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

North Carolina Court of Appeals rules that penalties collected under red-light camera program are subject to Article IX, Section 7. Shavitz v. City of High Point, ___ N.C. App. ___, 630 S.E.2d 4 (2006).

Facts: Earlier proceedings between Henry Shavitz and the City of High Point after he ran a red light under the city's red-light camera program left unresolved a dispute between the city and the Guilford County Board of Education. [See digest in "Clearinghouse," *School Law Bulletin* 35 (Fall 2004): 21–22.] The dispute concerned whether the clear proceeds of the fines and penalties collected by the red-light camera program were due to the board or the city.

The trial court ruled that these proceeds were due to the school board under Article IX, Section 7 of the North Carolina Constitution and awarded the board 90 percent of all amounts collected by the city from the inception of the red-light camera program, as well as post-judgment interest. The city appealed the entire ruling.

Holding: The North Carolina Court of Appeals affirmed the ruling, except the award of postjudgment interest.

Article IX, Section 7 of the North Carolina Constitution provides that the "clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the state, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools." Over the years many court decisions have addressed whether particular penalties and fines fall within the ambit of this provision. [See, for example, "Clearinghouse" digests of *North Carolina School Boards Association v. Moore* and *Donoho v. City of Asheville* in, respectively, *School Law Bulletin* 36 (Spring, 2005): 20–21 and 33 (Fall, 2002): 19–20.]

Two issues generally arise in these cases: (1) are the proceeds penalties or fines? and (2) are they imposed for breach of a state penal law?

The state supreme court has defined a penalty or fine as an assessment imposed to deter future violations and to extract retribution from the violator for illegal behavior.[1] The court of appeals concluded that proceeds of the red-light camera program meet this definition. Next, the court determined that the penalties or fines were assessed for violation of a state penal law. Section 20-158(b)(2) of the North Carolina General Statutes (hereinafter G.S.) makes failure to observe a red stoplight illegal. G.S. 20-176(b) makes this infraction punishable by a fine. G.S. 160A-300.1, which authorizes municipal red-light camera programs, merely creates an alternative mechanism for enforcement of G.S. 20-158(b)(2). Even though the red-light camera statute provides that a red-light violation punished under such a program shall be a noncriminal violation punishable by a civil penalty, it is still a violation of G.S. 20-158(b)(2)—a state penal law—for which the state statute has provided a municipal enforcement mechanism. Thus, the proceeds of the program are due to the Guilford County Board of Education.

The court of appeals also affirmed the percentage of the proceeds (90 percent) awarded to the board. G.S. 115C-437, which specifies how Section 7's goals are to be implemented, provides that "clear proceeds" are the full amount of all penalties and fines collected under Section 7, less only the actual costs of collection, which are not to exceed 10 percent of the total amount collected. The court rejected the city's argument that because its costs, including payments to the contractors who implemented the program, greatly exceeded

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1. For a detailed analysis of the state supreme court's decision interpreting the fines and forfeitures provision of Section 7, see Shea Riggsbee Denning, "N.C. Supreme Court Rules More Penalties Payable to Public Schools: *North Carolina School Boards Association v. Moore*," *School Law Bulletin* 36 (Fall 2005): 1–9.

10 percent, it should be allowed to keep a higher percentage of the proceeds. The statute only authorizes holding back the actual costs of *collecting* the proceeds, not the costs of implementing or enforcing the program.

The court did reverse the trial court's ruling on post-judgment interest. General statutes—such as G.S. 24-5(b), which governs post judgment interest—are not applicable to the state unless the state has shown its willingness to comply with them by an act of the General Assembly or a lawful contract. Because a municipality is a subdivision of the state, this principle applies to it as well.

School board not liable for off-campus shooting by students. Stein v. Asheville City Board of Education, N.C. 635 S.E.2d 58 (2006).

Facts: At the time of the shooting described herein, J.B. and C.N. were students with emotional and behavioral disabilities attending the Cooperative Learning Center (CLC). While riding on a CLC bus, J.B. and C.N. discussed robbing and killing someone with a gun C.N. had at his home. Bus monitor Gail Guzman overheard this conversation and reported it to Nancy Patton, the bus driver; neither reported it to any other school or law enforcement official.

