Clearinghouse

School Law Bulletin *looks at recent court decisions and attorney general's opinions*

Edited by Ingrid M. Johansen

Cases and Opinions That Directly Affect North Carolina

Former employee, who was classified as exempt from State Personnel Act, could not file discrimination claim in the Office of Administrative Hearings. Woodburn v. North Carolina State University, No. COA02-262, ___ N.C. App. ___, 577 S.E.2d 154 (2003).

Facts: Lee Woodburn was terminated from her position at North Carolina State University (NCSU) after suffering pregnancy-related medical complications that caused her to miss approximately two months of work. Her position was classified as "EPA"—that is, exempt from the State Personnel Act (SPA). When she filed suit in the Office of Administrative Hearings (OAH) alleging that her termination was due to gender and disability discrimination, NCSU had the suit dismissed because the OAH is not statutorily empowered to hear grievances brought by EPA employees. Woodburn appealed.

Holding: The North Carolina Court of Appeals affirmed the dismissal. EPA employees are generally exempt from the provisions of the SPA, although Article 6 of that statute, which prohibits discrimination in state employment, applies to all state employees. Because of this exception to the exemption, Woodburn argued that she was entitled to bring her claim before the OAH. The court noted, however, that Article 6 contains no discussion of remedies or procedures available to state employees claiming discrimination. The provision giving career state employees the right to file contested cases in the OAH is in Article 8, from which EPA employees are exempted. Although Woodburn therefore could not avail herself of the grievance procedure set out in the SPA, she was not without remedy for her discrimination claim: She was entitled to use university review procedures and judicial review.

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Court rules in favor of disability discrimination claimant and sends case back to trial court for hearing on damages. Johnson v. Trustees of Durham Technical Community College, No. COA02-356, ___ N.C. App. ___, 577 S.E.2d 670 (2003).

Facts: Susan Johnson, who suffered disabilities related to childhood polio, alleged that Durham Technical Community College dismissed her from her teaching position on the basis of her disability, in violation of the North Carolina Persons with Disabilities Protection Act (NCPDPA). A state trial court dismissed her claim, finding that misconduct allegations made against Johnson after her dismissal would have provided a lawful reason for dismissing her. Johnson appealed that ruling.

Holding: The North Carolina Court of Appeals ruled in Johnson's favor and sent the case back to the trial court for hearing on damages.

The U.S. Supreme Court has held that under federal discrimination statutes an employer that has a mixed motive for adverse employment action—that is, a lawful reason and an unlawful one—cannot be held liable for the unlawful one if the lawful reason alone would have sufficed to justify the action. However, in cases where misconduct justifying dismissal is not discovered until after the dismissal, there can be no mixed motive, because the employer could not have been motivated by knowledge it did not have.

Johnson argued that North Carolina, like many other states, should adopt this rule in the context of its employment discrimination statutes and that the trial court erred in failing to do so. The court of appeals agreed, finding the NCPDPA similar in purpose and structure to the federal Americans with Disabilities Act. Because Johnson's alleged misconduct did not come to Durham Tech's attention until five days after its decision to dismiss her because of her disability, the court ruled in her favor on the disability discrimination claim.

Although the evidence of misconduct acquired subsequently could not be used to shield Durham Tech from liability for its discriminatory dismissal of Johnson, it might

be relevant in determining the relief available to her. For example, if the misconduct allegations against Johnson are adequately proven, the court could justifiably refuse to order Durham Tech to reinstate her. For this reason, the court remanded the case on the issue of damages and remedies.

Court reinstates teachers' breach of contract action against Guilford County for adding instructional days to school calendar in the wake of Hurricane Floyd. Lea v. Grier, No. COA02-538, ___ N.C. App. ___, 577 S.E.2d 411 (2003).

Facts: Hurricane Floyd caused many school districts to lose instructional days to the extent that they could not satisfy the statutory requirement of a thousand hours of instruction within at least 180 days. Therefore the General Assembly enacted the Hurricane Floyd Recovery Act of 1999, which amended the school calendar to allow for a minimum of *either* 180 days or a thousand hours of instruction.

In response to this legislation, the Guilford County school board added thirty minutes of instructional time to each school day, changed six teacher workdays to instructional days, and adopted various other measures. Several teachers alleged that these changes violated North Carolina statutes concerning the maximum number of yearly teacher workdays, violated their constitutional right to equal protection of the laws, and breached their contract with the board. Before trial, the court granted the board's motion to dismiss the teachers' claims. The teachers appealed.

