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

Court affirms breach of contract judgment against the University of North Carolina at Chapel Hill but reverses award of interest on the judgment. RPR & Associates, Inc. v. the University of North Carolina at Chapel Hill, ___ N.C. App. ___, 570 S.E.2d 510 (2002).

Facts: The University of North Carolina at Chapel Hill (Carolina) hired RPR & Associates to construct the George Watts Hill Alumni Center on campus. After completing the project, RPR sued the university for breach of contract, alleging that Carolina had made performance of the contract more difficult and caused unforeseen extracontractual expenses.

The university moved to have the complaint dismissed on the basis of sovereign immunity. The trial court denied the motion, finding that by entering into a contract with RPR, Carolina had waived its immunity. The court then denied its request to stay proceedings while the university appealed this ruling. Ultimately, trial was held on the matter after Carolina's appeal was heard by the Court of Appeals but before that court rendered a ruling on the immunity claim. The trial court found that the university had breached its contract with RPR and awarded RPR roughly $850,000 in damages and $750,000 in interest.

The university appealed the ruling, contending that the trial court erred in (1) continuing proceedings once the university gave notice of its appeal; (2) awarding excessive damages; and (3) assessing interest on the damages.

Holding: The North Carolina Court of Appeals affirmed the ruling in part and reversed it in part.

The trial court did not err in continuing proceedings after Carolina gave notice of its appeal. In the first instance, the trial court is empowered to determine whether its ruling affects a substantial right of a party and is immediately appealable. If the court so determines, it will stay further proceedings while the appeal is pending. Otherwise, the court may continue its proceedings. The court of appeals agreed with the trial court's ruling that because Carolina had waived its immunity, the appeal did not affect any substantial right of the university. The court of appeals also found that the trial court's damage award was supported by ample evidence.

The trial court erred, however, in assessing interest on the damage award. The general rule is that interest is not recoverable against the state unless expressly authorized by statute or contract. RPR argued that its contract with the university authorized such interest: the contract cited G.S. 143-134.1, which authorizes assessment of interest on past-due payments for public construction contracts after forty-five days. However, the court of appeals noted, RPR had never claimed that Carolina failed to pay monies owed under the contract, and the trial court never made such a finding. Instead, RPR claimed, and the trial court found, that the university's actions caused RPR to incur unexpected extracontractual expenses. The damage award was thus not an award of overdue payments subject to interest.

Fines levied by local clean air agency for violations of local ordinances, collected under authority granted by the state, are penalties and forfeitures payable to the county schools. Donoho v. City of Asheville, ___ N.C. App. ___, 569 S.E.2d 19 (2002), *cert. denied*, 567 S.E.2d 110 (N.C., Jan. 6, 2003).

Facts: The City of Asheville and Buncombe County formed a local agency, the Western North Carolina Regional Air Quality Agency. This pollution control agency was set up, and collected fines for violations of local air quality ordinances, under authority granted by the state Environmental Management Commission (EMC). The agency intended to use the proceeds of the fines it levied to fund a clean air trust to improve air quality in the community. However, the Buncombe County Board of Education demanded that the agency turn the proceeds over to the school board. The agency refused, and Betty Donoho, a resident of Asheville, and later

Ingrid M. Johansen is a research fellow at the Institute of Government.

the board of education, sued the pollution control agency to obtain the funds.

The trial court granted judgment before trial to the agency, concluding that the county schools were not entitled to the funds. Donoho and the board appealed.

Holding: The North Carolina Court of Appeals ordered the lower court to reverse its judgment in favor of the agency and to grant judgment in favor of Donoho and the board.

G.S. 115C-457.2 provides that the clear proceeds of all civil penalties and forfeitures collected by a state agency are payable to the County School Fund. The pollution control agency argued that the fines in this case were collected by a local agency for violations of local regulations. Donoho and the board argued that since the only authority the agency had for its existence, implementation of regulations, and collection of fines came from the state and the EMC, the fines were effectively collected by a state agency and payable to the school fund.

The court agreed with Donoho and the board. The statutory scheme under which the EMC operates allows a local agency to act in lieu of the state so long as it adopts pollution control standards that are at least as strong as the state's. The EMC will supplant a local agency that fails to abide by state standards. The local agency, in effect, operates as a state agent. And while the fines collected by a local pollution control agency are not remitted to the state treasurer, they still accrue to the state—as opposed to a private person. Finally, the court noted, it would be odd if fines for violations of state-mandated air quality standards were payable to local school boards in all counties where the EMC enforces laws but were directed elsewhere in counties with local programs.

