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

The public duty doctrine protects two law enforcement officers from claims of negligent infliction of emotional distress. Collum v. Charlotte-Mecklenburg Board of Education, 2008 WL 2486114 (W.D.N.C.).

Facts: An unidentified middle school student in the Charlotte-Mecklenburg School System reported being abused by a teacher. Represented by guardian ad litem Travis Collum, the student filed suit against numerous defendants, including the law enforcement officer who investigated the claim (Gus Welborn) and his supervisor (Ted Pearson). Collum alleged that Welborn and Pearson, in their official capacities, negligently caused the student emotional distress, apparently by failing to report the abuse allegations to the Department of Social Services and allowing further harm to come to the student. (The facts of the case are very sketchily set out in the opinion.)

After the magistrate judge in charge of the case recommended against dismissing these claims, Welborn and Pearson objected.

Holding: The federal court for the Western District of North Carolina dismissed the negligent infliction of emotional distress claims against Welborn and Pearson in their official capacities.

The public duty doctrine bars official capacity claims against law enforcement officers for the negligent performance of governmental duties that require the exercise of discretion—as, for example, in determining the actions necessary to protect the public from crime. Neither Welborn nor Pearson was legally required to report the abuse to the Department of Social Services: G.S. 7B-301 requires certain public officials to report child abuse perpetrated by a parent, guardian, caretaker, or custodian. A teacher, the accused in this case, does not fit into any of these categories, concluded the court.

Having found that the two officers had neglected no statutory duty, the court next examined whether this case fit into one of two exceptions to the public duty doctrine—the special relationship or the special duty. As Collum did not allege that Welborn or Pearson had a special duty to the abused student, his claim rests on the existence of a special relationship. Students have been found to have special relationships, for example, with school crossing guards or school resource officers. These officials see the students on a daily basis, often having direct and personal contact with them, and the dangers from which they seek to protect the students are immediate and foreseeable. There is no evidence in this case that Pearson was ever at the school the student attended, so no special relationship exists between him and the student. Welborn was not at the school on a day-to-day basis and had no direct, much less special, relationship with the students there. His presence at the school was for the general purpose of investigating crimes. Without a special relationship, the court concluded, these claims must be dismissed.

North Carolina Court of Appeals affirms its earlier ruling that Alice Rainey is entitled to the salary differential offered for certification under the National Board for Professional Teaching Standards. Rainey v. North Carolina Department of Public Instruction, ___ N.C. App. ___, 667 S.E.2d 237 (2008).

Facts: Through a lengthy appeals process, Alice Rainey contested the North Carolina Department of Public Instruction's (DPI) decision to deny her a salary increase granted by G.S. 115C-296.2(b) to teachers who attain certification from the National Board for Professional Teaching Standards (NBPTS). That decision was based on the finding that Rainey was not actually a "teacher" as the DPI construed that term. A trial court affirmed DPI's ruling, but the North Carolina Court of Appeals found that DPI's definition of teacher imposed requirements above and beyond those found in the NBPTS statutory scheme and that Rainey was entitled to the scheme's salary differential. DPI appealed to the North Carolina Supreme Court, which sent

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the case back to the court of appeals for reconsideration. The state supreme court found that the court of appeal's ruling was wrong insofar as it faulted the *trial* court for crediting DPI's expertise in interpreting the statutes it administers. According to the supreme court, the court of appeals misinterpreted the requirement that the trial court not give any deference to the DPI's ruling on the Rainey case to mean that the trial court could not give deference to *any* DPI rulings on the same issues. [See digests in "Clearinghouse," *School Law Bulletin* 35 (Summer 2004): 19; 37 (Fall 2006): 18–19; and 38 (Spring–Summer–Fall 2007): 39.]

Holding: On reconsideration, the North Carolina Court of Appeals affirmed its earlier ruling. Although the court conceded that it had made a mistake as to the standard used by the trial court in reaching its decision, the appeals court found that as it had subsequently reviewed the merits of the case without consideration of the trial court's opinion, its own opinion was unaffected by this error and remained sound.

