouri Revised Statutes section 168.114 does not serve to inform teachers of conduct that may lead to their termination¹⁷³ because the meaning of “immoral” depends on the characteristics and beliefs of the individual school board members.¹⁷⁴ As such, there is an inherent danger of arbitrary and discriminatory enforcement.¹⁷⁵ Considering this risk, it is not altogether surprising that Missouri’s appellate courts have generally failed to settle upon a definition of “immoral conduct.” That said, the Missouri Court of Appeals, Southern District decision in *Homa* reduced this danger.

167. *Id.* at 279.

168. *Id.* at 278-79.

169. *Id.* at 279.

170. *Id.*

171. *Id.*

172. Fulmer, *supra* note 3, at 277.

173. *See* Fischer, *supra* note 128, at 479.

174. Fleming, Cooley & McFadden-Wade, *supra* note 4, at 93 (quoting Burton v. Cascade Sch. Dist. Union High Sch. No. 5, 353 F. Supp. 254, 254-55 (D. Or. 1973) (interpreting Oregon’s “immorality” clause)). A potential for arbitrary school board decisions has always been a risk with state statutes governing the morals of teachers. *Id.*

175. *Id.*

By adopting the Eastern District's definition of "immoral conduct" from *Youngman*, the Southern District added more stability to the phrase and made it easier for teachers, school boards, and courts to interpret what type of behavior is "immoral" under the statute.

Prior to *Homa*, most cases of "immoral conduct" involved instances of sexual misconduct¹⁷⁶ or theft.¹⁷⁷ However, in *Homa*, the appellate court applied the phrase "immoral conduct" to a very distinct set of circumstances.¹⁷⁸ Reasonable people could disagree about whether Homa's acts were so egregious that they would be considered "immoral." Considering that Davenport said the relationship between Bail and her child was one of the worst cases of neglect she had ever seen, it is fair to assume that she and Homa had the child's best interests in mind when the adoption discussion took place.¹⁷⁹ Additionally, some may question whether using taxpayer funds to facilitate such a discussion is so completely inappropriate that it rises to the level of "immoral." Homa did not embezzle the money and use it for her own personal benefit – she was trying to help a child. In fact, the court even stated in a footnote that a PAT educator discussing adoption with a PAT client may not always rise to the level of immoral conduct.¹⁸⁰ Thus, the crux of the "immoral conduct" was not simply the PAT educator's act of discussing adoption with a parent, but rather discussing adoption given the extenuating circumstances: the vulnerability of Bail, the misuse of funds, Homa's dishonesty in concealing the visit, and her failure to accept responsibility.¹⁸¹ But on what basis does the court draw this distinction? What is the standard, and was it correctly applied?

Using the *Kimble* and *Cochran* cases as its sources of comparison, the Southern District stated that Homa's actions were similarly "immoral" because they went "beyond poor judgment and [fell] outside the scope of acceptable behavior."¹⁸² However, the teachers in those two cases arguably displayed more morally culpable behavior than Homa.¹⁸³ Regardless, in *Howard*, the Southern District previously held that a teacher's behavior was "patently immoral" because it reflected poor judgment and was outside the scope of acceptable behavior.¹⁸⁴ Thus, under *Howard*, it would appear as

176. See, e.g., *Youngman v. Doerhoff*, 890 S.W.2d 330 (Mo. App. E.D. 1994); *Lang v. Lee*, 639 S.W.2d 111 (Mo. App. W.D. 1982).

177. See, e.g., *Kimble v. Worth Cnty. R-III Bd. of Educ.*, 669 S.W.2d 949 (Mo. App. W.D. 1984).

178. *Homa v. Carthage R-IX Sch. Dist.*, 345 S.W.3d 266, 279 (Mo. App. S.D. 2011), *transfer denied*.

179. *Id.* at 273.

180. *Id.* at 278 n.10.

181. *Id.* at 278.

182. *Id.* at 277.