Former baseball coach's discrimination claims dismissed for improper service. Calder v. Stanly County Board of Education, 2002 WL 31370364, ___ F. Supp. 2d ___ (M.D.N.C. 2002).

Facts: Leroy Calder became the head coach of the varsity baseball team at South Stanly High School during the 1994–1995 academic year. In March 1999 he missed some work because of a mild heart attack. In the beginning of 2000 he had a slight stroke, a knee infection, and a blocked carotid artery that caused him to miss more work. Stanly High's principal, Robert Patterson, installed an interim head coach and, citing concerns for Calder's health, asked him to resign his position. Calder declined, and Patterson removed him from the position.

Calder then filed suit, alleging that Patterson, Stanly County Superintendent Jeff Moss, and the Stanly County Board of Education had discriminated against him on the basis of disability. He attempted to serve his complaint on the board by leaving a copy of it with Mark Lowder, the board's attorney, and attempted to serve Moss by leaving a copy with his secretary, Vickie Lisk. Patterson apparently received his copy personally. The board and Moss moved to dismiss Calder's complaint on the grounds of improper service.

Holding: The federal court for the Middle District of North Carolina granted the motions to dismiss without prejudice, which means that Calder can refile his complaint once he has achieved proper service.

North Carolina law provides that a complainant may serve a board of education by delivering a copy to an officer or director of the board, or to an agent or attorney authorized to accept service on the board's behalf. Lowder, though the board's attorney, was not authorized to accept service on its behalf. Calder argued that service on Patterson, who acted as an agent of the board in its educational functions, was sufficient for service on all defendants. As Patterson was not authorized to accept service for the board, or for Moss, serving him did not meet the statutory requirements.

Service on an individual must be made to the individual himself or herself, or to an authorized agent. Calder's delivery of his complaint to Moss's secretary did not satisfy this requirement.

Court addresses motions to dismiss former teacher's sexual harassment claims. Barbier v. Durham County Board of Education, 225 F. Supp. 2d 617 (M.D.N.C. 2002).

Facts: Lori Barbier began working as a chorus teacher at Githens Middle School in October 1998. Barbier alleged that at that time, and through the summer of 1999, the principal of Githens Middle School, Brandon Smith, created a sexually hostile work environment by engaging in sexually explicit and suggestive behavior toward her. Her complaint contains a lengthy list of incidents.

In September 1999, Barbier informed Smith that his inappropriate behavior toward her must stop. She reported Smith's behavior to the arts coordinator and choral music consultant for the Durham Public Schools, who told her to focus on her work and drop her sexual harassment complaint, lest she lose her job. Barbier then carried her complaint to the superintendent for curriculum who, instead of documenting her complaint, referred her to another superintendent. Feeling that her complaint was being ignored, Barbier instead called the National Education Association (NEA). After the NEA pursued the matter, Smith was placed on suspension in February 2000.

In April 2000 Githens's interim principal, Delia Robinson, encouraged Barbier to find employment at another school. In May Robinson notified her that her contract would not be renewed unless she met proper licensing requirements. Despite presentation of appropriate documents and attempts to procure a provisional license, her contract was not renewed.

Barbier filed suit against the Durham County Board of Education, alleging sexual harassment, retaliation, wrongful discharge, negligent infliction of emotional distress, and negligent retention and supervision of Smith. She filed a negligent infliction of emotional distress claim against Smith. Both defendants moved to have Barbier's claims dismissed before trial.

Holding: The federal court for the Middle District of North Carolina denied the motion to dismiss most of Barbier's claims, but granted it as to a few.

The court dismissed the claim of negligent infliction of emotional distress against Smith because *negligent* behavior is the failure to exercise an appropriate level of care. Sexual harassment does not result from negligence: It is intentional behavior.

The court declined to dismiss Barbier's sexual harassment claim. The board argued that the court should dismiss Barbier's sexual harassment claim because Title VII, the statute under which she filed it, has a 180-day filing deadline. The last act of harassment Barbier alleged occurred in September 1999, yet she didn't file suit until July 2000. The court refused to allow the board to rely on the 180-day rule because of the pressure its agents put on Barbier to stop her pursuit of her claim. The court also rejected the board's contentions that Barbier failed to show that Smith's conduct was either unwelcome or severe and pervasive enough to give rise to an actionable claim. The court noted that Barbier asked Smith to stop, making clear that his behavior was unwanted. Allegations that Smith grabbed Barbier's buttocks and kissed her with his open mouth were sufficient to satisfy the severity and pervasiveness requirements at this stage of the proceedings.

The court also rejected the board's motion to dismiss Barbier's retaliation claim. The board asserted that license problems, not retaliation, were the reason for Barbier's nonrenewal. The court found, however, that Barbier's evidence that she presented proper documentation and was nonetheless not renewed, coupled with the proximity in time between Smith's suspension and her nonrenewal, presented sufficient facts to create an inference of retaliation.

