

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

Pro se parent cannot represent child in constitutional claims against school system. *Williams v. Wake County Public School System*, 2008 WL 2491129 (E.D.N.C.).

Facts: Pro se (that is, without a lawyer) claimant Bobby Williams requested damages and injunctive relief on behalf of his son, E. W. He alleged that Cassie Bricker, a teacher at Fuquay-Varina Middle School in the Wake County Public School System, violated E. W.'s Fourth and Fourteenth Amendment rights by wrongfully and maliciously accusing him of a theft he did not commit and then depriving him of due process to rebut the accusation.

Holding: The federal court for the Eastern District of North Carolina dismissed Williams's case without prejudice (meaning he can refile later) because although he—and every other competent adult—is entitled to represent himself in court without an attorney, he is not entitled to represent a third party. The reasons for this rule are twofold: first, to protect the rights of those being represented, and second, to safeguard the judiciary's right to govern who appears before them.

Industrial Commission has exclusive jurisdiction over negligence claims brought by survivors of student killed by school bus. *Stacy v. Merrill*, ___ N.C. App. ___, 664 S.E.2d 565 (2008).

Facts: Quentin Stacy was killed when he lost control of his bike and fell in front of a moving school bus. He had been riding home from R. Homer Andrews Elementary School (in the Alamance–Burlington County school system) with his brothers Zachary and Jacob, who witnessed his death.

Thereafter, Quentin's father, Anderson Timothy Stacy, filed negligence suits against various school officials (the defendants) seeking damages for infliction of severe emotional distress on Zachary and Jacob and for unreimbursed medical expenses. Stacy filed the first negligence suit in

superior court and the second, brought under the Torts Claim Act, in the North Carolina Industrial Commission.

In response to a defense motion, the superior court dismissed Stacy's claims, finding that it had no jurisdiction to hear them. Stacy appealed.

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

G.S. 115C-42 allows a school board to waive immunity for employee torts by purchasing liability insurance; this same statute, however, provides that a board *may not* waive immunity for torts arising from the operation of a public school bus or the negligence of its driver. Under G.S. 143.300.1 the Industrial Commission has jurisdiction to hear such cases. Thus, if a case falls within the Industrial Commission's purview, it may not also be pursued in court under the theory that the board has waived its immunity. Clearly, concluded the court, Stacy's claim must be heard in the Industrial Commission.

Majority of parents claims concerning their son's special education survive board's motion to dismiss. *B.H. v. Charlotte-Mecklenburg Board of Education*, 2008 WL 4394191 (W.D.N.C.).

Facts: The facts of the case, as pled by B.H., show a long-standing and almost inexplicable refusal by the Charlotte-Mecklenburg Board of Education (CMBE) to take seriously B.H.'s disabilities. In February 2003 B.H.'s kindergarten teacher referred him to an intervention team for evaluation; no team was ever formed. His first-grade teacher knew nothing of the referral until told by B.H.'s parents and made no referral until April 2004, when his parents filed a written request for one. In the meantime, because he could not finish his work, his teacher sent him back to kindergarten classes, which embarrassed him. At the end of first grade the school psychologist tested B.H. and found that he functioned in the "low-average" range but remarked that the test results were invalid because of B.H.'s attention-disorder type behavior during the testing. She recommended additional testing, but none was conducted until spring of 2006—near the end of the fourth year at issue. Using the initial test scores as a basis for evaluation nonetheless, the

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school decided in June 2004 that B.H. did not qualify for special education services.

Because the school refused to retest, or to test B.H. for other health impairments, his pediatrician referred him for private evaluation. B.H. was diagnosed with developmental coordination disorder, learning disorder, and ideomotor dyspraxia. He was found also to have a significant auditory processing disorder, speech difficulties, dyslexia, saccadic eye movement disorder, ocular pursuit disorder, and retinal dystrophy. These results were completed by October 2004. Ultimately B.H. was diagnosed with juvenile Batten's disease, a deteriorative neurological condition that is always fatal, usually by the patient's late teens.

