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 and Opinions That Affect North Carolina

Court finds that failure to notify parent before seizure and police interrogation of ten-year-old student was not unconstitutional. Wofford v. Evans, 390 F.3d 318 (4th Cir. 2004).

Facts: The day before Thanksgiving, several classmates of M.D., a ten-year-old student at Colonial Elementary School, reported that she had brought a gun to school. Upon hearing these reports, Assistant Principal Erika Rosa brought M.D. to her office and questioned her about the gun. M.D. allowed Rosa to search her book bag and desk, but Rosa found no weapon. Rosa then allowed M.D. to go home.

The following Monday Rosa, accompanied by Principal Rita Evans, continued to investigate the incident. They contacted the police after one student reported seeing M.D. throw a gun into the woods adjoining the school. Rosa and Evans then brought M.D. into the office for more questioning. They did not grant M.D.'s request to have her mother, Jennifer Wofford, present. When three police officers arrived, they took up the questioning, still in the presence of school officials. Despite M.D.'s requests to have her mother present, Wofford was not contacted until after the officers had left. According to Rosa, Evans, and one officer, the police questioning lasted fifteen minutes; M.D. believed the interrogation went on for an hour-and-a-half.

No gun was found.

Wofford filed suit against Rosa, Evans, the county school board, and the police officers (hereinafter the defendants), alleging that the school's disciplinary procedures violated her (Wofford's) right to due process and M.D.'s right to be free from unreasonable seizures. The federal court for the Western District of Virginia dismissed Wofford's claims. Wofford appealed.

Holding: The Fourth Circuit Court of Appeals affirmed the dismissal.

The court began by explaining why it declined to impose the disciplinary rules—parental notification and time limits on detentions—that Wofford advanced. Although students do not shed their constitutional rights at the schoolhouse gate, these rights are not coextensive with those afforded adults in the criminal law setting. Constitutionalizing the rules as suggested by Wofford raises a host of difficulties that could result in dangerous inaction or delayed action. For example: What efforts must officials make to contact parents? How long must they wait if they cannot reach parents? At what stage in the investigation must parents be notified? Must parents be present at the interrogation, or only be notified of it? How long should parents be given to arrive? What role should parents play in the interrogation? Although the court found the concerns about pupils' well-being Wofford raised meritorious, it concluded that they would be more appropriately addressed by local school systems than by federal courts.

The court went on to address why the detention and interrogation of M.D. in this case was constitutional. Wofford first alleged that the officials' behavior deprived her of her parental interest in the care, custody, and control of her child without due process. The court found that the cases she cited to support this contention showed that the U.S. Constitution protects such parental interests in cases involving changes in the physical custody of a child but do not establish a parental interest in a child's freedom from temporary detention at

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school for disciplinary reasons. As Wofford failed to allege a constitutionally protected interest, no specific due process was required.

Nor did the court find the seizure of M.D. unconstitutional under the Fourth Amendment, which prohibits unreasonable searches and seizures. School officials may *search* a student, without a warrant, so long as the search is justified at its inception and reasonably related in scope to the circumstances that justified the interference in the first place. This standard, stated the court, should extend to the *seizure* of students as well.

Seizing a student is reasonable if school officials have a reasonable basis for believing that the student has violated the law or a school rule. Carrying a gun onto school grounds is illegal under Virginia law, and several of M.D.'s classmates had alleged that she had done just that. Thus it was reasonable for Rosa and Evans to seize M.D. And, because law enforcement officers have particular expertise in retrieving hidden weapons, it was further reasonable for Rosa and Evans to involve them in the investigation. When a violation of law is suspected, law enforcement officials are entitled to the same leeway as school officials: they may detain students if they have a reasonable basis for doing so.

The court also found that M.D.'s seizure was reasonably related in scope to the circumstances that justified it. The presence of a gun on school premises endangered the entire school population. Holding the girl until they were able to determine that no gun was near to hand was therefore justified.

Students' seizure by school resource officer was constitutional. In the Matters of J.F.M. and T.J.B., ___ N.C. App. ___, 607 S.E.2d 304 (2005).