183. See *supra* notes 88-95 and accompanying text.

184. *Howard v. Mo. State Bd. of Educ.*, 913 S.W.2d 887, 893 (Mo. App. S.D. 1995).

though the court needed no other justification for upholding the District's decision besides a nexus between Homa's immoral conduct and her fitness to teach. Nevertheless, the court went on to address Homa's claim that she did not have the requisite intent to constitute immoral conduct.¹⁸⁵

Although the phrase "immoral conduct" withstood state and federal constitutional challenges in *Ross* and *Thompson*, no Missouri case prior to *Youngman* explicitly required teachers to have intentionally engaged in immoral conduct or to have possessed knowledge that their actions were wrong. In *Youngman*, the Eastern District stated that "immoral conduct requires at least an inference of *conscious intent*."¹⁸⁶ The court stated that the element of intent is necessary to "provide stability and certainty in matters of teacher discipline" and to not require it would "undermine if not destroy the concept of prior notice that due process requires."¹⁸⁷ Therefore, when interpreting "immoral conduct" in this manner, the "consciousness of wrongdoing serves as notice."¹⁸⁸

In *Homa*, the Southern District found that Homa's actions¹⁸⁹ revealed she "willfully" engaged in conduct she "*knew* to be unacceptable," and, therefore, she "satisfie[d] the intentional element of immoral conduct."¹⁹⁰ Thus, the court adopted the rule from *Youngman*¹⁹¹ and included a *mens rea*¹⁹² amongst the elements required to fire a tenured teacher for "immoral conduct." In doing so, the court abandoned its reasoning in *Howard* and concluded that, although Homa's behavior was "outside the scope of acceptable behavior," the facts must corroborate a specific culpable mental state.¹⁹³ Therefore, in both the Southern and Eastern Districts of Missouri, in order for

185. *Homa*, 345 S.W.3d at 277.

186. *Youngman v. Doerhoff*, 890 S.W.2d 330, 342 (Mo. App. E.D. 1994) (emphasis added).

187. *Id.*

188. *Id.* at 341.

189. Homa's actions in "concealing Davenport's purpose for the visiting the jail – only approving half the mileage, not sending developmental material, not asking DESE for approval, not requiring a report of Davenport's visit, and not informing District administration of the subpoena served upon Davenport – demonstrate[d] she knew the visit was unacceptable." *Homa*, 345 S.W.3d at 277.

190. *Id.* (emphasis added).

191. *See Youngman*, 890 S.W.2d at 342.

192. A culpable mental state. For example, under Missouri criminal law a person acts knowingly, or with knowledge,

- (1) With respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist; or
- (2) With respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result.

MO. REV. STAT. § 562.016 (2000).

193. *See Homa*, 345 S.W.3d at 277. Of course, *Howard* is distinguishable from the instant decision because it involved a license revocation under a different statute. *Howard v. Mo. State Bd. of Educ.*, 913 S.W.2d 887, 888 (Mo. App. S.D. 1995).

a school board to terminate a tenured teacher for “immoral conduct,” the board must find that the teacher “intentionally” engaged in conduct he or she “knew” was inappropriate. In other words, the teacher must “knowingly”¹⁹⁴ engage in the inappropriate conduct. But does this mean a teacher may be terminated for knowingly engaging in any conduct that is inappropriate?

Once again, the major problem with statutes that allow for termination based upon immorality is that they do not apprise teachers of the conduct that may lead to their termination. One commentator has argued that these statutes are “simply outdated” and “pose significant difficulties when applied to today’s more complex world.”¹⁹⁵ However, after applying the “knowledge” standard to the facts of *Homa*, it is not surprising that the court reached the result it did.

Homa’s decision to allow Davenport to visit Bail while in jail to discuss the adoption of Bail’s son was, if not immoral, definitely a poor choice. Regardless, it was her deceitfulness that appears to have elevated her behavior to “immoral.” According to the court, not only did her actions and testimony confirm that she believed the adoption conversation was wrong to begin with, they revealed untrustworthiness and a failure to take responsibility.¹⁹⁶ Unlike the teacher in *Youngman*, who had no prior notice that his conduct was inappropriate,¹⁹⁷ Homa’s actions reflected genuine “dishonesty.”¹⁹⁸ Does this mean a teacher may be terminated merely for being dishonest? No, probably not, but Homa did not simply lie about some innocuous act. She engaged in conduct that the school board thought was inappropriate (visiting the jail to solicit the adoption of a vulnerable client’s child); she acknowledged through her own actions that she also believed the conduct was wrong (by not asking permission from DESE before the visit or requiring a report of Davenport’s visit after she returned); and, perhaps most importantly, she tried to actively conceal the true nature of her conduct (by changing her story). Having fully established that she thought her actions were unacceptable under the PAT program, as well as trying to hide them from her superiors, it would be irrational for Homa to then say that she was not given notice of what type of behavior would subject her to termination.¹⁹⁹

Missouri is not the only state in which knowledge of one’s wrongful conduct is relevant. For instance, the Maine case, *Wright v. Superintendent School Committee*, and the California case, *San Francisco Unified School District v. Weiland*, both support the proposition that courts are more likely to

194. See *supra* note 192 and accompanying text.

195. Fulmer, *supra* note 3, at 289.

196. *Homa*, 345 S.W.3d at 278.