Barbier's negligence claims against the board also survived the motion to dismiss. Despite the board's argument that Barbier failed to allege severe emotional distress, the court found that the anxiety she complained of was sufficient to support a claim of negligent infliction of emotional distress. Further, her negligent supervision and retention claim was supported by evidence that the board knew, or should have known, of Smith's behavior yet failed to take appropriate action to stop it.

The court did dismiss two of Barbier's claims against the board. First, it dismissed her claim of wrongful discharge under North Carolina's Equal Employment Practices Act, finding that the statute did not create a private cause of action for claims like hers. Second, it dismissed her claim for punitive damages, noting that public school boards are considered municipalities in North Carolina, and municipalities are immune from punitive damages.

Student with disabilities was offered a free appropriate public education. MM v. School District of Greenville County, 303 F.3d 523 (4th Cir. 2002).

Facts: In September 1995 the Greenville County (S.C.) school district prepared an individualized education plan (IEP) for MM, a student with disabilities. The plan, approved by MM's parents, placed MM in a preschool for one day a week and provided weekly speech and physical therapy and monthly occupational therapy. Her parents approved the once-a-week preschool because it allowed them time to implement Lovaas therapy (for autism) in their home. By the end of the 1995–1996 school year, MM had made educational progress.

In May 1996 the IEP team reconvened to develop a new IEP for the 1996–1997 school year. The team proposed a plan building on the 1995–1996 model. The plan did not include extended school year (ESY) services. MM's parents did not sign the IEP. Later that month, they filed a request for reimbursement for the in-home Lovaas therapy MM had been receiving. The district rejected the request, held another unsuccessful IEP meeting, and scheduled another one; but MM's parents cancelled that meeting and withdrew MM from the district schools. For the 1997–1998 school year, the district asked for the opportunity to reassess MM and develop another IEP for her, but her parents refused. The district did not offer an IEP for that year.

In March 1998, MM's parents requested a due process hearing concerning the IEPs for the 1995–1996, 1996–1997, and 1997–1998 school years. At the first hearing, the hearing officer concluded that the IEPs offered for the first two years were legally sufficient and that the district had not been required to offer an IEP for the 1997–1998 school year. He did find, however, that the district should have offered MM ESY services for the summer of 1997 and ordered the district to reimburse MM's parents $3,600 for summer expenses. MM's parents appealed to a reviewing officer, who affirmed the ruling below, except for the ESY finding.

MM's parents then appealed to the federal court for the District of South Carolina, alleging—in addition to the claims they asserted before the hearing officers—that the district inappropriately failed to offer MM an IEP for the years 1998–1999 and 1999–2000. The court found that, contrary to the conclusions of both hearing officers, the 1995–1996 IEP had not provided MM with a free appropriate public education (FAPE). On this basis, the court awarded MM's parents

$5,500 in damages, $2,000 in prejudgment interest, and $42,000 in attorney fees. The court affirmed the second review officer's ruling in all other respects. As to the claims concerning 1998–1999 and 1999–2000, the court ruled that MM's parents had failed to exhaust their administrative remedies and dismissed these claims. MM's parents appealed again.

Holding: The Fourth Circuit Court of Appeals reversed the district court's ruling on the 1995–1996 IEP but affirmed the rest of the ruling.

In ruling that the 1995–1996 IEP was legally insufficient, the district court inappropriately substituted its judgments about educational policy for that of professional educators and failed to give due weight to the findings of state administrative officers. In addition, the district court failed to take into account that MM actually made educational progress under the IEP, instead concluding that the IEP was not *reasonably calculated* to provide educational benefit. By refusing to evaluate the objective indicators of educational benefit, the court substituted its own personal views for the judgment of educators. As MM did achieve educational progress under the IEP, she had received a FAPE.

The court of appeals essentially agreed with the rest of the district court's ruling but expanded on its conclusion that the district was not required to provide MM with ESY. Extended school year services are only necessary, the court held, when the benefits a child gains during the regular school year will be significantly jeopardized if he or she is not provided with education during the summer months. The mere fact of likely regression is insufficient to require such services, as all students, disabled or not, may regress to some extent during the summer break.

School district does not fail to provide a free appropriate public education to a student with disabilities merely because it violates a procedural provision of the Individuals with Disabilities Education Act; the violation must actually interfere with the education of the child. DiBuo v. Board of Education of Worcester County, 309 F.3d 184 (4th Cir. 2002).