Facts: S. L. Barr, a Forsyth County deputy sheriff and resource officer at the Kennedy Learning Center, observed what appeared to be the aftermath of an affray on school grounds and saw T.B. leaving the area. She ignored his commands to stop. Barr spoke with a school administrator who told him that T.B. had been involved in the affray. Less than an hour later, while still on duty, Barr saw T.B. waiting with her sister, J.M., at a bus stop on school grounds. He approached the girls and told T.B. that she needed to accompany him back to the school to speak with an administrator about the affray.

T.B. refused to go with Barr. When he grabbed her arm, J.M. pushed him and told him to let go of her sister. Barr then grabbed J.M. and told her she was under arrest for resisting and delaying an officer. When he attempted to handcuff her, J.M. bit him, and T.B. hit him with her umbrella. The girls ran off, but were soon apprehended by the back-up officer that Barr had called. Both sisters reacted so violently to being detained that they were placed in handcuffs and leg restraints before being put in patrol cars.

The two girls were adjudicated delinquent for resisting, delaying, and obstructing a public officer and for assault on a public officer. They protested the adjudications, stating that a school administrator had authorized T.B. to leave school grounds. Therefore, they continued, T.B. was justified in refusing to go with Barr and their violence was a lawful response to his unlawful attempt to detain them.

Holding: The North Carolina Court of Appeals affirmed the adjudications of delinquency.

School officials are not held to the same constitutional standard as law enforcement officials in student searches and seizures. While law enforcement officials must (generally) show probable cause to justify a search or seizure, school officials only need to satisfy a reasonableness standard. As discussed above in the *Wofford* digest, the reasonableness inquiry is twofold: (1) Was the action justified at its inception? and (2) Was the action reasonably related in scope to the circumstances that justified it in the first place? The North Carolina Court of Appeals recently extended the applicability of the reasonableness standard to *searches* conducted by law enforcement officials working in conjunction with school officials.

Should the reasonableness standard, then, also be applied to *seizures* conducted by law enforcement officials working in conjunction with school officials? The court concluded that it should, at least when an officer acting in conjunction with school officials detains a student on school premises.

After concluding that Barr was working in conjunction with a school official, the court went on to examine whether the seizure was reasonable. An affray is a violation of both state law and state rules governing schools. Barr had seen T.B. near the scene in the aftermath of an affray and had spoken with a school official who affirmed her presence there. He therefore had reasonable grounds, the court said, on which to believe that she had violated school policy. Thus his subsequent detention of her was justified. And, though the court expressed concern about Barr's action in grabbing T.B.'s arm, it concluded that this action did not bring the seizure into the realm of the unconstitutional. Because the seizure was reasonable, T.B.'s and J.M.'s resistance was without legal justification.

Trial court rules that the clear proceeds of penalties imposed under local red-light program must be paid to the school board. City of High Point, No. 01 CVS 7997 (In the Superior Court for Guilford County, December 22, 2004).

Facts: Henry Shavitz protested a fine he received for running a red light in the city of High Point. He challenged the legality of the city's red-light camera program and, in the alternative, argued that any fine collected under the program must be paid to the local school board under Article IX,

Section 7 of the North Carolina Constitution. [*See* digest in "Clearinghouse," *School Law Bulletin* 35 (Spring 2004): 30.] Eventually the case came before the Superior Court for Guilford County to decide whether the penalties imposed under the city's red-light program were subject to the Article IX, Section 7 requirements.

Holding: The court held that the fines collected under the city's red-light program were subject to Article IX, Section 7, which states that the clear proceeds of all penalties collected in the several counties for any breach of state penal laws shall remain in the counties and be used for the maintenance of the public schools. At issue in this case was whether the fines collected under High Point's red-light program were punitive or remedial in nature; if the former, they belonged to the school board. The court found that although the ordinance under which the fines were collected made running a red light a civil and not a criminal violation, the penalty imposed was nonetheless punitive in nature—that is, it was intended to punish and deter the wrongdoer, not to compensate a person or entity harmed by the violation.