Several days later, at 8:15 P.M. at an Asheville intersection, the boys shot Kathlyn Stein just under her left ear during an attempted robbery. Stein brought suit against CLC, among others, alleging negligence. The trial court dismissed her claim before trial for failure to state a claim for which relief could be granted. Stein appealed to the North Carolina Court of Appeals, which reinstated her claim, finding that she had established that (1) CLC had a duty to protect others from J.B. and C.N.; (2) CLC breached this duty when Patton and Guzman failed to report the overheard conversation, as required by G.S. 115C-245; and (3) this breach proximately caused Stein's injuries. [See digest in "Clearinghouse," *School Law Bulletin* 36 (Winter 2005): 19–20 for earlier proceedings in this case.]. CLC appealed.

Holding: The North Carolina Supreme Court overruled the Court of Appeals and dismissed Stein's claim.

The court first addressed Stein's claim that by failing to report the conversation, Patton and Guzman violated G.S. 115C-245 and were thus negligent per se. To hold a defendant guilty of negligence per se, a court must find that he or she violated a public safety statute and that the plaintiff belongs to the class of people that statute was intended to protect. A public safety statute is one imposing a specific duty for the protection of others. G.S. 115C-245 provides that the driver of a school bus shall report promptly to the principal any misconduct on the bus. The same statute imposes a duty on the bus monitor to preserve order on the bus to protect the safety of the students and employees assigned to it. Leaving aside the question of whether J.B. and C.N.'s conversation constituted misconduct or disorder, the statute's plain language reveals that the specific class of persons it intends to protect consists of students and employees on the bus, not the general public.

The court next addressed Stein's common law negligence claim. In the court of appeals, CLC argued that it had no legal duty to protect Stein from the actions of J.B. and C.N. when they were completely outside CLC's control at the time of the shooting. The court of appeals disagreed, finding that Stein's claim was not that the negligence occurred at the time of the shooting, but that the negligence occurred at the time of the conversation, when CLC did have control of the students and a legal duty to report the conversation.

The supreme court found this claim a misstatement of law. Courts are traditionally reluctant to hold a person or organization liable for the actions of a third person over whom they had no control. Only when a defendant has a special relationship with the third party will a court hold him or her responsible for that party's actions. Specifically, a plaintiff must show (1) that the defendant knew or should have known of the third person's violent propensities and (2) that the defendant had the ability and opportunity to control the third person at the time of the criminal acts. Here, the facts showed that J.B. and C.N. were completely outside of CLC's control and custody at the time of the shooting. Therefore CLC had no duty to protect Stein from J.B. and C.N.

U.S. Supreme Court rules that Solomon Amendment, which restricts federal funding to institutions of higher education that deny military recruiters access to students equal to that provided other recruiters, does not violate First Amendment rights to freedom of speech or association. Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 126 S.Ct. 1297 (2006).

Facts: The Forum for Academic and Institutional Rights (FAIR) is an association of law schools and law faculties organized, in part, to oppose discrimination. FAIR members began limiting military recruiters' access to law school campuses because of the military's policy on homosexuals. In response, Congress enacted the Solomon Amendment (10 U.S.C. 983), which restricts grants of specific federal funds to institutions of higher education that deny military recruiters access to students on the same basis as other recruiters. Thus, FAIR members were forced to choose between opposing discrimination against homosexuals or causing their parent institutions to lose certain federal funds. This choice, FAIR argued in its lawsuit, infringed its First Amendment freedoms of speech and association. The U.S. Supreme Court granted review of the issue.

Holding: The U.S. Supreme Court concluded that the Solomon Amendment was constitutional.

The Court began by observing that congressional power is great with respect to raising and supporting armies and

that Congress could, if it so chose, require campus access for military recruiters, as long as the legislation creating this obligation did not exceed constitutional limits on its power. The Court also noted that judicial deference is at its greatest when Congress legislates under its power to raise and support armies.

Even though it has the authority to order campuses to grant access to military recruiters, Congress opted to secure access indirectly, through its power to control government spending. This approach would seem less problematic legally, because it gives universities a choice about whether to allow access. Nonetheless, Congress may not deny a benefit to a person or organization on a basis that infringes the right to free speech or association—even when that person or organization has no legal entitlement to the benefit.