Facts: Mark DiBuo was a student with disabilities in the Worcester County (Md.) schools. In March 2000, school officials met with the DiBuos to prepare an individualized education plan (IEP) for Mark. The DiBuos agreed with the proposed IEP as far as it went but argued that Mark should also receive extended school year services (ESY) for the summer of 2000. In support of their position, they presented evaluations from three professionals; the school officials refused to look at them and declined to provide ESY services. Although the DiBuos refused to sign the IEP because of the absence of ESY, Mark received the services outlined in the IEP during the remainder of the school year. The DiBuos paid for the therapeutic services Mark received over the summer.

The DiBuos sought a due process hearing to recover the cost of ESY services from the Worcester County school board. The administrative law judge (ALJ) concluded that the refusal of school officials to review the evaluations submitted by the DiBuos violated the Individuals with Disabilities Education Act (IDEA). The ALJ went on, however, to state that not every procedural violation of the IDEA warrants granting the relief requested. In this case, since Mark was not denied a FAPE, and since the evidence did not establish that ESY services were warranted, the ALJ found for the board. The DiBuos appealed, and the federal court for the District of Maryland ruled that the procedural violation was significant enough to seriously infringe the DiBuos's right to participate in the IEP formulation process and that Mark and his parents were necessarily substantively harmed by it. The court ordered the board to reimburse them for the ESY expenses. The board appealed.

Holding: The Fourth Circuit Court of Appeals reversed, stating that existing case law has well established that a procedural violation of the IDEA alone cannot support a finding that a board failed to provide a student with disabilities a FAPE. The violation must have *actually interfered* with the provision of FAPE before a student and parents are entitled to relief under the IDEA.

Breach of contract claim against the University of North Carolina at Chapel Hill is not barred by sovereign immunity. Kawai America Corporation v. University of North Carolina at Chapel Hill, 152 N.C. App. 163, 567 S.E.2d 215 (2002).

Facts: Piedmont Music Company, a dealer of Kawai pianos, entered into a contract to provide pianos to the University of North Carolina at Chapel Hill. At the end of the agreement, Piedmont alleged that several of the pianos returned were damaged and that several pianos were not returned at all. Piedmont filed suit against the university, bringing claims of breach of contract or, in the alternative, conversion (in lay terms, *theft*) and damage to property. The university sought to dismiss the second and third claims on the basis of sovereign immunity.

Holding: The North Carolina Court of Appeals granted the university's motion in part and denied it in part.

The court began by noting that the university acted appropriately in not moving to dismiss Piedmont's breach of contract claim: When the state enters into a contract, it implicitly consents to be sued for damages if it breaches that contract. The court went on to find that the damage to property claim was merely a request for damages for liability stemming from the contract between the parties. The conver-

sion claim, however, involved an intentional wrong. Although the state Tort Claims Act waives state immunity for negligence claims brought before the Industrial Commission, it does not waive sovereign immunity for intentional torts.

Employee's unsworn and unnotarized letter to the Equal Employment Opportunity Commission was a valid discrimination complaint. Edelman v. Lynchburg College, 300 F.3d 400 (4th Cir. 2002).

Facts: Leonard Edelman sent a letter to the Equal Employment Opportunity Commission (EEOC) alleging that he was denied tenure at Lynchburg College because of his gender. This letter was not signed or notarized (also called *verified*) until after the deadline for filing a complaint had passed, and the college argued that this omission was fatal to his case. Edelman argued that Title VII regulations allowed him to verify his complaint after the date for filing so long as his letter outlined the substance of his case. The Fourth Circuit Court of Appeals found the Title VII regulation invalid and dismissed Edelman's case.

Edelman appealed, and the U. S. Supreme Court upheld the regulation. [See digest of *Edelman v. Lynchburg College*, in "Clearinghouse," 33 *School Law Bulletin* (Spring 2002): 17–18.] The Court then remanded Edelman's case to the Fourth Circuit for further hearing on the issue of whether his letter otherwise met the requirements of a valid complaint. Specifically, the college argued that because the EEOC failed to treat Edelman's letter as a complaint—by failing to assign it an EEOC number, forward it to the college, or forward it to the state human rights commission—it was never a valid complaint.

Holding: The Fourth Circuit Court of Appeals rejected the college's argument. The problems the college raised, the court said, were not problems with Edelman's charge but failures of the EEOC to carry out its Title VII responsibilities.

Student's conviction of injury to real property and two counts of disorderly conduct was appropriate. In the Matter of Brandon Pineault, 152 N.C. App. 196, 566 S.E.2d 854 (2002), *rev. denied*, 356 N.C. 302, 570 S.E.2d 728 (2002).

