

Clearinghouse

Edited by Ingrid M. Johansen

The Clearinghouse digests recent state and federal opinions that affect North Carolina. The facts and legal conclusions contained in the digests are summaries of the facts and legal conclusions set forth in judicial opinions. Each digest includes a citation to the relevant judicial opinion, so interested readers may read the opinion's actual text. Neither the Clearinghouse editor nor the School of Government takes a position as to the truth of the facts as presented in the opinions or the merits of the legal conclusions reached by any court.

Cases That Affect North Carolina

State Personnel Commission had jurisdiction to hear terminated employee's discrimination claim. *Bobbitt v. North Carolina State University*, __ N.C. App. __, 635 S.E.2d 463 (2006).

Facts: Thomas Bobbitt worked at North Carolina State University (NCSU) for fifteen years; at the time of his termination he was a floor maintenance assistant at the university's sports arena. An employee of an outside cleaning service reported to Bobbitt's supervisor that he had seen Bobbitt urinating on the floor in the men's room. Though Bobbitt repeatedly denied this allegation, NCSU terminated his employment for improper personal conduct. NCSU's termination letter informed Bobbitt that he had fifteen working days to appeal his dismissal to the Division of Human Resources. It went on to state that if his appeal contained a claim of discrimination, he could choose to bypass NCSU's grievance procedure and go directly to the State Personnel Commission.

Bobbitt appealed his termination to the Office of Administrative Hearings (OAH), arguing that it was without just cause and based on race and age discrimination. At the contested case hearing NCSU's attorney agreed with the assertion by Bobbitt's attorney that the two issues in the case were termination without just cause and racial harassment in the workplace. When Bobbitt's attorney went forward on the just cause claim alone, NCSU's attorney did not move to dismiss the discrimination claim. The administrative law judge (ALJ) who heard the case determined that it was more likely than not that Bobbitt did not commit the misconduct at issue and recommended that NCSU reverse Bobbitt's dismissal and reinstate him.

NCSU appealed the ruling to the State Personnel Commission, which dismissed it, based on lack of jurisdiction; it held that because Bobbitt did not exhaust NCSU's

administrative process, the commission could not hear his claim. Bobbitt sought review in the North Carolina Court of Appeals.

Holding: The North Carolina Court of Appeals reinstated Bobbitt's claim.

Section 126-36 of the North Carolina General Statutes allows a career state employee to appeal directly to the commission if he or she has reason to believe the dismissal was based on discrimination. Although Bobbitt's attorney proceeded, and prevailed, on the just cause issue alone, Bobbitt's petition for a contested case hearing clearly alleged discrimination. Viewing the assertions in Bobbitt's complaint in the light most favorable to him, his discrimination claim was sufficient to relieve him of the duty to exhaust NCSU's grievance procedure.

Probationary female security officer failed to show that her discharge was due to gender discrimination. *Hooper v. North Carolina*, 2006 WL 2850596 (M.D.N.C.).

Facts: Deona Hooper became a security officer at North Carolina Central University (NCCU) on a one-year probationary basis in March 2001. In October 2001 her supervisor mistakenly informed her that she had become a permanent employee, even though she had been on the job for only seven months. During December 2001 and January 2002, several incidents occurred that led Hooper to charge NCCU and numerous others with gender discrimination; these same incidents led NCCU to terminate Hooper's employment.

In December the "tie incident" occurred. While working in the Communications Office as a dispatcher, Hooper failed to wear the tie that was a required part of her uniform. When the shift supervisor instructed her to put it on, she did not do so and refused to speak to her captain about the incident afterward. For this incident, Hooper received a written warning for unacceptable personal conduct. In response she filed a grievance with NCCU's Human Resources Office,

Ingrid M. Johansen is a research fellow of the School of Government.

alleging sexually discriminatory discipline procedures. Her grievance was dismissed, however, because probationary employees are not eligible to file grievances. Hooper was told that her belief that she was a permanent employee was based on her supervisor's mistake, but she believed she had been demoted back to probationary status because of her discrimination complaint.

In January the "cafeteria incident" occurred. Despite being aware of a department rule prohibiting officers from eating together while on duty, Hooper made arrangements to have lunch with a fellow officer at the NCCU cafeteria. While there, a cafeteria employee asked Hooper for help with a student who refused to pay for his lunch. The student scared Hooper, and she radioed for backup. Her supervisor, Lieutenant Watlington, arrived and spoke with the student, whom he apparently knew. Hooper approached, and the student again became belligerent toward her. Watlington did not intervene until Hooper attempted to speak, at which point he yelled at her to be quiet. After this incident, Hooper told Watlington that she did not feel safe working with him and asked to speak to one of the captains. Watlington denied her request and also informed dispatchers not to put Hooper through to any captain.