Court grants pregnant teacher right to take depositions of five additional school board employees in her discrimination suit. Zampogna v. Gaston County Schools Board of Education, 2008 WL 3992151 (W.D.N.C. 2008).

Facts: Heather Zampogna was once an award-winning third-grade teacher and mentor to new teachers at Tryon Elementary School in Gaston County (N.C.). After she and her new-teacher mentee, Douglas Doorley, revealed to their principal that their relationship had become intimate and that Zampogna was pregnant, Zampogna was transferred to a tutor position working with at-risk children in a school rated as poorly performing. Nothing happened to Doorley.

Zampogna filed suit against the Gaston County School Board, alleging that the transfer constituted sex and pregnancy discrimination in violation of Title VII. [For more details on the facts of this case, see digest in "Clearinghouse," *School Law Bulletin* 38 (Spring–Summer–Fall 2007): 36]. Before trial the parties agreed that they would each depose seven witnesses, and this limitation was included in the court's pretrial order. However, during the course of discovery Zampogna found witnesses with information concerning another case of a romantic relationship between teachers at Tryon Elementary—a case in which no action was taken at all. Zampogna thus sought the court's permission to add another five witnesses to her list. The board opposed this motion.

Holding: The federal court for the Western District of North Carolina found that Zampogna had presented a credible case for her motion. Because the rules of discovery are to be interpreted broadly, the court granted her request.

Editor's note: This suit has since been settled.

Out-of-state student with disabilities may appeal some aspects of his suspension from a North Carolina school. L.K. v. North Carolina State Board of Education, 2008 WL 2397696 (E.D.N.C.).

Facts: L. K., a student with disabilities who had been receiving special education services in his home-state of New Jersey, moved to North Carolina to live with his maternal aunt. She enrolled him at J. F. Webb High School, in the Granville County school system. Within two weeks of his enrollment at Webb, the principal there recommended a yearlong suspension for L. K. for bringing a razor to school. Ultimately, a state-level review officer determined that L. K.'s behavior was not a manifestation of his disability and upheld the principal's suspension recommendation. Thereafter L. K. and his aunt moved back to New Jersey, and L. K. enrolled in a public high school there.

L. K., through his guardian, filed suit in North Carolina charging that the North Carolina State Board of Education (NCSBE) violated the Individuals with Disabilities Education Act (IDEA) in its handling of the appeals process in L. K.'s case and in its determination that his behavior was not related to his disability. The claim also charged that certain provisions of North Carolina's special education law were in conflict with the IDEA. Finally, L. K. sought an order granting him the right to return immediately to the J. F. Webb High School. The NCSBE argued that the claims should be dismissed because now that L. K. did not live in North Carolina the asserted issues were moot.

Holding: The federal court for the Eastern District of North Carolina granted NCSBE's motion in part.

Well-established precedent under the IDEA allows students who are no longer residents of the school district in question to seek retrospective relief—that is, redress for past injuries. L. K.'s assertion that the state-level review officer incorrectly determined that his behavior was not a manifestation of his disability is such a claim: if a court concludes that L. K. is correct, the incident may be removed from his school record. The court declined to dismiss this claim, therefore.

However, L. K.'s request for immediate admission to Webb—or a determination that he had been denied some future right to enrollment there—was invalid. A student who is not a resident of Granville County has no right to demand to be enrolled in the schools there. In addition, L. K.'s evidence was insufficient to show that his claim about the alleged conflict between North Carolina law and the IDEA presented any risk of imminent injury to him: in short, the court had no reason to believe that addressing this claim would bring relief of a relevant nature to L. K. Thus, L. K. had no standing to bring this claim either.

Court dismisses claims by a student with disabilities who may have suffered an injury due to the negligence of the school employee helping him use the bathroom. Foster v. Nash–Rocky Mount County Board of Education, ___N.C. App. ___, 665 S.E.2d 745 (2008).

Facts: During the 1999–2000 school year Richard Spoor was a seven-year-old student with disabilities in the Nash–Rocky Mount County schools. He had cerebral palsy, hydrocephalus, and seizure disorder. Since infancy he had had a shunt in his brain for the hydrocephalus. At this time he was able to stand easily, and his individualized education plan contained no mention of necessary toileting procedures, although he was always accompanied by his special education teacher, Harriett Brown, or one of her assistants.