Holding: The North Carolina Court of Appeals reinstated the breach of contract claim but affirmed the dismissal of the teachers' other claims.

The teachers sought declaratory, injunctive, and monetary relief for their claim that the amended schedule violated G.S. 115C-84.2 (concerning the maximum number of teacher workdays a year) and G.S. 115C-301.1 (concerning required planning periods). They were not entitled to declaratory relief, began the court, because the action they complained about was a one-time occurrence, not a continuing violation; there would therefore be no benefit from having a court determine whether the calendar changes violated the statutes. Nor were the teachers entitled to a court order or monetary relief on their statutory claims, because neither of the statutes on which they were based allows a private right of action.

To survive a motion to dismiss their constitutional claim, the teachers would have had to show that the board's failure to adopt a uniform calendar policy applicable to all teachers within the county—some were allowed to count the extra thirty minutes toward optional workdays—was without a rational basis. They could not do so, because North Carolina statutes specifically allow differential treatment of teachers within the same district. The teachers thus failed to rebut the presumption that the action taken under statutory authority had a rational basis.

The teachers' contract with the board, however, did specifically mandate compliance with state law. Therefore, if, as the teachers allege, the calendar changes violated G.S. 115C-84.2 and G.S. 115C-301.1, they may be able to show breach of contract. This claim, the court held, should be allowed to go to trial.

Student who shouted profanity in school hallway appropriately found guilty of disorderly conduct. *In re.* M.G., No. COA02-487, ___ N.C. App. ___, 576 S.E.2d 398 (2003).

Facts: Scott Slocum, a teacher at Williston (N.C.) Middle School, heard M.G., a fourteen-year-old student at the school, shout "shut the f—k up" to a group of students in a hallway. At the time of M.G.'s shout, Slocum was on his way to cafeteria duty and classes were in session in four of the classrooms along this hallway. Slocum stopped his progress toward the cafeteria to escort M.G. to the detention center.

M.G. was charged with and found guilty of disorderly conduct. He appealed his conviction for lack of evidence.

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

Case law holds that disorderly conduct must cause a substantial interference with the operation of a school's educational mission. The court found M.G.'s conduct to be similar to that of a student in a recent case in which it found substantial interference and upheld a disorderly conduct conviction. [See digest of *In re Pineault* in "Clearinghouse," 33 *School Law Bulletin* (Fall 2002): 23]. In *Pineault*, a student said "f—k you" in a loud angry voice during class. The teacher had to stop class, escort the student to principal's office, and explain to office staff what had happened. All of this required her to be out of the classroom for several minutes, thus disrupting the operation of her classroom in a substantial manner. Similarly, M.G.'s conduct in this case deterred Slocum from performing his cafeteria duties for at least several minutes. This, to the court's mind, was sufficient to establish disorderly conduct.

Expelled law student's claims against North Carolina Central University dismissed on basis of sovereign immunity. Pfouts v. North Carolina Central University, No. 1:02CV00016, ___ F. Supp. 2d ___ (M.D.N.C., March 24, 2003).

Facts: A panel of the Student Disciplinary Committee expelled Felicia Pfouts from North Carolina Central University's (NCCU) law school for engaging in deliberately

deceptive and dishonest conduct to gain an unfair advantage on law school examinations. Pfouts appealed this decision, without success, from the law school's full faculty, to the NCCU chancellor, the NCCU Board of Trustees, the University of North Carolina's (UNC) president, and the UNC Board of Governors.

Pfouts then filed suit against NCCU as an institution in federal court for the Middle District of North Carolina. She made numerous claims under 42 U.S.C. § 1983 and other federal statutes. NCCU moved to dismiss her claims on the basis that the Eleventh Amendment barred them.

Holding: The court dismissed Pfouts's claims, finding that NCCU was protected from suit by sovereign immunity under the Eleventh Amendment. That amendment bars suits by individuals against a state in federal court. An individual can avoid this obstacle only if (1) the state has clearly waived sovereign immunity, (2) the case falls into a certain category of suits brought against state officials, or (3) Congress has validly abrogated the state's immunity by statute. In Pfouts's case, NCCU had not waived its immunity, there were no individual state defendants, and 42 U.S.C. § 1983 does not abrogate Eleventh Amendment immunity. Her claims were barred.

Court allows discrimination claimant to file a second, amended complaint. Jenkins v. Trustees of Sandhills Community College, No. 1:99CV0064, ___ F. Supp. 2d ___ (M.D.N.C., December 3, 2002).