B.H.'s parents then placed him in a private school while attempting to get CMBE to provide him a free appropriate public education (FAPE). Despite the results of the private screening, in March 2005 the school determined that B.H. still did not qualify for special education services, except for vision-impaired services. B.H. requested provision of these services, but the school did not convene a meeting to formulate an Individualized Education Plan (IEP) for B.H. until October 2005, at which time the school once again found B.H. ineligible for special education services. In March 2006 the school again determined that B.H. was vision impaired but did not require any other special education services. B.H. declined the school's proffered IEP, which included a provision requiring him to waive all rights to assert legal claims against CMBE before receiving the services, and filed a contested case in the Office of Administrative Hearings.

The state review officer held that CMBE had failed to provide B.H. a FAPE and ordered reimbursement for two years of private school tuition, therapy, and other services. CMBE appealed this ruling to the federal court for the Western District of North Carolina. B.H., through his parents, then filed a counterclaim against CMBE alleging that its failure to identify their son as a student with disabilities and to provide him a FAPE violated the Individuals with Disabilities Education Act (IDEA), the Rehabilitation Act (Section 504), and the Americans with Disabilities Act (ADA). In addition, B.H. charged CMBE with state and federal due process violations. CMBE sought to dismiss these claims before trial.

Holding: The federal court for the Western District of North Carolina dismissed the due process claims but did not dismiss the others.

In cases involving rights created by the IDEA (e.g., the provision of a FAPE through an IEP), the IDEA provides the sole means of redress; under well-established case law, no constitutional claim is available in such cases. Therefore the court dismissed B.H.'s due process claims.

That B.H.'s IDEA claim was viable went without saying, except to the extent that it asked for compensatory and punitive monetary damages above and beyond reimbursement for the expense of private education. The IDEA does not provide such remedies, and any claim for them would be invalid.

Claims under Section 504 and the ADA are different from IDEA claims. Under these statutes, a complainant must establish that he or she was discriminated against solely on the basis of disability, and failure to provide a FAPE is insufficient to substantiate this assertion. In addition, he or she must also show bad faith or gross misjudgment. Allegations that show single instances of failure to identify, provide an IEP, or provide a FAPE do not establish bad faith or gross misjudgment. However, the repeated pattern of steadfast refusal to appropriately evaluate or identify B.H., as well as the attempt to get B.H. to waive his legal rights against CMBE, all in the face of four years of unrelenting attempts by his parents to get CMBE to take his disabilities seriously, satisfy the required showing. In fact, the court opined, if proven at trial, these allegations would even support a finding of malicious arrogant indifference.

Workers' Compensation Act provides sole remedy for student injured while employed by North Carolina State University. Christopher v. North Carolina State University, ___ N.C. App. ___, 661 S.E.2d 36 (2008).

Facts: J. Christopher worked as a resident advisor for North Carolina State University (NCSU) while he was a student there. In September 2003 he resigned his position due to alleged nonresponsiveness of NCSU to his complaints that there was visible mold and mildew growing in the residence hall. Two months later he was diagnosed with asthma and a permanent respiratory condition. In 2005 his condition was reevaluated, and found to have worsened, by navy medical personnel who concluded that although he had been found fit for full service when he joined the reserves in 2002, his asthma now constituted a disqualifying factor. The navy released Christopher from his service commitment five years early.

Thereafter Christopher filed a tort claim with the Industrial Commission against NCSU seeking \$150,000 for injuries received while working in a substandard and unhealthy indoor environment. NCSU responded with a motion to dismiss his claim, arguing that the commission had no jurisdiction to hear it: this was so because at the time of Christopher's alleged injuries, he was an NCSU employee, and his exclusive remedy was a claim under the North Carolina Workers' Compensation Act. The commission agreed and dismissed his tort claim. Christopher appealed.

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

The factor that determines whether Christopher's claim is subject to the exclusive remedies provision of the Workers' Compensation Act is whether an employer-employee relationship existed between NCSU and Christopher at the time of his injury. In his pleadings and during his earlier hearings, Christopher admitted as much more than once. The Industrial Commission appropriately dismissed his claim.