On the occasion of the bathroom trip that led to this suit, Spoor fell while attempting to stand up from the toilet without assistance. Brown attempted to catch Spoor as he fell but did not succeed. Spoor hit the back of his head on the toilet seat. Although he showed no signs of injury immediately after the fall, the shunt in his brain began to malfunction. Spoor, through a guardian, filed suit against Brown and the school board alleging that Brown's negligence had been responsible for his injury.

Brown and the board sought to have his case dismissed before trial. None of the evidence Spoor produced, they argued, showed negligence or that Brown's toileting procedure was inappropriate or dangerous. If Brown was not negligent, then there was no basis for holding the board liable for Spoor's injury. The trial court agreed with these arguments and dismissed Spoor's claims. Spoor appealed.

Holding: The North Carolina Court of Appeals affirmed the dismissal.

Brown testified that she accompanied Spoor to the bathroom, positioned his walker facing the toilet and pulled down his pants. She then helped him sit down and maneuvered the walker so it was right in front of him. Although there was also different testimony concerning the procedure used by her assistants on the rare occasions they helped Spoor, this only showed that sometimes the procedure varied, not that Brown was negligent in her method or on the day of the accident.

State supreme court affirms holding that teacher's general anxiety disorder was not an occupational disease. Hassell v. Onslow County Board of Education, 362 N.C. 299, 661 S.E.2d 709 (N.C. 2008).

Facts: Barbara Hassell taught sixth grade in the Onslow County school system. During her employment there, Hassell received several negative performance evaluations and numerous complaints from parents and children. She also experienced a greater degree of difficulty in controlling her classroom than did other teachers who taught the same students. She entered into four action plans in an attempt to improve her performance, but a curriculum specialist who observed her classroom found that she had not improved. When her principal asked her to sign a warning letter, Hassell refused, left the building, and never returned.

Subsequently her psychologist diagnosed her with general anxiety disorder (GAD), concluding that "her job was driving her crazy." She then filed suit seeking workers' compensation for an occupational disease. The Industrial Commission denied her claim, and the North Carolina Court of Appeals affirmed this ruling. [See digest in "Clearinghouse," *School Law Bulletin* 37 (Fall 2006): 20.] Hassell appealed again.

Holding: The North Carolina Supreme Court again affirmed the conclusion that Hassell's GAD was not an occupational disease. The Industrial Commission found that Hassell's condition was not due to the conditions of her employment, but by her inability to satisfactorily perform the duties required of her. She provided no evidence that others holding the same job did or would have an increased risk of developing GAD. The court found these conclusions supported by competent evidence.

Court concludes that a judgment on the merits has been rendered in most of professor's discrimination claims. Salami v. Monroe, 2008 WL 2981553 (M.D.N.C.).

Facts: In the original case of *Salami v. North Carolina A & T State University* (see digest in "Clearinghouse," *School Law Bulletin* 36 (Spring 2005): 21), Professor Mohammad Salami charged that because of his national origin—Iranian—and religion—Islam—North Carolina A & T discriminated against him by removing him from his position as associate dean of the College of Engineering and denying him funds necessary for his research. After trial, a jury ruled in favor of A & T, and the Fourth Circuit Court of Appeals affirmed the verdict.

Salami then filed a new suit in the federal court for the Middle District of North Carolina. In addition to reiterating several claims that were ruled on in the first case, Salami asserted claims (1) on behalf of three other Iranian American professors against whom A & T also had discriminated, (2) alleging that A & T had violated his right to academic freedom, and (3) concerning retaliatory behavior by A & T after the jury verdict. This suit was filed against Joseph Monroe, dean of the College of Engineering, as well as A & T.

The defendants moved to dismiss all of Salami's claims before trial, except for the retaliation claims against A & T.

Holding: The federal court for the Middle District of North Carolina granted the defendants' motion, leaving only Salami's retaliation claims against A & T remaining.