Facts: Diane Jenkins, an African American woman representing herself before the federal court for the Middle District of North Carolina, filed discrimination charges against Sandhills Community College after she was terminated from her teaching position there. This digest concerns her motion to submit a second, amended complaint, which the college contested.

Holding: The court granted Jenkins's motion as to some of her proposed amendments and denied it as to others.

Under Federal Rule of Civil Procedure 15, leave to amend a complaint should be freely given unless the amendment (1) would cause prejudice to the other party, (2) is sought in bad faith, or (3) would add futile claims to the complaint. The court here found no evidence of prejudice or bad faith and so focused on the futility prong of this analysis.

Claims not found to be futile. Jenkins sought to add a claim under North Carolina's Whistleblower Act alleging that the college had retaliated against her for reporting a racial discrimination claim to the Equal Employment Opportunity Commission. As the North Carolina Court of Appeals had recently held that the act covers retaliation for reporting sexual harassment, the same rationale would support extending it to retaliation for reporting racial discrimination.

The court found no reason to deny Jenkins's motion to add claims under 42 U.S.C. §§ 1985 and 1986. Section 1985 creates a cause of action for intentional conspiracy to deprive a person of equal protection of the laws on the basis of race or some other class-based characteristic. Section 1986 imposes liability on those who know of the conspiracy but fail to prevent the perpetrators from acting on it. These claims were consistent with other claims already included in Jenkins's complaint.

The court also allowed Jenkins to modify her complaint to increase the amount of damages she sought as well as her motion to add parties to the suit. The court did caution Jenkins, however, that her request to add attorneys for the defendants as parties could constitute a frivolous claim for which she could be sanctioned under Rule 11 of the Federal Rules of Civil Procedure. If her claim against the attorneys is based solely on the contention that they conspired to deprive her of constitutional rights because of the positions they advocated in their defense of the college, its employees, and officers, she should be wary of making it.

Claims found to be futile. Jenkins also proposed to add a claim under Section 115D-30 of the North Carolina General Statutes (hereinafter G.S.), which grants certain rights to community college employees who object to material in their personnel files. As this statute does not provide for a private right of action, this claim would not survive a motion to dismiss and so could not be added.

Jenkins also sought to add criminal charges of perjury, subornation of perjury, and RICO (Racketeer Influenced and Corrupt Organization Act) violations against the college and its attorneys. However, contentions made in the motions stage of a lawsuit are not statements of material fact made under oath or affirmation and thus are not actionable under perjury or RICO statutes.

The court concluded its opinions by admonishing Jenkins to eliminate from her complaint extraneous material (case citations, excerpts from books and speeches, discussions of racism in society generally) and to describe only the specific conduct of which she complains.

Education provided to student with a disability by school located on United States air base should be judged under federal standard, not state standard. G. v. Fort Bragg Dependents Schools, 324 F.3d 240 (4th Cir. 2003).

Facts: The Fort Bragg Dependents School (FBDS) System developed an individualized education plan (IEP) for G., a student with autism, when he began attending school there during the 1994–1995 school year. At the end of the 1995–1996 school year, G.'s mother attended a conference on the Lovaas method and told G.'s teachers she believed the method held great promise for G. The IEP that FBDS proposed for G.

for the 1996–1997 school year contained no Lovaas techniques or methods, and his mother rejected it. During the summer and fall of 1996, G. began receiving Lovaas therapy at home, at his parents' expense. In November 1996 his parents requested that FBDS fund the in-home Lovaas therapy.

FBDS did not respond to this request. G. continued to receive Lovaas therapy at home and made significant progress. In April 1997 FBDS proposed another IEP for G., this time incorporating instructional methods and activities based on Lovaas therapy but failing to provide for the participation of a Lovaas-certified consultant. G.'s parents rejected this IEP and sought a due process hearing.

The federal court for the Eastern District of North Carolina awarded G. approximately $11,000 in compensation for November 1996 to April 1997 (the period in which the FBDS provided him with no education) but found that the April 1997 IEP did offer him a free appropriate public education (FAPE). The court denied G.'s request for compensatory education (apparently based on the contention that FBDS had denied him an FAPE beginning with the 1994–1995 school year) because his parents had raised no objections to any IEP before that proposed for 1996–97. G. appealed the ruling but not the $11,000 award.

Holding: The Fourth Circuit Court of Appeals reversed the district court ruling on several counts.