The Court determined that the Solomon Amendment regulates conduct, not speech, and rejected FAIR's argument that hosting military recruiters compelled its universities to speak the military's message. Case law striking down state-compelled speech has concerned, for example, attempts to force school children to recite the Pledge of Allegiance or to require motorists to display a certain motto on their license plates. The compelled speech in this case—sending out scheduling e-mails and posting recruiter bulletins—isn't comparable; it requires nothing in the way of specific speech content, and, in fact, requires no speech at all beyond what law schools may provide to other recruiters. Further, hosting military recruiters does not compel the law schools to voice the military's position; law school recruiting services lack the expressive quality of speech, and law students are certainly sophisticated enough to differentiate between treating military recruiters like other recruiters and endorsing their message.

Nor are law schools forced to provide a forum for the military's message about homosexuals. The government's ability to insist that its message be heard is not without limits, but these limits apply only when the government's message affects the host's ability to speak its own message. The Solomon Amendment does nothing to prevent law schools from voicing their opinion about the military's policy on homosexuals.

FAIR also argued that the law schools' former practice of segregating military recruiters in less-desirable quarters and denying them the same services it provides to other recruiters—which is prohibited by the act—sent the message that the schools disapproved of the military's discrimination. The Court disagreed, finding that without accompanying speech to explain it, the less-favorable treatment given military recruiters did not express any clear idea to observers. For example, an undergraduate noticing that the military is not recruiting at the law school would not necessarily know that the law school was expressing its disapproval of the military; the student might just as easily assume that all the law school's interviewing rooms were occupied or that the military itself chose to hold interviews in a different location.

The Court also rejected FAIR's freedom-of-association argument. The association argued that by requiring law schools to associate with military recruiters on law school premises and to assist them with recruiting services, the Solomon Amendment significantly affected their ability to express the message that discrimination on the basis of sexual orientation is wrong. The Court responded by noting that military recruiters do not seek to become members of the law school community; they are outsiders who come on campus to hire students. Nor does their presence for a limited time make being a member of the law school community significantly less attractive. In short, nothing in the Solomon Amendment curtails or influences the associational choices available to law students and faculty.

Court reinstates claims of student injured by school's faulty traffic control gate and holds that local school board is a "person" subject to suit under Section 1983. Rippellino v. North Carolina School Boards Association, ___ N.C. App. ___, 633 S.E.2d 823 (2006).

Facts: The traffic control gate at Clayton High School (in Johnston County) came down on the Rippellino family vehicle and injured Nicole Rippellino, a student at the school. Several months after the incident, the local board of education paid the family roughly $2,200 for property damage but refused to pay medical expenses or other claims. The Rippellinos filed suit against the board, claiming (1) negligent personal injury, (2) medical expenses, and (3) violations of both Section 1983 and the state constitution. The trial court granted judgment for the board before trial and the Rippellinos appealed.

Holding: The North Carolina Court of Appeals reversed the judgment and remanded the case for further action by the lower court.

The court first addressed the nonconstitutional claims. The board had obtained insurance for, and had thus waived immunity on, claims in excess of $100,000 and less than $1,000,000. The Rippellinos satisfactorily pled that their claims fell within this range. However, the board argued that the incident from which the claims arose was excluded from coverage under a provision that barred claims arising out of the use of an automobile; because Nicole was in a car when she was injured, the board asserted, it did not owe her compensation for her injury. The court rejected this argument, finding that the injury arose from a faulty traffic control gate and could have occurred even if Nicole had been walking or riding a bicycle. The court ordered that the trial court, on remand, enter summary judgment for the Rippellinos on their negligent personal injury and medical expense claims.

The court next addressed the constitutional claims raised under Section 1983 and the North Carolina Constitution. The Rippellinos alleged that their due process and equal protection rights had been violated by the board's procedure for determining which tort claims to compensate; specifically, they argued that the board had a practice of compensating similarly situated individuals and that the board's refusal to do so in their case was unreasonable and unconstitutional.

Section 1983 grants a cause of action to citizens who have been deprived of legal rights by a person, or persons, operating under the color of law. The board argued that it was immune from Section 1983 suits seeking monetary damages because of well-established precedent providing that the state and its respective agencies are not "persons" within the meaning of Section 1983. The appeals court disagreed, finding that whether a local school board qualified as a person under Section 1983 had not been determined in North Carolina. In addressing this issue, and in deciding that a local board of education does meet the definition of *person* for Section 1983 purposes, the court focused on the following factors: (1) any recovery the Rippellinos obtain will not come from state coffers but from the board; (2) the board is a corporate entity of its own and can sue—and be sued—to the extent it has waived immunity; and (3) the board performs purely local functions, so that a suit against it does not impair the state's integrity under the federal system. Based on this reasoning, the trial court must reinstate the Section 1983 claim against the board.