University employee who was terminated pursuant to a reduction in force may not bring a contested case to challenge university's failure to abide by law requiring priority consideration for rehiring that employee. Holt v. North Carolina State University, In the Office of Administrative Hearings, 03 OSP 2415 (October 15, 2004).

Facts: Phyllis Holt was terminated from her position at North Carolina State University (NCSU) pursuant to a reduction in force (RIF). She filed a contested case hearing in the Office of Administrative Hearings to challenge NCSU's failure to give her priority consideration for rehiring, as required by Section 126-7.1(c1) of the North Carolina General Statutes (hereinafter G.S.). NCSU moved to dismiss the case, arguing that Holt, who had not attained career status, was not allowed to bring such a claim.

Holding: The Office of Administrative Hearings dismissed Holt's claim but noted a troubling inconsistency in state law.

G.S. 126-7.1(c1) provides that *all* state employees separated from employment due to a RIF are to be given priority consideration for reemployment by all state agencies. Yet G.S. 126-34.1(a)(5) limits the right of state employees to bring contested cases for failure to give priority consideration for reemployment to career state employees. Thus, although state agencies must observe the priority consideration requirement contained in G.S. 126-7.1(c1) for noncareer employees, these employees must find some other way to enforce the law when agencies fail to observe it.

Court dismisses sexual harassment claims of university soccer player. Jennings v. University of North Carolina at Chapel Hill, 340 F. Supp. 2d 666 (M.D.N.C. 2004).

Facts: Melissa Jennings was a member of the University of North Carolina at Chapel Hill's (UNC) soccer team from 1996 until 1998, when she was dismissed from the team. She alleged that while she was on the team, coaches Anson Dorrance and William Palladino made sexual comments so offensive as to create a hostile sexual environment in violation of Title IX. She also charged that Dorrance had made sexual inquiries so invasive as to violate her constitutional and common law rights to privacy. [*See* digest in "Clearinghouse," *School Law Bulletin* 34 (Winter, 2003): 21–22 for earlier proceedings in this case.]

According to Jennings's complaint, Dorrance and (less often) Palladino would occasionally approach players during warm-ups when it was common for players to discuss their social and sexual activities. Dorrance would join in the conversations and ask questions about the players' activities. Jennings also claimed that he made comments about players' physical attributes and discussed players' sex lives. Jennings herself did not normally participate in such discussions, but on two occasions she was the subject of them in Dorrance's presence. On the first occasion, Dorrance followed up a general conversation about Jennings's boyfriend with a question about what she was going to do with him over the weekend; she did not answer the question, and no one pursued it. On the second occasion, a teammate asked her whether a male friend who had attended a game was her boyfriend. Dorrance was present at this conversation but did not participate in it.

Jennings also alleged that in a private meeting to discuss her performance on the team, Dorrance warned her that her grades were low enough to put her in danger of being dropped from the team. Immediately thereafter he asked about her social life, including who her sexual partner was (though phrased in less delicate language). When she declined to answer, Dorrance dropped the matter.

Jennings did not express her displeasure with these conversations to Dorrance or Palladino, though she did complain to university officials. When she was dismissed from the team a year later, her father contacted university officials to express his concern about the coaches' sexually inappropriate behavior. About the same time, university officials received a letter from the parents of another player expressing similar concerns. After the university's investigation of the complaints, Dorrance apologized to Jennings and agreed to refrain from discussing sexual matters with players. Jennings then filed suit.

Holding: The federal court for the Middle District of North Carolina dismissed Jennings's claims before trial.

To state a Title IX violation, the sexual harassment alleged must be so objectively severe as to deprive the victim of access to the educational benefits provided by a school. The comments Jennings complained of simply did not meet this standard, concluded the court. They occurred less than weekly, were not sufficiently egregious, and were made in the context of player-initiated conversations about sexual matters. The question about Jennings's sexual activities made during the private interview was admittedly highly personal; nonetheless it was only one question, was asked in a context related to her grades, and was not followed-up when she refused to answer it.