Facts: After repeated incidents of profanity-laced classroom interruptions at Piney Grove (N.C.) Middle School, student Brandon Pineault was taken to the principal's office. According to Principal Roger Lee Tucker, Pineault was behaving in a disorderly fashion, and several staff people attempted to calm him down. When these attempts failed and Pineault refused to enter Tucker's office, Tucker restrained Pineault by holding his trunk and pinning his arms to carry him into his office. Pineault began kicking, and continued kicking all the way down the hall, damaging the wall.

A trial court found Pineault delinquent on the basis of violations of North Carolina statutes prohibiting injury to property and prohibiting disorderly conduct in school. Pineault appealed.

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

Pineault argued that he was improperly convicted of injury to property because there was insufficient evidence that he willfully damaged property. The court disagreed. The law presumes that a person intends the natural and foreseeable consequences of his actions: The natural and foreseeable consequence of kicking wildly down the hall is wall damage.

Pineault also argued that his conduct did not create a disruption sufficient to find him guilty of disorderly conduct in school. Conduct punishable under the disorderly conduct statute must cause "substantial interference with, disruption of and confusion of the operation of the school in its program of instruction." That Pineault's conduct caused his teacher to stop teaching, escort him to the principal's office, and spend several minutes there explaining the situation proves that his conduct substantially interfered with classroom instruction. That Pineault's conduct caused Tucker to physically restrain him is proof of yet another substantial interference with the orderly functioning of the school.

Nonrenewed professor failed to present evidence of age discrimination. Kambon v. St. Augustine's College, No. 5:00-CV-884-BR(3), ___ F. Supp. 2d ___ (E.D.N.C. July 30, 2002).

Facts: Kamau Kambon served as an assistant professor at St. Augustine's College under a series of annual contracts from 1982 to 2000. Between 1990 and 1998, he served as coordinator of elementary education. He then became coordinator of social studies education. In 1999 and 2000, he taught several courses required for a degree in elementary education. In 2000, the college declined to renew his contract for the 2000–2001 academic year. At the same time, the college also declined to renew the contracts of several other professors, nine out of ten of them older than age forty. Of the sixty-seven faculty members retained, fifty-four were forty or older. Kambon filed suit, alleging age discrimination in his nonrenewal. The college asked the court for judgment in its favor before trial.

Holding: The federal court for the Eastern District of North Carolina granted summary judgment for the college.

Kambon offered four kinds of evidence to show that the college did not treat his age neutrally in deciding not to renew his contract: (1) the testimony of colleagues; (2) data regarding renewed and nonrenewed faculty; (3) the delay in the college's explanation for his nonrenewal; and (4) the

college's disregard of his experience in the field of elementary education.

The court noted that the personal speculations of Kambon and his colleagues as to the reasons for their nonrenewals did not constitute evidence of age discrimination. The court also rejected Kambon's data that nine of ten of the nonrenewed professors were older than age forty. The court pointed out that the sample was too small to be useful and, further, that statistical data is generally not accepted in such cases absent expert testimony to explain it. In addition, fifty-four of the sixty-seven remaining faculty members were also over the age of forty.

The court did find the college's delay in giving Kambon a reason for his nonrenewal somewhat suspicious. But, as the explanation put forth by the college in its court documents—that the college was trying to save money by eliminating programs that failed to attract a sufficient number of students—matched the explanation the college gave to another nonrenewed professor, the court found it credible.

The court also rejected Kambon's final claim, that the college's refusal to transfer him to the department of elementary education, where he had significant experience, showed that age was the real reason for his dismissal. Although the court was somewhat distrustful of the college's actions in this respect, it concluded that they did not constitute evidence of age discrimination. Too many other factors could have accounted for the decision to find that it was motivated by age discrimination.

Court dismisses principal's cross-claim against board of education. Kirkcaldy v. Richmond County Board of Education, Marcus Smith v. Richmond County Board of Education, 212 F.R.D. 289, ___ F. Supp. 2d ___ (M.D.N.C. 2002).

Facts: Elizabeth Kirkcaldy alleged that Marcus Smith, principal of the Leak Street Alternative School in the Richmond County (N.C.) school system, sexually harassed her for almost a year while she worked at the school. After an investigation, the board held a hearing at which Smith was allowed to present evidence in his defense. At the end of the hearing, the board voted to dismiss him. Smith appealed that decision through the North Carolina courts, and it was affirmed each time.

When Kirkcaldy brought suit against Smith and the board on her sexual harassment (and other) claims, Smith filed a cross-claim against the board under 42 U.S.C. § 1983, alleging that it had violated his due process rights in the way it had terminated him. The board sought to have Smith's claim dismissed, arguing that he had already litigated the matter in state court and that it was not properly filed as a cross-claim in Kirkcaldy's action.