As to the Rippellinos's state constitutional claims, the board argued that they were barred by a legal rule that limits such claims to cases in which no other adequate legal remedy is available. The board argued that the Rippellinos's negligence claims provided them adequate recompense. The court rejected this argument, noting that the Rippellinos had claimed damages for both negligence and intentional and arbitrary discrimination. As no other state law remedy exists with respect to the latter claim, proceeding under the state constitution is permissible.

Finally, given that the constitutional claims were not otherwise barred, the appeals court addressed whether the trial court erred in dismissing them for failure to present any genuine issues of material fact. There were material issues to litigate, the court found—among them whether the board actually had some set of standard criteria that it applied in evaluating tort claims like the Rippellinos's. For that reason, dismissal of the family's claims was improper.

North Carolina Supreme Court rejects former professor's request for a new trial on damages he suffered when the university breached its contract with him. Munn v. North Carolina State University, 360 N.C. 353, 626 S.E.2d 270 (2006).

Facts: Harry Munn sued North Carolina State University (NCSU) for breach of contract and showed damages of approximately $40,000—the amount he would have been paid if allowed to perform his duties in the two years remaining on his contract. At trial, the jury found that NCSU had breached Munn's contract but awarded him only $1 in damages. Munn requested that the trial court either grant him a new trial or enter a judgment notwithstanding the verdict on the issue of damages. The trial court rejected this request, and Munn appealed.

The North Carolina Court of Appeals ordered the trial court to grant Munn a new trial on the issue of damages. Munn, the court said, had presented uncontradicted and specific evidence of the harm he suffered as a result of NCSU's breach, and the jury's verdict potentially constituted a substantial miscarriage of justice. The court went on to find that as the jury never addressed NCSU's contention that Munn was entitled only to nominal damages because he failed to show that he was ready and able to perform the contract, a new trial was necessary. NCSU appealed.

Holding: The North Carolina Supreme Court reversed the court of appeals, finding (as did the dissent in the court of appeals) that Munn had failed to properly reference the basis for his appeal within the trial court record. Therefore, because he violated Rule 10(c) of the Rules of Appellate Procedure, the court was prohibited from hearing his appeal.

Court dismisses claims of Christian fraternity as moot. Alpha Iota Omega Christian Fraternity v. Moeser, 2006 WL 1286186 (M.D.N.C., May 10, 2006).

Facts: In order to be officially recognized, student organizations at the University of North Carolina at Chapel Hill (UNC-CH) must agree that they will not discriminate on the basis of age, sex, race, color, national origin, religion, disability, veteran status, or sexual orientation. The Alpha Iota Omega (AIO) Christian Fraternity complied with this policy for several years. But in 2003, AIO notified the university that it would no longer agree to the policy to the extent that it conflicted with AIO's code. That code required all members and officers to adhere to a Christian statement of faith and tenets of belief and to conform to certain standards of conduct. In short, AIO sought the right to refuse membership to non-Christians and homosexuals.

According to the AIO, its refusal to comply with the nondiscrimination policy caused UNC-CH to rescind its status as an officially recognized student organization. AIO then filed suit against the university and several of its officials, alleging that the nondiscrimination policy violated AIO's

right to freedom of association, freedom of speech, and freedom of religion. AIO sought relief in the form of a preliminary and permanent injunction prohibiting UNC-CH from applying the nondiscrimination policy and a declaratory judgment (that is, a judge's opinion) that the policy was either unconstitutional as written or as applied.

The federal court for the Middle District of North Carolina granted AIO a preliminary injunction, agreeing with AIO that there is a significant difference between discriminating on the basis of one's beliefs (permissible) and discriminating on the basis of one's status (impermissible). The injunction ordered UNC-CH to stop applying the policy in a way that prevented AIO from limiting its membership to students who, upon individual inquiry, share its beliefs and agree to conform their behavior to its code.

After that order, but before the issuance of the opinion that is the subject of this digest, UNC-CH amended its nondiscrimination policy to extend recognition to student organizations that select their members on the basis of commitment to a set of beliefs. Subsequently it recognized AIO as an official student organization entitled to all the benefits and privileges thereof. UNC-CH then moved to dismiss AIO's remaining claims because they were moot (that is, they no longer presented a live controversy). AIO, on the other hand, moved to add claims to its original complaint and to recover attorney fees as the prevailing party.