Court dismisses majority of former employee's pay discrimination claims.

Hunter v. Wake County Board of Education, 2008 WL 2695813 (E.D.N.C.).

Facts: Claude Hunter, an African American, worked as a custodian field supervisor for the Wake County Board of Education from 2001 to 2006, when he took disability retirement. His claim, brought against the Wake County Board of Education and the Wake County Public Schools, charged that during his employment he did not receive pay increases commensurate with those given to Caucasian custodian field supervisors; therefore, the claim continued, his retirement pay was also comparatively lower. This inequality, Hunter alleged, violated Title VII, 42 U.S.C. 1981, and 42 U.S.C. 1983. The defendants moved to dismiss Hunter's claims.

Holding: The federal court for the Eastern District of North Carolina denied the defendants' motion only with respect to the Section 1983 claims against the Wake County School Board: these were not mentioned in the defendants' motion papers, and the court could therefore address them.

As to the other claims, the court first dismissed the Wake County Public Schools from the suit entirely, finding that it was not a body subject to suit under North Carolina law and, further, was not Hunter's employer. The court next dismissed Hunter's Title VII claims for failure to file them in a timely matter. Finally, the court dismissed the 1981 claims against the board because 1983 provides the only avenue of recourse against state actors in cases such as this.

Employer appeals award of death benefits to sister of university employee who died as a proximate result of a compensable occupational disease. *Kelly v. Duke University*, ___ N.C. App. ___, 661 S.E.2d 745 (2008).

Facts: Betty Jean Jeffreys began working as a secretary at the Duke University Medical Center in March 1996. Part of her job required providing administrative support to a doctor who, the evidence tended to show, was excessively demanding, demeaning, and abusive. The stress from this treatment exacerbated Jeffreys's preexisting diabetic condition and, over the course of the next three years, led to almost complete loss of Jeffreys's vision. By April 1, 1999, she was placed on disability retirement. In 2000 a deputy commissioner of the Industrial Commission concluded that Jeffreys's work environment caused her to contract an

occupational disease that exacerbated and accelerated her preexisting diabetic condition and led to her loss of vision; Jeffreys began receiving total disability benefits under G.S. 97-29, dating back to her retirement date and continuing for 240 weeks.

Jeffreys began receiving treatment for her condition from Dr. Scott Joy in 2001. In 2004, after suffering three weeks of respiratory ailments, Jeffreys called Joy and received antibiotics for a respiratory infection. She died three days later. Although no autopsy was conducted, Joy concluded that the most likely cause of death was a cardiovascular event secondary to Jeffreys's diabetic condition rather than complications from her respiratory infection. Jeffreys was survived only by her sister, Elsie Kelly.

The Industrial Commission determined that Kelly was entitled to death benefits and funeral expenses because Jeffreys's death was proximately related to her occupational disease. It also awarded Kelly 240 weeks of benefits under G.S. 97-31 for her sister's blindness, which was found to be a compensable work-related injury.

Duke University appealed these rulings, arguing that Kelly's claim for death benefits was not timely under G.S. 97-38; that the finding that Jeffreys's death was caused by her occupational diseases was unsupported by competent evidence; and that allowing Kelly to recover damages for both total disability and a work-related injury was impermissible. Kelly sought an award of attorney's fees.

Holding: The North Carolina Court of Appeals affirmed the Industrial Commission's ruling except as to the payment of dual benefits for occupational disease and for injury. The court granted Kelly's request for attorney's fees.

The university first argued that because the commission determined that the date of Jeffreys's compensable injury was April 1997 (when she began losing sight in one eye), it was without authority to decide that she was not disabled until April 1999. Under G.S. 97-38, an employer is obligated to pay death benefits if the employee's death was proximately related to a compensable injury or occupational disease and occurs within six years thereafter. The court disagreed: under its past interpretation of this provision, "injury" means injury by accident and excludes "disease" in any form. Therefore, as this is an occupational disease case, the relevant date is not the date of injury, but the date on which Jeffreys became incapable of earning wages.