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

The court rejected the board's argument that Smith's claim was barred by *res judicata* (that is, the contention that he had already had the opportunity to litigate it in state court). Smith's state court actions requested review of the board's decision to terminate him. His federal court action was brought under a federal statute and alleged that the process by which the board terminated him violated his due process rights. Since the two matters raised different issues, *res judicata* does not bar Smith's claim.

The federal rules of procedure concerning cross-claims do, however, bar Smith's claim. Specifically, Federal Rule of Procedure 13(g) provides that one party may file a cross-claim against a co-party so long as it arises out of the same occurrence that is the subject of the original suit. The board argued that Smith's action, which concerned his dismissal, did not arise out of the same incidents as Kirkcaldy's harassment claim. The court agreed, finding that the two claims involved different issues of fact and law that, though related causally and chronologically, were logically unrelated.

Smith argued that even if his claim did not satisfy the requirements of Rule 13(g), he should be allowed to assert it under Rule 13(b)'s provisions concerning permissive counterclaims. That rule allows a party, at the court's discretion, to file a claim against an opposing party, even when it doesn't arise out of the same occurrence that is the subject of the opposing party's claim. But Smith and the board, the court found, were not opposing parties. Smith argued that they were because the board filed a claim for indemnification (essentially repayment of any damage award) against Smith. The court held, however, that legal precedent established that claims for indemnification—without other substantive claims—do not transform codefendants into opposing parties. Thus Smith's claim did not qualify for consideration under Rule 13(b).

Hispanic medical school resident failed to state claim for discrimination on the basis of race, color, and national origin. Jane v. Bowman Gray School of Medicine, 211 F. Supp. 2d 678 (M.D.N.C. 2002).

Facts: Dr. Julio Jane, a Hispanic man, was a resident in the psychiatry resident training program at Wake Forest University's Bowman Gray School of Medicine and Baptist Hospital from July 1, 1994 through May 31, 1996. Prior to entering this program, Dr. Jane was a resident at Duke Medical School. His contract with Duke "was not renewed after his second year of a four-year residency because he was not performing at the level of the other second year residents." In September 1994, Jane received performance evaluations that he believed were discriminatory. The evaluations in-

cluded language attributing his interpersonal "rubs" with others to possible language or expression problems. During the same period, he submitted a letter to the director of residency education, Dr. Kramer, criticizing a particular rotation. Thereafter, Jane alleged, Kramer had it in for him.

In May 1995, Jane was called before the Educational Policy Committee (EPC) to discuss problems he was allegedly having with tardiness, attendance, and staff and patient relations. During this meeting, Jane felt that the criticisms he received were based on his ethnicity. At the end of the meeting, Kramer stated that he felt Jane's problems had been adequately addressed, and he made special note of Jane's accomplishments during the semester.

Nonetheless, subsequent evaluations identified the same problems with Jane's performance, as well as concern over a potentially unethical relationship with a patient. As a result of these performance evaluations, the EPC placed Jane on probation, setting specific conditions he was to meet to correct his problems. Although Kramer subsequently noted substantial improvement in Jane's performance, another supervisor noted significant concerns about his performance and asserted that his abrupt manner had prompted patient complaints. This evaluation, in combination with Jane's failure to satisfy other conditions of his probation, caused Kramer to issue Jane a final warning.

Two final incidents led to Jane's termination from the program. First, Jane allegedly improperly continued to refill a patient's medication without follow-up, failed to document the refills, lied about them to a supervisor, and became threatening with the patient's wife when she revealed the story. The second incident involved one of Jane's patients who was a known suicide risk. She telephoned repeatedly asking to speak to Jane, but he apparently did not return her calls. She subsequently attempted suicide.

Following his termination, Jane filed suit against the school and individual supervisors (the defendants). His first claim, under 42 U.S.C. § 1983, was that the defendants, acting under color of state law, deprived him of free speech, equal protection, and due process. He also alleged race, color, and national origin discrimination under Titles VI and VII of the Civil Rights Act. The defendants moved for judgment before trial.

Holding: The federal court for the Middle District of North Carolina granted judgment for the defendants.

The court first dismissed Jane's § 1983 claim because Bowman Gray Medical School and Wake Forest University are not public universities. Section 1983 only allows suits against persons acting with the authority of state law.

The court granted judgment to the defendants on the discrimination claims because Jane failed to present evidence that the reason for his termination given by the defendants was a pretext for discrimination. The evidence submitted revealed adequate basis for their concern about Jane's performance.