The U.S. Constitution protects a privacy interest in avoiding the disclosure of personal matters. But Jennings was never required to disclose personal information or answer questions about her sexual activities. And her failure to discuss such matters did not lead to her dismissal from the team; that came more than a year later. State law also protects citizens from invasions into personal matters, but to be actionable the invasion must be so egregious as to be highly offensive to a reasonable person. Again, though crude, Dorrance's unanswered question about Jennings's sex life does not rise to that standard.

In unpublished opinion, Court of Appeals affirms ruling that injured student failed to state his claim within applicable statute of limitations. DePalma v. Roman Catholic Diocese of Raleigh, ___ N.C. App. ___, 605 S.E.2d 267 (2004).

Facts: On October 15, 1999, Marcus DePalma injured his knee and ankle while playing football for Cardinal Gibbons High School. On May 31, 2003, he filed suit against the school (among others), alleging negligence by school personnel who failed to (1) inform DePalma of the severity of his injury, (2) properly treat the injury, (3) properly supervise DePalma's activities, and (4) properly hire, train, and supervise certain school personnel. The school moved to dismiss the claims on the basis that they were filed too late. The trial court granted the school's motion, finding that negligence claims are governed by a three-year statute of limitations, which DePalma had failed to observe in filing his claim.

DePalma appealed.

Holding: In an unpublished opinion, the North Carolina Court of Appeals affirmed the dismissal. DePalma's injury occurred, and his claim accrued, on October 15, 1999; thus the May 2003 filing fell, the court noted, outside the three-year limitations period. DePalma argued, however, that the running of the limitations period was stopped (or "tolled" in legalese) by the fact that he did not discover the severity of the injury until November 2000. The court rejected this argument for several reasons. First, much of the evidence on which this claim was based was not a part of the complaint DePalma filed. Second, the tolling of the limitations period applies only to cases in which a plaintiff is unaware that he or she has suffered *any* damage—not to cases where only the *extent* of the injury is unknown. Finally, the court was not persuaded by DePalma's contention that the school's "continuing supervision" of him constituted an ongoing course of treatment—which would bring this claim into line with medical malpractice cases, which have a different statute of limitations.

Court denies school board's appeal of Industrial Commission ruling that allowed workers' compensation claimant to refile complaint that had been dismissed. Ward v. Wake County Board of Education, ___ N.C. App. ___, 603 S.E.2d 896 (2004).

Facts: Robert Ward suffered a compensable workplace injury while employed by the Wake County Board of Education. After a lengthy period of inaction in his claim for benefits, the Industrial Commission deputy in charge of the case ordered Ward to give the board certain medical records and other documents by a certain date, which Ward failed to do. The board then filed a motion to dismiss the complaint, and Ward did not respond. The deputy commissioner entered an order dismissing Ward's claim.

Ward then obtained different counsel and refiled his claim for benefits. The deputy commissioner removed the case from the docket on the grounds that it had been dismissed, and Ward then appealed the dismissal. He also sought to have the dismissal either vacated or interpreted as having been entered "without prejudice"—which would leave him free to refile. The Industrial Commission denied the appeal from the deputy commissioner's dismissal but ordered that it be considered as without prejudice.

The board appealed this ruling, and Ward argued that it was not subject to immediate review.

Holding: The North Carolina Court of Appeals agreed with Ward. Generally, there is no right to appeal what is known as an "interlocutory order"—that is, an order handed down during a case that does not dispose of the controversy. North Carolina courts have previously found dismissals without prejudice to be interlocutory. The board argued that an exception to the rule barring interlocutory appeals applied here: namely, that denial of immediate review would affect the board's right not to have to retry an issue already litigated.

Had Ward's claim been dismissed with prejudice, said the court, it would have been tantamount to a final judgment, a dismissal on the merits. Retrying it would have been barred by the doctrine of *res judicata*. However, as the Industrial Commission exercised its inherent authority to set aside the dismissal, the issue was not relitigated, and Ward's claim is not barred by *res judicata*. The avoidance of the expense necessitated by a hearing on Ward's claim is not a substantial right. The board can appeal any final ruling on the merits of the claim if it so desires.