The cafeteria incident led to the "criminal citations" incident. Before filing her report on the cafeteria incident, Hooper obtained a background check on the student involved and learned that he had several prior arrests, including one for assault against police officers. Thereupon she prepared two criminal citations for the student. She gave the originals to a Durham police officer to deliver to the magistrate's office and the copies to a fellow officer for service on the student. Hooper engaged in this activity even though she had been informed during the fall of 2001 that NCCU did not serve NCCU students with criminal citations. At the end of her shift, Hooper gave Watlington her report, along with copies of the citations. Instead of leaving the campus, Hooper stayed on, riding along with another officer.

Hooper learned from the officer's car radio that Watlington had ordered that the citations not be served on the student. He also ordered Hooper, twice, to bring the original citations back to headquarters. When she refused, her captain came on the line and repeated the order. She again refused but did follow his order to return to headquarters. When Hooper again refused to return the original citations—and did not reveal that they had already been turned over for delivery to the magistrate—Watlington took her badge and gun and placed her on administrative leave. After an internal investigation, NCCU terminated Hooper.

Hooper appealed her termination through NCCU's grievance procedure without success. She then filed a claim in the federal court for the Middle District of North Carolina,

alleging sex discrimination under Title VII and Title IX as well as several other claims. NCCU moved to have Hooper's claims dismissed before trial.

Holding: The court granted NCCU's motion and dismissed Hooper's claims.

Hooper's first discrimination claim was that NCCU had created (or allowed) a sexually hostile work environment. The court determined that this claim failed because she offered only allegations of isolated events or general conclusory allegations; by law neither constituted evidence sufficient to support such a claim.

Hooper also claimed that she suffered two discriminatory adverse employment actions. First, she alleged that she was demoted from permanent to probationary status because she attempted to file a discrimination grievance. Although expressing some skepticism as to whether Hooper had ever actually been a permanent employee, the court found that even if she had been, the move back to probationary status was not an adverse employment action because the only changed condition of employment Hooper complained of was her inability to file a grievance. However, as only "career" employees—those employed by the State of North Carolina for at least twenty-four consecutive months—are eligible to file grievances, Hooper would not have been entitled to file a grievance in any case.

The termination was clearly an adverse employment action, but Hooper failed to establish another required element of her claim: that she was performing her job in a satisfactory manner at the time of her termination. Despite her contentions to the contrary, the court found undisputed evidence of unsatisfactory performance, including (1) the tie incident; (2) the cafeteria incident, insofar as she was eating there at a time she should not have been; and (3) the criminal citations incident in several respects: (a) that she issued the citations at all, when the object of them was an NCCU student; (b) that she refused to bring the original citations back, despite several direct orders to do so; and (c) that she never informed her supervising officers that she could not return the originals because she had already sent them to the magistrate's office.

Hooper did not contest the evidence of the above events, but instead countered that male officers had engaged in similar or worse behavior and received lighter punishment. Only one of these instances involved an officer (Watlington) who refused to follow a direct order, and the order he ignored was not as grave as those Hooper ignored. Hooper then cited serious misconduct by Watlington that had occurred over a three-year period and did not result in termination. The court noted that in each instance Watlington had been cited and disciplined for unacceptable conduct. In addition, these acts occurred over three years—not in a few short months. Further, as a career employee, Watlington

was entitled to protections and procedures that Hooper—as a probationary (or even a permanent) employee—was not.

Parent has no claim for school official's failure to place child in program for talented students. *Thomas v. Charlotte-Mecklenburg Board of Education*, 2006 WL 3257051 (W.D.N.C.).

Facts: Alfred Thomas was a student at the Elizabeth Traditional Elementary School in the Charlotte-Mecklenburg school system. His father brought suit against the school board, among others, alleging that Alfred was entitled to some kind of relief because school officials had never regarded him as a student with many talents and abilities, but rather as a student with a disability. The board moved to dismiss the claim.

Holding: The federal court for the Western District of North Carolina granted the board's motion; Thomas failed to state a claim entitling him to relief.

Court dismisses plaintiff's claims after she failed to respond to the defendant's motion to dismiss. *Lowe v. Bennett College*, No. 1:05CV00626 (M.D.N.C. 9/26/06).

Facts: Veronica Lowe filed an action against Bennett College seeking unpaid overtime wages. At the time of the filing, Lowe had a lawyer, but she later chose to represent herself (that is, to proceed pro se). She missed several deadlines in the proceeding and, without explanation, failed to show up for court-ordered mediation of the dispute. The college filed a motion to dismiss Lowe's claims before trial, and Lowe failed to respond to the motion.

Holding: The federal court for the Middle District of North Carolina dismissed Lowe's claims with prejudice, meaning that she could not refile them at a later date. ■