All claims based on facts or transactions ruled on in the earlier case, and involving the same parties must be

dismissed, began the court. The legal doctrine of *res judicata* prevents Salami from taking another bite of the apple. Although Monroe was not a named party in the first suit, in his official capacity Monroe's interests are so identified with those of A & T that his addition to the case here makes no legal difference.

As to Salami's claims on behalf of Iranian colleagues, the court ruled that he lacked standing to bring them. Unless he could show that these colleagues were somehow hindered or rendered unable to protect their own interests, Salami could not himself protect them. Salami presented no evidence that this was the case, and, in fact, evidence showed that one of these colleagues had already obtained a judgment against A & T.

The court found that Salami's academic freedom claim was not one recognized by law. There is certainly a right to academic freedom, the court said, but it is premised on the right to free speech guaranteed by the First Amendment. As Salami's claim does not invoke the First Amendment, this claim must be dismissed.

The court went on to dismiss all discrimination claims that were based on 42 U.S.C. 1983, a statute that allows aggrieved citizens to contest alleged unconstitutional actions by state actors. Under 1983 case law, neither the state nor its officials acting in their professional capacity are subject to suit.

The court expressed some confusion about whether the complaint contained remaining discrimination claims asserted under Title VII (Salami represented himself in this suit). Assuming this to be the case, the court repeated that the claims already ruled on were out, as were the claims Salami asserted on behalf of others. Because A & T did not object to the retaliation claims against it, these stand. Claims against Monroe under Title VII must be dismissed, the court noted, because there is no supervisory liability under that statute. Finally, as to those remaining claims, the court dismissed Salami's request for punitive damages in them: punitive damages are not available under Title VII.

Court addresses former professor's civil rights claims. Sherman v. University of North Carolina at Wilmington, 2008 WL 4461935 (E.D.N.C.).

Facts: Adrian Sherman, formerly a professor at the University of North Carolina at Wilmington (UNCW), brought suit against the university and various university officials (the defendants) alleging civil rights violations that arose in the context of his allegedly involuntary resignation from his tenured position. He sought compensatory relief (monetary damages) as well as prospective equitable relief, including: reinstatement, provision of full required due process, and an order directing defendants to expunge from his record all charges stemming from UNCW's wrongful behavior. The defendants sought to dismiss his suit before trial.

Holding: The federal court for the Eastern District of North Carolina dismissed all claims except those seeking equitable relief against individual defendants.

The court began by dismissing Sherman's claim that the defendants deprived him of a liberty interest without due process. It is true, the court noted, that a person may be entitled to procedural due process when governmental action harms that person's liberty interest in his or her reputation or choice of occupation. In such cases, the complainant must show four things: (1) that the employer's statements occurred in the course of a discharge or significant demotion, (2) that the employer's comments constituted a charge of serious character defect, (3) that the comments were public, and (4) that the comments were false. In this case, Sherman alleged that the defendants indiscreetly and wrongfully informed the media that they had suspended him and relieved him of his duties as provost of international programs. Nowhere, however, does Sherman allege that these statements were false; in fact, he admits that he was suspended and relieved of his duties. Because Sherman has not been deprived of any liberty interest, he has no due process claim.

Sherman's claim that he was deprived of a property interest in his job without due process fared better. Defendants, Sherman alleged, forced him to involuntarily resign before an investigation of his conduct (whatever it was) could be completed. According to his complaint, before a complete investigation, the defendants: (1) stripped him of teaching duties and his provost position, (2) told him dismissal was a potential outcome, (3) took his keys and ordered him to have no contact with staff or students, (4) advised him to cancel a trip to a conference because UNCW would not pay for it, though they suggested he go on his own dime to look for a job, (5) told him he had no future at UNCW and that he could "stop this whole thing now" by resigning, (6) warned him that if he protested any charges before a faculty committee the charges would have to become public. Based on the allegations in his complaint, the court found that Sherman could have felt he had no option but to resign. Whether these allegations can be proven at trial, right now they are sufficient to survive a motion to dismiss.

Sherman will therefore be allowed to present evidence on this claim at trial and to seek equitable relief to right his situation (thus including back pay and attorney's fees, if he prevails). ■