Court grants in part and denies in part motion to dismiss hazing claims. Meeker v. Edmundson, No. 5:03-CV-612-BO(3) (E.D.N.C. November 10, 2004).

Facts: The parents of Bob Meeker, a freshman wrestler on the Rosewood High School wrestling team, brought suit against William Edmundson, the team's coach, various school officials, and the county board of education (hereinafter the defendants). The suit concerned mistreatment Bob allegedly suffered at the hands of his fellow wrestlers. At Edmundson's instigation, he claimed, other members of the team held him down and hit his bare torso until his skin turned red. According to the Meekers, Edmundson used "red-bellying" as a method of discouraging members he didn't want on the team. After Bob brandished a tool as a weapon at wrestling practice, he was suspended for ten days and then transferred to an alternative high school.

The Meekers brought the bulk of their suit under 42 U.S.C. Section 1983, charging that the red-bellying deprived Bob of his right to bodily integrity, his right to be free from unreasonable seizure, and his right to receive due process before the imposition of corporal punishment. Bob's suspension and transfer, they further alleged, deprived him of his property interest in public education. The Meekers also brought state law negligence claims against the defendants.

Holding: The federal court for the Eastern District of North Carolina granted the defendants' motion to dismiss in part, and denied it in part.

The court first dismissed all of the Meekers' constitutional claims except those against Edmundson in his individual capacity. Under Section 1983, municipal entities—including school boards and their officials—cannot be held liable for constitutional violations committed by their employees merely because of the employment relationship. Thus, the Meekers were required to show some basis for imputing wrongdoing to the board itself. They first alleged that Edmundson had been granted policymaking authority by the board. The court rejected this contention, stating the teachers do not have policymaking authority under North Carolina law and that Edmundson only had authority to make decisions for his wrestling team, not to discipline athletes within the school system more generally. Nor did the court believe that the board had an established custom condoning the red-bellying; the Meekers failed to show that the board even had constructive knowledge of the practice. Finally, even assuming (as the Meekers alleged) that the board failed to train Edmundson in the appropriate use of peer pressure as a disciplinary technique, there was no causal link between that failure and the red-bellying practice.

Section 1983 does allow suits against state actors—like Edmundson—in their individual capacities, but these actors may be immune to suit if they can show that their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The Meekers' primary claim was that the red-bellying deprived Bob of his right to bodily integrity and his right to be free from unreasonable seizure. Under either provision, a state actor, through his agents, cannot randomly beat a student. This proposition has been clearly established for decades, and a reasonable person would have been aware of it. Therefore the court allowed this claim to proceed.

The court dismissed the Meekers' remaining Section 1983 allegations against Edmundson, however, for failure to state a claim. First, the red-bellying could not properly be defined as corporal punishment that requires due process before it is administered. Second, the red-bellying did not appear to affect the Meekers' ability to determine how Bob was disciplined—which would have infringed their right to his care, custody, and control; nor, apparently, did the Meekers ever express to Edmundson their wishes about discipline. Finally, Bob's suspension and school transfer did not deprive him of his right to public education; his suspension for carrying a weapon to school was constitutional, and he had no constitutionally protected right to a particular course of study at a particular school.

The court declined to dismiss the Meekers' state law negligence claims against the defendants, finding that the Meekers had alleged facts sufficient to state a claim that the defendants owed Bob Meeker a duty of care and that their failure to exercise reasonable care allowed him to be badly beaten.

Court vacates jury award in discrimination case. Miller v. Barber-Scotia College, ___ N.C. App. ___, 605 S.E.2d 474 (2004).

Facts: David Miller, a Caucasian professor at Barber-Scotia College, submitted a grade change request for one of his students. College policy allowed faculty members to make grade changes in only four enumerated situations, and then only when the request was submitted in writing, stated the reason for the request, and was approved by the department chair. Miller twice requested this grade change without giving a reason for the request. The dean for academic affairs,

James Ramsey, denied both requests. Miller's department chair, Babafemi Elufiede, approved a third request, even though it was not based on one of the enumerated reasons. (It is not clear whether Elufiede approved the first two requests.) Ramsey again denied the grade change and, after meeting with Miller to discuss the matter, recommended to the college president that Miller be given a terminal one-year contract based on his disregard for the grade-change policy. (Ramsey had recently been hired out of retirement to assume the position of dean of academic affairs with the explicit goal of strengthening the college's academic integrity.)