First, the court reversed the ruling that the April 1997 IEP provided a FAPE, because the district court had incorrectly applied the relevant legal standard. G. argued that the IEP's appropriateness should have been judged under the "full potential" standard of the North Carolina special education statute because FBDS operated within North Carolina. FBDS argued, successfully, that because the school is run by the Department of Defense the IEP should be judged under the more lenient "educational benefit" standard of the federal Individuals with Disabilities Education Act. Although the district court had correctly decided that the federal standard applied, it had applied that standard incorrectly. Instead of looking at the IEP to determine whether it was reasonably calculated to give G. educational benefit, the district court compared it to the program of Lovaas therapy G. had received at home to determine to what extent the IEP could replicate that program. On remand, the court must assess the IEP under the proper (that is, federal) standard.

The district court also erred in determining that G.'s request for compensatory education was barred by his parents' failure to object to the earlier IEPs. This conclusion was legally incorrect insofar as case law holds that a parent's failure to object to a child's placement does not deprive that child of the right to a FAPE. Nonetheless, the court noted, its reversal on this point was based only on the erroneous legal conclusion, not on the merits of the claim for compensatory education.

Court denies in part and grants in part school board's motion to dismiss job applicant's race discrimination claims. Denning v. Tyrell County Board of Education, No. 2:02-CV-24-BO(1), ___ F. Supp. 2d ___ (E.D.N.C. February 6, 2003).

Facts: Walter Denning, a white male with doctoral licenses as superintendent, principal, and curriculum specialist, claimed that the Tyrell County Board of Education discriminated against him on the basis of race in denying him employment. Denning applied for positions as principal and curriculum specialist with the board but, he contended, was rejected in favor of less-qualified African-American applicants. He filed race discrimination claims under 42 U.S.C. § 1983, Title VII, and state law. The board moved to dismiss these claims before trial.

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

Denning made three claims under Section 1983: by denying him employment, the board (1) violated the Equal Protection Clause; (2) deprived him of due process; and (3) violated the constitution, laws, and public policy of North Carolina. As to the first, the court rejected the board's contention that Denning's Title VII claim precluded an equal protection claim. (Some courts have held that as claims under both statutes involve allegedly discriminatory behavior, Title VII should provide the exclusive remedy). The court did, however, dismiss Denning's due process and state law claims. The mere expectation of employment is not a constitutionally protected property interest for which Denning was entitled to due process before being deprived of it; moreover, Section 1983 does not provide a remedy for violations of state law, only federal law.

Denning also sought punitive damages under Title VII. The court dismissed this claim as well, noting that under Title VII such damages are not available against government agencies or political subdivisions.

Finally, the court dismissed Denning's Claim under the North Carolina Equal Employment Practices Act (NCEEPA), because that statute does not provide for a private cause of action.

Former employee's Americans with Disabilities Act claim against university dismissed. Byrd v. North Carolina State University, No. 5:02-CV-112-BO(3), ___ F. Supp. 2d ___ (E.D.N.C., February 5, 2003).

Facts: Victor Byrd, formerly an employee of North Carolina State University's (NCSU) temporary services division, was terminated for excessive absenteeism. In response, Byrd filed a complaint against NCSU under the Americans with Disabilities Act (ADA). NCSU moved to dismiss the claim.

Holding: The federal court for the Eastern District of North Carolina granted NCSU's motion. The U.S. Supreme Court has held that employment discrimination claims against state entities filed under Title I of the ADA are barred by sovereign immunity. The U.S. Court of Appeals for the Fourth Circuit (with jurisdiction over North Carolina) has held that sovereign immunity also blocks suits against state entities brought under Title II of the ADA, which prohibits disability discrimination in the provision of public services. As NCSU is a state institution, Byrd's claim had to be dismissed.

Virginia Military Institute's supper prayer violates the Establishment Clause. Mellen v. Bunting, 327 F.3d 355 (4th Cir. 2003).

Facts: The federal court for the Western District of Virginia found that the Virginia Military Institute's (VMI) practice of reading a supper prayer to the assembled student body violated the Establishment Clause of the U. S. Constitution. The court found in favor of the two students (hereinafter the plaintiffs) who challenged the practice, and it issued an order declaring the practice unconstitutional and barring its future use. It declined to grant the plaintiffs monetary relief, because the official responsible for implementing the practice (General Josiah Bunting) was entitled to qualified immunity.

Bunting appealed the ruling that the prayer was unconstitutional, and the plaintiffs appealed the finding that Bunting was entitled to qualified immunity.