Employee whose work year was reduced from twelve to ten months stated no claim against her employer or supervisors. Swaim v. Westchester Academy, 208 F. Supp. 2d 579 (2002).

Facts: Brenda Swaim, fifty-seven years old, started at Westchester Academy thirty-four years ago as a bus driver. She later moved into the position of receptionist and director of transportation. She served under a series of annual contracts. In 1998, headmaster Peter Cowen attempted to change Swaim's status from year-round employee to nine-month employee. After Swaim complained to the school's board of directors, she was continued as a year-round employee.

In 2000, Harry Lejda was appointed assistant headmaster and Swaim's direct supervisor. From the beginning, their relationship was very contentious, with Lejda allegedly berating Swaim frequently for inferior performance—both orally (in front of others) and in memos. Swaim alleged several other incidents of misbehavior by Lejda, including rifling through her file drawers and inappropriately adding to her duties. Swaim filed a charge of sex and age discrimination with the Equal Employment Opportunity Commission (EEOC), which issued her a right-to-sue letter.

In 2001, Swaim received a contract from Cowen offering her employment for ten months of the 2001–2002 school year. She was the only twelve-month employee to receive a ten-month contract that year. However, the vast majority of Westchester's other employees, including the only other receptionist, were already on ten-month contracts. When Swaim filed her discrimination claim in federal court, she also alleged retaliation for her EEOC complaint, breach of contract, and infliction of emotional distress.

Before trial Cowen, Lejda, and Westchester sought to dismiss some of Swaim's claims and sought judgment in their favor on others.

Holding: The federal court for the Middle District of North Carolina granted the defendants' motions.

The court dismissed Swaim's claims against Cowen and Lejda personally because neither the Age Discrimination in Employment Act nor Title VII allows claims against individual supervisors, only against employers. Further, neither Cowen nor Lejda was a party to Swaim's contract: her contract was with Westchester Academy. Finally, none of the actions taken by Cowen and Lejda was sufficiently outrageous to cause Swaim significant emotional distress.

The court granted Westchester judgment on Swaim's age and sex discrimination claims. Even assuming, for the sake of argument, that Swaim had shown that she was satisfactorily performing her duties, she failed to rebut Westchester's legiti-

mate nondiscriminatory explanation for reducing her contract length: her services, like those of the vast majority of school staff members, were not needed when school was not in session.

Swaim lost on her breach of contract claim because she pointed to no evidence that Westchester had violated any terms of the 2001–2002 contract. It appears that because her annual contracts to date had been for twelve months, she believed that the 2001–2002 contract constituted a substantial revision in the terms of her 2000–2001 contract. However, these two documents were legally separate and distinct agreements.

In an unpublished opinion, the Fourth Circuit Court of Appeals affirms judgment in favor of university on former employee's due process claim. Parkman v. University of South Carolina, Unpublished (4th Cir., Aug. 6, 2002).

Facts: Thomas Parkman was the head librarian at the University of South Carolina's Music Library. Following charges of sexual harassment made by two of his assistants, Parkman was reassigned to the nonsupervisory position of special projects librarian. This reassignment became permanent following the university's investigation of these charges. Parkman later resigned from the university for medical reasons.

The controversy in this case arises from the process the university used to investigate the claims against Parkman. Despite his repeated requests, the university never gave Parkman more than the vague outlines of the allegations against him; he never received the names of witnesses against him or the opportunity to cross-examine them.

Parkman appealed the university's reassignment through the university grievance procedure; eventually the hearing body that originally found him guilty was ordered to complete a new investigation and hearing—one in which Parkman was given the opportunity to examine the witnesses against him. This new process was still pending when Parkman filed suit in federal court, alleging (among other things) that the university deprived him of his right to due process under the Fourteenth Amendment to the Constitution.

Holding: In an unpublished opinion (one, that is, with no precedential value), the Fourth Circuit Court of Appeals rejected Parkman's claim.

The Due Process Clause of the Fourteenth Amendment prohibits states from depriving citizens of life, liberty, or property without due process of law. Parkman alleged that reassigning him, without giving him the opportunity to effectively rebut the charges against him, deprived him of a property interest in the position of head music librarian and of a liberty interest in his professional reputation and future employment opportunities.

The court disagreed. The university deprived Parkman of no property right. While an employee may have a constitutionally protected property interest in continued employment, this interest does not extend to the right to possess a certain job or to perform certain duties. Because Parkman's reassignment left his tenure status and compensation package completely intact, the change in his duties and position title are not of constitutional importance.

Further, though an employee may have a liberty interest in maintaining professional status, such an interest is only constitutionally protected when the employee can show that publication of certain information actually damaged his or her potential for future employment. In this case, Parkman maintained his employment with the university and so cannot complain that the university's actions made him unemployable.