Holding: The federal court for the Middle District of North Carolina dismissed the suit.

AIO argued that its case was not moot because UNC-CH could easily revert to its old nondiscrimination policy. However, the court believed that the university had met the burden of showing that reactivation of the old policy could not reasonably be expected to occur. The old policy is gone, and the university has made the new policy as public and permanent as possible, the court found. Additionally, UNC-CH officially recognized AIO. AIO simply failed to show that any actual controversy or issue remained—other than the mere possibility of another violation.

The court also rejected AIO's argument that the new policy too was unconstitutional. The new policy allows AIO to reject potential members on the basis of their beliefs, as the fraternity requested. But it also requires AIO to determine the nature of these beliefs through individual inquiry—not through prejudgment of a person's reputation, status, appearance, or heritage. This, the court concluded, creates a thoughtful and constitutional balance between student organizations' interest in creating like-minded memberships and the university's interest in discouraging discrimination.

Because AIO's request was voluntarily granted by the university's creation of the new, constitutional policy, the court refused its motion to amend its complaint to add new claims.

In conclusion, the court denied AIO's request for attorney fees. Although AIO did receive the relief it sought, and its argument that the lawsuit was the catalyst that caused UNC-CH to change its policy may possibly be true, the catalyst theory is not recognized by the federal courts that govern North Carolina. In this case, said the court, there was no winner and no loser: UNC-CH voluntarily changed its policy, and AIO voluntarily applied for and received official recognition under the new policy. The parties reached common ground.

School employee injured at school is entitled only to wages earned from her school job, not also those from her summer employment. Jones v. New Hanover County Schools, ___ N.C. App. ___, 627 S.E.2d 684 (2006).

Facts: Lori Jones, a special education classroom assistant in the New Hanover County schools, suffered a compensable on-the-job injury during a violent student outburst. Jones filed for workers' compensation benefits, and the board granted her request for medical benefits but denied her request for disability benefits for time lost from employment in her family's commercial fishing business. After an individual commissioner agreed with the board, Jones appealed to the full Industrial Commission, which granted her disability benefits for time lost from her second job. The board appealed this ruling.

Holding: The North Carolina Court of Appeals reversed the award of disability benefits for the second job. G.S. 97-2(5) provides for the computation of lost income on the basis of average weekly wages and defines such wages as those earned by the injured employee in the employment in which he or she was working at the time of the injury. In addition, the North Carolina Supreme Court has explicitly stated that the statute does not allow the inclusion of wages earned in employment other than that in which the employee was injured.

University did not violate a federal labor statute when it assisted a union in its case against an employee. Summerville v. Duke University, 2006 WL 771887 (M.D.N.C., March 24, 2006).

Facts: Melton Summerville was a Duke University employee and a member of Local 77 of the American Federation of State, County, and Municipal Employees (AFSCME). He filed suit against Local 77 and AFSCME, alleging misfeasance in a dispute resolution procedure AFSCME conducted. Subsequently he served Duke with a subpoena requesting responses to a set of interrogatories. Duke, arguing that it could not be compelled to provide information because it was not a party to the case and, in any event, had no relevant information to share, filed a motion to quash the subpoena and a motion for a protective order against any future discovery requests. Duke provided

Local 77 and AFSCME with an affidavit in support of this position. Ultimately, Summerville's action was dismissed before trial.

Summerville then filed suit against Duke, alleging that its assistance (in the form of obstructing his discovery) to Local 77 and AFSCME violated a federal labor statute (29 U.S.C. 411(a)(4)) that provides that no interested employer shall participate—directly or indirectly—in an action by a union member against his or her union. Duke moved to dismiss his action before trial.

Holding: The federal court for the Middle District of North Carolina dismissed Summerville's claim.

Duke argued that 29 U.S.C. 411(a)(4) does not provide for a cause of action against an employer. The court agreed. The statute's purpose was to limit a union member's right to initiate employer-funded suits against the union, not to punish employers who provide assistance to the union. If there is no action against an employer for assisting a union member, conversely there is no action against an employer for helping the union.

Dismissed nursing student who alleged age and gender discrimination failed to show that he was performing up to the school's expectations. Blundell v. Wake Forest University Baptist Medical Center, 2006 WL 694630 (M.D.N.C., March 15, 2006).