Holding: The Fourth Circuit Court of Appeals affirmed both rulings.

The Establishment Clause prohibits the state from engaging in actions that advance or inhibit religion. While there have been numerous cases in which the U.S. Supreme Court has held that a state is prohibited from sponsoring prayer in elementary and secondary schools, it has never directly forbidden state-sponsored prayer at a public college or university. The court first turned to this point.

The court identified two key standards under which the U.S. Supreme Court has adjudged the constitutionality of prayer in the educational setting. First, the *Lemon* test requires that a state practice (1) have a secular purpose, (2) that its principal or primary effect be neither to advance nor inhibit religion, and (3) that it not foster an excessive entanglement of government with religion. Second, in *Lee v. Weisman* [see digest in "Clearinghouse," 23 *School Law Bulletin* (Summer 1992): 23], the Court emphasized that the government may not coerce anyone to support religion or participate in its exercise. The VMI supper prayer, found the appeals court, was unconstitutional under both of these standards.

In regard to *Lemon*, the court noted the extreme difficulty of formulating a persuasive secular purpose for an act as intrinsically religious as prayer. Nonetheless, for the sake of argument, the court assumed that the prayer was secularly motivated. However, because the supper prayer sent an unequivocal message that VMI endorsed religious expression, and because VMI officials composed, mandated, and monitored the supper prayer, the practice failed the second and third prongs of *Lemon*.

More to the point, however, the court found the supper prayer unduly coercive. To accomplish its mission of creating citizen-soldiers, VMI uses an adversative education model that involves a punishing system of indoctrination predicated on the importance of making students doubt their existing beliefs and experiences in order to create a mindset conducive to accepting the values VMI attempts to impart. This system, concluded the court, makes VMI cadets uniquely susceptible to coercion in regard to participation in the supper prayer.

Despite its finding of unconstitutionality, the court declined to hold General Bunting liable for the prayer practice. A state official is immune from suits for damages unless he or she has violated clearly established statutory or constitutional rights of which a reasonable person would have known. Because of the uncertainty as to whether, and in what circumstances, prayer practices in the university setting are constitutional, the court concluded that Bunting could reasonably have believed that the practice was acceptable.

Probationary teacher's discrimination claims dismissed for failure to show satisfactory job performance. King v. Rumsfeld, 328 F.3d 145 (4th Cir. 2003).

Facts: Alfred King, an African American man, was terminated from his probationary teaching position with the Department of Defense (DOD). He filed suit alleging that he was terminated because of race and sex discrimination and in retaliation for filing a discrimination complaint with the Equal Employment Opportunity Commission (EEOC). The federal court for the Eastern District of Virginia granted judgment for the DOD before trial, and King appealed.

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

To survive the DOD's motion for judgment before trial, King was required to show (1) that he was a member of a protected class, (2) that he suffered adverse employment action, and (3) that at the time of the adverse action his job performance satisfied his employer's legitimate expectations. King failed to show that he had fulfilled the third element of this scheme. In support of his claim that his job performance was satisfactory, King offered two kinds of evidence: his own testimony and testimony from his co-workers that his lesson plans were substantially comparable to theirs. His own testimony, the court stated, cannot establish this point; nor can the testimony of his co-workers, insofar as proof that their work was similar to his does not speak to either the DOD's

legitimate job expectations or whether King's performance met them.

King did meet the requirements for an initial showing that his termination was retaliatory: he filed a discrimination complaint with the EEOC and he was terminated; these two events were sufficiently close in time to lead to an inference of retaliation. However, King failed to rebut the DOD's assertion that it had a legitimate, nonretaliatory motive for his termination—unsatisfactory performance. King offered evidence that a similarly situated white probationary teacher was not terminated and that his supervisor picked on him, asked colleagues for negative reviews of his work, and ultimately told him that black people always file discrimination complaints when they "screw up." This information did not, however, contradict the DOD's assertion that his job performance was subpar. Because it failed to rebut that assertion, his evidence of retaliatory motive was of no use to him.

Extended school year services not required to help student with autism make reasonable progress toward goals contained in his individualized education plan. JH v. Henrico County School Board, 326 F.3d 560 (4th Cir. 2003).