Miller received the one-year terminal contract and filed suit alleging that his contract was not renewed because of his race. The jury found that the college had discriminated against Miller and awarded him $68,495 in compensatory and $7,500 in punitive damages. The defendants appealed.

Holding: The North Carolina Court of Appeals vacated the jury award, finding that Miller had failed to present facts that would lead a jury to reasonably conclude that he had been discriminated against.

Miller's race discrimination claim was based on disparate impact: that is, that he had been treated differently than similarly situated persons because of his race. Specifically, he claimed that the fact that he—a white man—had received a terminal contract for an improper grade-change request, while his department chair, Elufiede—a black man—had not, established that the nondiscriminatory reason given for his termination was a pretext. However, the court found that Elufiede was not similarly situated. First of all, Elufiede and Miller did not occupy the same position: Elufiede was a department chair and had a different supervisor and different duties from a professor. Further, Elufiede did not initiate the grade changes. Because of these differences, the court found the circumstantial evidence of discrimination unpersuasive and insufficient to support a jury verdict in Miller's favor.

Appeal of court order reversing student's long-term suspension is moot. J.S.W. v. Lee County Board of Education, ___ N.C. App. ___, 604 S.E.2d 336 (2004).

Facts: In October 2002 teachers at Lee County (N.C.) Senior High School found two bags of white powder in the possession of J.S.W, a student. When the State Bureau of Investigation determined that the powder contained cocaine, Lee County Superintendent Barry Aycock suspended J.S.W. for the remainder of the 2002–2003 school year. On appeal, the county board of education affirmed the dismissal. J.S.W.'s parents then sought judicial review of the suspension, and the trial court reversed the suspension order. The board appealed.

Holding: The North Carolina Court of Appeals dismissed the board's appeal as moot: That is, the court determined that the suspension was no longer an issue as the school year in question had already passed and the board had no authority to resuspend J.S.W. for subsequent years.

Court affirms Industrial Commission finding that university employee did not constructively refuse suitable employment. Lowery v. Duke University, ___ N.C. App. ___, 609 S.E.2d 780 (2005).

Facts: Melvin Lowery, who had been employed as a utility worker at Duke University since 1969, fell down some stairs while working and suffered an acute knee injury. Duke accepted that this injury was compensable and paid him temporary total disability benefits. After surgery and rehabilitation, Lowery returned to work with some restrictions and a cane, which Duke refused to allow him to use at work. Unable to work without it, Lowery returned for further physical rehabilitation. He was again released to work, with significant restrictions; he could not kneel or squat and could not lift or pull more than twenty pounds without assistance. When he returned to work, he was again sent home for refusing to perform his job without his cane. Duke argued that this amounted to refusal of suitable employment. The Industrial Commission disagreed and ordered Duke to continue paying Lowery disability benefits. Duke appealed.

Holding: The North Carolina Court of Appeals affirmed the Industrial Commission's ruling. The commission, the court said, had heard sufficient evidence to credit Lowery's claim that he couldn't perform his job without his cane and to conclude that the kind of custodial work utility workers at Duke perform could not be done with a cane. The burden of showing that Lowery refused suitable employment was on Duke, and Duke had failed to meet that burden.

In an unpublished decision, court awards board cost of depositions incurred before plaintiff voluntarily dismissed her claim. Daniels v. Winston-Salem/Forsyth County Board of Education, ___ N.C. App. ___, 607 S.E.2d 55 (2005).

Facts: Celisha Daniels filed suit against the Winston-Salem/Forsyth County Board of Education, alleging negligence (among other claims) in the injury of her son DeMarcus while he was attending the county's Children's Center. She later took a voluntary dismissal of her suit without prejudice; that is, she decided not to pursue the case at that time but did not forfeit her right to pursue it in the future. After the dismissal, the board filed a motion requesting that Daniels pay deposition costs of roughly $2,060.