Facts: Paul Blundell alleged that he was dismissed from the Nurse Anesthesia Program (NAP), which is run jointly by the University of North Carolina at Greensboro (UNC-G) and Wake Forest University Baptist Medical Center, on the basis of his age and gender, in violation of Title IX. (He also alleged other claims not relevant here.) Both universities moved to dismiss his claims before trial.

The nursing program automatically dismisses students who earn a "C" in more than six semester hours of course work or a "C" in any nursing specialty class, including clinical practice classes. In the spring of his first year in the program, Blundell received a "C" in a three-credit-hour class, missed getting a "C" in a nursing specialty course by one point, and received ratings of "unacceptable" in some areas of his clinical practice. Taken together, these factors caused the program director, Sandra Ouellette, to call Blundell before the program's executive committee to review his progress. At this meeting Blundell presented evidence in his defense, and the committee decided to allow him to continue in the program without placing him on probation.

However, in the fall of that year, Blundell's poor performance in the clinical setting continued. As a result, Ouellette met with Blundell and they developed an "action plan" providing that he must receive no more "unacceptable" or "needs improvement" ratings and was expected to perform satisfactorily for the rest of the semester. He was also cautioned that failure to perform satisfactorily with respect to patient safety could result in immediate dismissal.

Three days later Blundell failed to perform a routine preoperation check on a machine to ensure that it was fully operational. As a result, a cardiothoracic patient undergoing surgery was placed in imminent and grave danger that was averted only by the quick actions of the supervising nurse and anesthesiologist. Blundell admitted his error, both orally after the surgery and again in writing in a letter to Wake Forest.

Blundell was dismissed from the program for unsafe clinical practice and, after exhausting all the university administrative reviews, filed suit against both universities and several of their officials.

Holding: The federal court for the Middle District of North Carolina dismissed Blundell's Title IX claims. One of the four criteria Blundell was required to show in order to state a basic case of gender discrimination was that he was performing at a level that met program expectations, but was nonetheless dismissed. This he failed to do. In addition, he failed to show that younger female nursing students were treated more favorably.

Professor passed over for chairmanship of his department did not rebut administration's legitimate explanation for hiring someone else. Guseh v. North Carolina Central University, 2006 WL 694621 (M.D.N.C., March 13, 2006).

Facts: James Guseh, a native of Liberia and a naturalized American citizen, alleged that administrators at North Carolina Central University (NCCU) denied him the chairmanship of the Department of Public Administration (where he was a tenured professor) because of national origin discrimination. Between 1999 and 2002 the position of department chair came open four times, and each time was given to someone native to the United States—someone, Guseh alleged, less qualified than himself.

NCCU acknowledged Guseh's qualifications but argued that in each case its subjective and scholarly judgment was simply that the candidates appointed would make better administrators. To rebut this legitimate explanation, Guseh offered nothing more than his own reiteration that his academic credentials were superior to those of the other candidates.

Before trial, NCCU moved to have Guseh's claims dismissed.

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

The court assumed, for the sake of argument, that Guseh had established a basic case for national origin discrimination: (1) he was a member of a protected national origin group; (2) he was qualified for the position in question; (3) he was rejected for the position despite his qualifications;

and (4) the position remained open and NCCU continued to seek applications from persons with the same qualifications but outside of his national origin group. When NCCU offered legitimate reasons for preferring others for the position, Guseh was required to show that those reasons were merely pretexts for discrimination. His assertions that he was better qualified do not suffice to meet this burden; the courts are not in the business of second-guessing apparently reasonable employment decisions, especially in the academic arena where they are so subjective.

Court affirms dismissal of university soccer player's sexual harassment claims. Jennings v. University of North Carolina at Chapel Hill, 444 F.3d 255 (4th Cir. 2006).

Facts: Melissa Jennings was a member of the University of North Carolina at Chapel Hill's (UNC-CH) soccer team from 1996 until 1998, when she was dismissed from the team. She alleged that during her membership on the team, its coaches, Anson Dorrance and William Palladino, made sexual comments and inquiries so outrageous as to constitute sexual harassment in violation of Title IX. The federal court for the Middle District of North Carolina dismissed Jennings's claims before trial. [See digests in "Clearinghouse," *School Law Bulletin* 34 (Winter 2003): 21–22 and 35 (Fall 2004): 22–23 for earlier proceedings in this case]. Jennings appealed.