197. *Youngman v. Doerhoff*, 890 S.W.3d 330, 342 (Mo. App. E.D. 1994).

198. *Homa*, 345 S.W.3d at 277.

199. Hypothetically speaking, the court probably would not have found Homa’s conduct to be “immoral” if she had not actively sought to hide it from her superiors.

uphold the termination where the teacher's conduct was intentional.²⁰⁰ Like the teacher in *Wright*, who did not intend on bringing a gun to school, the teacher in *Youngman* did not intend on making a sexual advance on the student.²⁰¹ Thus, both terminations were overturned on appeal. On the other hand, the respective terminations of the teachers in *Weiland* and *Homa* were both upheld after the respective school boards determined the teachers had willfully engaged in inappropriate actions.²⁰²

One commentator has suggested that state legislatures should modify their statutes to include a culpable mental state, so teachers will be more likely to know what behavior is expected of them.²⁰³ This suggestion has some merit because it is possible that by incorporating a more definite standard, teachers will be less likely to engage in behavior that will result in termination.²⁰⁴ However, in most cases of "immoral conduct," it is not difficult for the school board or the court to find intent. For instance, a court could easily determine intent in a case factually similar to *In re Thomas*, where the teacher was terminated after she fired a gun at another person without legal justification or excuse.²⁰⁵

The Southern District correctly decided to include intent as an element in determining whether a teacher acted immorally. Furthermore, the court accurately applied this standard in *Homa*. Practically speaking, it is only in the borderline decisions (those in which reasonable people could disagree, and those that should be taken to trial) where such a standard is truly necessary. In general, teachers, like most employees, know what type of behavior is considered inappropriate and will avoid that type of behavior. If teachers really do not "know" that what they did was wrong, then the courts in the Southern and Eastern Districts will probably not find that they engaged in "immoral conduct."

In the future, changing the statute to include a culpable mental state like "knowledge" would likely have little practical effect. If the "common denominator" in these cases is evidence of the teacher's conscious intent, then teachers already inherently know the standard.²⁰⁶ The only problem that remains is that neither the Western District, nor the Supreme Court of Missouri, has adopted this standard. Were they to do so, school districts and lower courts throughout the state would be less likely to make arbitrary decisions based solely on community standards.

200. See Fischer, *supra* note 128, at 480-81; *supra* notes 129-34 and accompanying text.

201. See *supra* notes 97-105 and accompanying text.

202. See *supra* notes 132-34 and accompanying text.

203. Fisher, *supra* note 128, at 480-81.

204. See *id.* at 482.

205. See *supra* notes 116-17 and accompanying text.

206. See *Youngman v. Doerhoff*, 890 S.W.2d 330, 342 (Mo. App. E.D. 1994).

VI. CONCLUSION

In Missouri, the three appellate courts have thus far failed to reach a consensus as to how to define “immoral conduct.” Moreover, the Supreme Court of Missouri has not clarified what the phrase means. Consequently, school boards charged with enforcement of the Missouri Tenure Teacher Act are the sole “arbiters of morality for the entire community.”²⁰⁷

In *Homa v. Carthage School District*, the Missouri Court of Appeals for the Southern District adopted a rule from the Eastern District, which requires school districts to find that teachers terminated for engaging in “immoral conduct” have at least “an inference of conscious intent.”²⁰⁸ By adopting this rule, the Southern District has provided teachers, administrators, school boards, and its circuit courts with additional guidance as to what type of behavior is considered “immoral.”²⁰⁹ Although “immoral conduct” is readily identifiable in many cases of teacher misconduct, situations may arise in which it is difficult for courts to determine whether or not the teacher’s behavior was properly deemed immoral by his or her local school board. Now, teachers like Homa cannot say that they had no notice of the type of behavior that would subject them to termination. The rule provides some stability to the decisions in those districts that apply it, benefiting both those who enforce the law and those who must abide by the law. In the future, the Supreme Court of Missouri and the Western District should also consider adopting this standard. If they do, teachers, school boards, attorneys, and courts across the state would benefit from the lower risk of arbitrary termination decisions.

207. Fulmer, *supra* note 3, at 275.

208. *Homa v. Carthage R-IX Sch. Dist.*, 345 S.W.3d 266, 276 (Mo. App. S.D. 2011), *transfer denied*.

209. See Fischer, *supra* note 128, at 479.