Daniels did not protest the amount of the fees, and the court—finding that they were reasonable and necessary—ordered her to pay them. Daniels appealed from this order.

Holding: In an unpublished decision, the North Carolina Court of Appeals affirmed the trial court ruling. Under

G.S. 1A-1, Rule 41(d), a plaintiff who dismisses an action shall be taxed with the costs of the action. Recoverable costs are set out in G.S. 7A-305(d) and do not include deposition expenses; nonetheless, the Court of Appeals has held in its own cases that such costs are recoverable—as long as they are necessary. In accordance with its own rulings, and finding the costs put forward by the board to be reasonable and necessary, the court affirmed the award.

Other Cases

Court finds textbook sticker commenting on evolution unconstitutional. Selman v. Cobb County School District, No. 1:02-CV-2325-CC, ___ F. Supp. 2d ___ (N.D. Ga. January 13, 2005).

Facts: The inclusion of evolution in the curriculum of the Cobb County (Ga.) schools had been a source of controversy for decades. In 2001, finding that the teaching of evolution within the county schools was inconsistent, the district determined to strengthen its instruction and adopt new science textbooks. Some parents criticized the proposed new textbook for presenting evolution as a fact rather than a theory and for its failure to present alternative theories of human evolution, including creationism and intelligent design. In response to these concerns, the school board consulted with legal counsel and decided to place a sticker at the front of each science textbook. The sticker read as follows:

> This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered.

The school board's vote was unanimous and, according to later testimony, primarily motivated by a desire to acknowledge the controversy over the subject of evolution and to alert parents to any potentially offensive material they might want to discuss with their children. The board's motivation was not, again according to later testimony, to inject alternative theories of human origin into classroom discussions or to promote religion in the classroom.

Parents of several students within Cobb County (hereinafter the plaintiffs) saw the sticker as a way of promoting religious views on human origin and challenged it as a violation of the Establishment Clause of the U.S. Constitution.

Holding: The federal court for the Northern District of Georgia found the sticker unconstitutional.

The Establishment Clause prohibits state actors from taking actions that advance religion. Many antievolution statutes and policies, as well as evolution disclaimers and balanced treatment laws (that is, laws requiring that alternative theories of human origin be taught) have been challenged under it. In the school context, state action violates the Establishment Clause if it: (1) does not have a secular purpose; (2) has the primary effect of advancing religion; or (3) excessively entangles government with religion. This standard is known as the *Lemon* test.

The court determined that the board's purpose in creating and placing the sticker was primarily secular, although intertwined with religion. The chief purpose, found the court, was to reduce offense to parents who opposed the teaching of evolution; in other words, to accommodate their religious views. Accommodating religious views was not tantamount, in the court's view, to advancing them. Although the parents themselves sought to advance religion in the schools, the board itself intended only to communicate that the personal beliefs of students would be respected and tolerated in the classroom.

However, the court determined that in spite of the board's intent the sticker did have the *effect* of advancing religion. Given that reasonable people know of the controversy surrounding evolution and alternative theories of human origin, and know that opposition to the teaching of evolution largely comes from the religious community, the sticker sends the message that those who oppose evolution for religious reasons are favored members of the community. And this is so even though the sticker does not explicitly refer to any specific religion or alternative theory of origin. The entire issue is so loaded with religious overtones, concluded the court, that a reasonable observer would be led to believe that the board was aligning itself with proponents of religious theories of origin.

In addition, the sticker itself negatively affects the teaching of evolution. Its placement at the front of the textbook, and its isolation of evolution as a subject of concern, implicitly denigrate evolution to the benefit of alternative, creator-based theories of origin. Further, the way in which the term "theory" is used in the sticker plays on a colloquial or popular understanding of the term suggesting that evolution is only a questionable opinion or a hunch. And while it may be valuable for students to spend time understanding what differentiates a theory from a fact, the need to address the issue in reference to the subject of evolution specifically leaves less time to teach the substance of evolution.

Therefore the sticker must be removed.

Editor's note: This case has been appealed to the Eleventh Circuit Court of Appeals. ■