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

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 evidence, when viewed most favorably to Jennings, shows that Dorrance used vulgar language, participated in sexual banter at practice, and once directed a vulgar question at Jennings. Dorrance never touched, threatened to touch, or propositioned her. The court concluded that, based on these facts, no reasonable jury could conclude that Dorrance sexually harassed Jennings. Therefore, the lower court's dismissal of her claim was appropriate.

Other Cases

Board is enjoined from punishing student whose diary contained an allegedly fictional account of a student-led Nazi group that planned to take over the school. Ponce v. Socorro Independent School District, 432 F. Supp. 2d 682 (W.D. Tex. 2006).

Facts: E.P., a student at Montwood High School in the Socorro (Texas) Independent School District (SISD), told a fellow student about a notebook in which he was writing a fictional, first-person diary recording in detail the formation of a Nazi-type group, involvement in several violent incidents, and a plan to commit an attack on Montwood. This student told a teacher, who then informed Assistant Principal Jesus Aguirre.

After questioning the reporting student, Aguirre called E.P. into his office and told him that students had complained that he was writing threats. E.P. denied this and explained that he was writing a work of fiction. When Aguirre asked for permission to search his backpack, E.P. consented, and Aguirre found the notebook. As Aguirre continued to question him about specific entries in the notebook, E.P. repeatedly maintained that it was fiction. When called in to discuss the issue, his mother confirmed that it was fiction and explained that as a result of creative writing classes she was taking, she had encouraged E.P. to write a dramatic monologue. Aguirre informed them that he would take the notebook home, read it over, and contact them the next day with a decision about how to handle the situation, based on the safety and security of the student body. He then sent E.P. back to class for the remainder of the day.

Having reviewed the notebook at home, Aguirre, based on "his knowledge of the ever increasing obligation to protect students since events like the Columbine High School incident . . . and the training I have received as an Administrator within the [SISD] with regard to the protection and safety of students," determined that the writing constituted a terrorist threat. He concluded that E.P. had violated the Student Code of Conduct, suspended him from school for three days, and recommended that he be placed at an alternative school. E.P.'s parents unsuccessfully protested this decision and, rather than place him in the recommended alternative setting, enrolled him in a private high school.

E.P., with his parents as representatives, filed suit to enjoin the SISD from, among other things, (1) maintaining entries in his school records indicating that he had broken any laws or school rules, and (2) assigning him to an alternative educational setting. SISD moved to dismiss E.P.'s suit.

Holding: The federal court for the Western District of Texas denied SISD's motion to dismiss and granted E.P.'s preliminary injunction.

E.P.'s primary claim was that the SISD's actions violated his First Amendment right to free speech. Looking at the facts in a light most favorable to E.P., the party not seeking dismissal of the suit, the court was inclined to agree.

School administrators are allowed to regulate student speech, but they must have a reasonable, fact-based belief that the speech will materially and substantially interfere with school work or discipline. SISD presented no evidence to support such a conclusion, found the court. The only affidavit submitted by SISD to justify classifying the writings in the notebook as terrorist threats was Aguirre's, and it stated

only that "based on his training" he determined that the writings constituted such a threat.

In addition, the record shows several facts casting doubt on Aguirre's conclusion: (1) E.P. was a good student with no history of disciplinary infractions; (2) E.P. specifically disavowed the views expressed in the notebook; (3) there were no incidents involving E.P. following his immediate release into the general student population after his meeting with Aguirre; and (4) none of the events involving the Nazi-type party described in the notebook had ever occurred—at least according to the information presented by SISD. Furthermore, the record contains no evidence that the notebook was shown to any student other than the one who reported its existence or that even this student had an adverse reaction to it. Finally, it is now clear that E.P.'s behavior was good for the entire year he spent at the private school.

Given the dearth of evidence to support SISD's contention that the notebook constituted a terrorist threat, the court refused to dismiss E.P.'s free speech claim and moved on to consider the preliminary injunction.

The court weighed four factors in determining whether to issue a preliminary injunction: (1) Is there a substantial likelihood of success on the merits of the claim? (2) Is there a substantial threat that the party moving for the injunction will suffer irreparable injury if it is denied? (3) Does the threatened injury outweigh any damage the injunction might cause the nonmoving party? and (4) Will the injunction serve the public interest? The court answered all four questions in the affirmative. In particular, the court noted that injuries involving free speech rights are presumptively irreparable. The court thus granted the preliminary injunction. ■