The university next argued that the commission's reliance on Joy's testimony to determine that Jeffreys's death was proximately related to her occupational disease was unfounded. In reviewing commission findings of fact and conclusions of law, the court is limited to determining whether *any* competent evidence supported the finding in question—regardless of whether there is evidence supporting an alternative conclusion. Here, Joy's expertise in

the area of diabetes, the statistical likelihood that Jeffreys's death was diabetes-related, and Joy's treatment of Jeffreys over the course of several years establish a base of competent evidence. The court affirmed the commission's conclusion.

The court agreed with the university, however, that the dual award of benefits for both total disability and a compensable work-related injury was impermissible. A claimant who can claim benefits for both of the above is required by G.S. 97-31 to select the compensation scheme that provides greater benefits and cannot choose both. Jeffreys was awarded 240 weeks of total disability benefits and could not then receive compensation for her injury.

In conclusion, the court ruled that Kelly's success in arguing against the university's appeal made an award of attorney's fees appropriate. The court remanded the issue to the commission to determine the amount of reasonable attorney's fees incurred by Kelly during the appeal.

Court denies county resident access to school district's informational channels to protest district's stance on pending legislation that would give tax credits for private, parochial, and home school expenses. Page v. Lexington County School District One, 551 F.3d 275 (4th Cir. 2008).

Facts: The South Carolina General Assembly was considering enactment of a law called the "Put Parents in Charge Act (PPICA)." The PPICA proposed tax credits for the expense of private and home schools. Lexington County School District One, concerned that PPICA would draw funds away from and undermine public education, passed a resolution to oppose the measure. To that end, the district's director of school/community relations, Mary Beth Hill, began disseminating anti-PPICA messages through the district's webpage, e-mail system, fact sheets, and other available modes of communication. Hill controlled all content and did not invite third-party contributions, though on occasion she used anti-PPICA work by a third party.

Randall Page, a Lexington County resident who supported PPICA, asked for equal access to all communication media used by the district in disseminating its anti-PPICA message. The district rejected Page's request, defending its anti-PPICA communications as appropriate, in the best interests of public education, and entirely district-controlled. Page then filed an action seeking a judgment that the district violated his right to free speech and

an order requiring the district to open its communication media to him.

Before trial the court granted the school district's motion to dismiss Page's action. Page appealed.

Holding: The Fourth Circuit Court of Appeals affirmed the lower court ruling.

The First Amendment, broadly stated, prohibits the government from infringing on citizen speech, but it doesn't regulate government speech itself. Government speech is exempt from First Amendment review. A government necessarily pursues the policies it favors, and these policies are not, of course, supported by every citizen. Nonetheless, all citizens are compelled to support these policies through the payment of taxes. By extension then, if the government may use the tax money of all citizens to further policies not universally supported, it may also speak in favor of such policies. The remedy for unpopular governmental speech (or policy) is the ballot box, not regulation. The district's speech in this case is government speech, the court concluded: the district established its message through formal resolution and maintained effective control over its content and dissemination.

Page did not dispute the court's characterization of First Amendment law but did object to the conclusion that the district's speech was government speech. He believed that because it ineffectively controlled the content and dissemination of its anti-PPICA communications, the district had created a limited public forum to which he should have been given access. The district's refusal to allow him access was based on his viewpoint and thus violated the First Amendment. For example, he cited an anti-PPICA article by a Dr. Ray that Hill had attached to an e-mail to show that the district was granting access to third parties. The court rejected this contention because Hill had not solicited the article but had merely used it as representative of the district's position. Nor did the fact that the district's webpage contained links to other anti-PPICA groups signify a loss of control: No one but district employees had the ability to change content on the website proper; the district maintained the right to eliminate any link that no longer reflected the district's position; and the site contained a clear disclaimer of ownership or authorship of the material on the linked sites.

As Page produced no other evidence showing that the district did not effectively control the content and dissemination of its anti-PPICA message, the court affirmed the dismissal of Page's claim. ■