Facts: JH, a student with autism in the Henrico County (Va.) School System, brought suit against the school board seeking reimbursement for the cost of speech and occupational therapy services he received during the summer of 2001. The board had offered JH extended school year (ESY) services but not at a level that his parents deemed satisfactory. A state hearing officer ruled that JH was entitled to receive ESY services from the board at a level higher than the board had offered; the goal of such services should be amended from the board's goal of "maintaining progress already made," to the goal of "making reasonable progress" toward aims set out in JH's individualized education plan (IEP). The hearing officer did not address the issue of reimbursement for expenses his parents had already incurred in obtaining the requested services.

JH appealed, again seeking reimbursement, but also arguing that the officer had erred in requiring only "reasonable progress" as the goal of the ESY services. He instead contended that the goal should be "mastery" of the aims unmet under his existing IEP. The board appealed as well, disputing the level of speech and therapy services ordered by the hearing officer. The district court, using the "reasonable benefit" standard, found that the ESY services offered by the board were sufficient to provide JH with educational benefit.

JH appealed again, but during the course of that appeal, the Fourth Circuit Court of Appeals issued its opinion in *MM v. School District of Greenville County*. [See digest in "Clearinghouse," 33 *School Law Bulletin* (Fall 2002): 21–22.] In that case, the court held that ESY services are necessary only when the benefits a child with disabilities gained during the regular school year will be significantly jeopardized if ESY services are not provided. JH's appeal was thus reviewed under this standard.

Holding: The Fourth Circuit Court of Appeals vacated the district court opinion and sent the case back to the hearing officer for further hearings.

The court found that both the hearing officer and the district court had reviewed the board's offer of ESY services under the wrong standard—the "reasonable progress" standard. They thus failed to obtain evidence needed to determine whether the level of ESY services offered by the board was adequate to prevent JH's regular school year progress from being significantly jeopardized. More evidence on this issue is required to address that issue.

Other Cases

School district not immune from discrimination claims of lesbian student. Massey v. Banning Unified School District, 256 F. Supp. 1090 (C.D. Cal. 2003).

Facts: Ashly Massey, an eighth-grade student at Coombs Middle School in the Banning Unified School District (Calif.), answered "yes" when a friend asked her if she was a lesbian. The next day Karen Gill, the school physical education teacher, barred Massey from gym class and told her she was to spend the period sitting in the principal's office. A week and a half later, Massey's mother was informed of the ban when she called the vice principal, Kirby Dabney, to discuss an unrelated matter. No school official ever alleged that Massey behaved inappropriately, only that her presence made other students feel uncomfortable.

Massey filed suit against the district and its officials, in their official and private capacities, under 42 U.S.C. § 1983 (and under other California laws not discussed in this digest), seeking declaratory and injunctive relief as well as punitive damages. The defendants moved to have the claims dismissed before trial, asserting various immunities from suit.

Holding: The federal court for the Central District of California denied the defendants' motion.

The court first rejected the defendants' contention that they were protected from suit by sovereign immunity. The Eleventh Amendment to the U. S. Constitution bars suits against state entities in federal court when claimants seek money damages. Massey acknowledged that she could not collect such damages from the board or from individual defendants acting in their professional capacities. She could, however,

obtain declaratory and injunctive relief against them, as well as damages against the individual defendants in their personal capacities. Therefore the Eleventh Amendment did not require dismissal of her claims.

The court also rejected the claim by individual defendants that they were entitled to qualified immunity. They were protected from suit, they argued, because the right to be free from discrimination based on sexual orientation was not clearly established in case law; neither the U.S. Supreme Court nor the Ninth Circuit (the federal court with jurisdiction over California), they said, had decided cases involving facts closely analogous to those present in the Massey situation. To determine the persuasiveness of this claim, the court examined whether Massey had in fact alleged a constitutional rights violation and, if so, whether that right was clearly established at the time of violation.

As to the first prong of the inquiry, the court quickly found that arbitrary discrimination on the basis of sexual orientation violates the Equal Protection Clause of the U.S. Constitution. Massey's exclusion from physical education class because she was a lesbian clearly fits into this category of violation. The court also concluded that the right to be free of such discrimination was clearly established at the time the defendants acted. The defendants were incorrect in asserting that the legal standard for determining whether they had fair notice that their conduct was unconstitutional required "closely analogous" case law. Given the number of cases from across the nation holding that sexual orientation discrimination violates the Equal Protection Clause, the defendants could not immunize themselves from suit because another case with nearly identical facts has not been decided in the Ninth Circuit.

The court also rejected the argument that the individual defendants were entitled to immunity because their actions were a reasonable attempt to protect Massey from harassment by other students. Massey never complained of such harassment and, in any event, barring her from class would not have been a constitutionally permissible response had she done so. ■