Industrial Commission award upheld. Levens v. Guilford County Schools, 152 N.C. App. 390, 567 S.E.2d 767 (2002).

Facts: Rhonda Levens was largely disabled by an accident arising out of her employment with the Guilford County Schools. Her physician ordered attendant care, increasing from three hours daily to eight hours daily several months later. Before the Industrial Commission hearing, the Guilford County Schools agreed that Levens was totally and permanently disabled, that she was entitled either to have modifications made to her existing home, or to have a new home built that would be more accessible. The issue of contention was whether the Levens family members were entitled to retroactive pay for providing the attendant care that the county had not provided.

The commission awarded the Levenses retroactive pay for attendant care at the rate of $10 per hour. The commission also ordered the county to pay Levens's attorney fees because of its unreasonable defense against Levens's claims. Both parties appealed the ruling.

Holding: The North Carolina Court of Appeals affirmed the ruling, finding it well supported by the evidence.

Court affirms Industrial Commission's disability ruling. Gilberto v. Wake Forest University, 152 N.C. App. 112, 566 S.E.2d 788 (2002).

Facts: Rebecca Gilberto suffered a compensable injury while employed as director of dance by Wake Forest University. Because of this injury, she was no longer able to teach dance and applied for a six-month paid leave of absence beginning January 1, 1995. The university paid Gilberto her full salary for this period and gave her discretionary leave pay through August 1995. In September 1995, Gilberto moved to Chicago, where she held a part-time job for a short while but

made essentially no effort to find other work after that job ended—that is, until February 1999, three months before her disability benefits hearing before the Industrial Commission.

The commission awarded Gilberto total disability compensation for the period of January 1, 1995, through July 1, 1995, but gave the university credit for wages paid during this period. It then awarded Gilberto permanent partial disability compensation for a period of ten and six-sevenths weeks. Gilberto appealed.

Holding: The North Carolina Court of Appeals affirmed the commission's order.

Gilberto argued that her disability payments should not have begun until September 1995 and that the university should not have received credit for wages paid during her leave, as these payments were a job benefit independent of her disability. The court disagreed, finding that Gilberto was disabled during this period and had informed the university that she would no longer be able to perform her job. Disability benefits are based on an employee's actual earning capacity, not on the wages an employee receives because of an employer's largesse.

The court also rejected Gilberto's argument that she was entitled to benefits for a continuing disability. Although her condition prevented her from dancing, Gilberto's training and education made her well capable of alternate employment. Her failure to make reasonable efforts to obtain alternate employment doomed her claim that she was not able to obtain alternate, or equally remunerative, employment.

Court dismisses university employee's civil rights claims. Mooring v. East Carolina University, No. 4:02-CV-62-H(3), ___ F. Supp. 2d ___ (E.D.N.C. Aug. 6, 2002).

Facts: Linwood Mooring, an employee of East Carolina University (ECU), alleged that ECU's failure to promote him was discriminatory. He asserted (among other federal claims of little moment) federal civil rights claims under 42 U.S.C. §§ 1983, 1985, 1986, and 1988. He also asserted state law claims for intentional infliction of emotional distress and defamation. ECU moved to dismiss.

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

In enacting the federal civil rights statutes 42 U.S.C. §§ 1983, 1985, 1986, and 1988, Congress did not abrogate the Eleventh Amendment immunity states enjoy from suits for monetary damages in federal court. As Mooring presented no evidence that ECU, a branch of the State of North Carolina, had otherwise waived its immunity, these claims had to be dismissed. The Eleventh Amendment similarly bars federal courts from hearing claims that state officials have violated state law, so the court also dismissed these claims.

Other Cases and Opinions

The hiring, retention, and supervision of a particular teacher is not the kind of discretionary activity shielded by governmental immunity. Doe v. Cedar Rapids Community School District, 652 N.W.2d 439 (Iowa 2002).

Facts: The mothers of three middle school students (the plaintiffs) sued the Cedar Rapids (Iowa) Community School District for negligence in the hiring, retention, and supervision of a teacher, Gary Lindsey. Lindsey moved to the Cedar Rapids district after resigning his position in another district, where he had admitted a "lust for the flesh" of a fifth-grade student he had improperly touched. Lindsey's troubled history continued at Cedar Rapids. In 1990 he was reprimanded for inappropriate comments and contact with a student (and as a result, his school implemented specific review procedures for all teachers). Again in 1992 he was accused of improper contact. The plaintiffs in this case alleged that in 1995 Lindsey kissed and hugged the three third-graders, placed their hands on his penis, and asked each of them to stay alone with him in his classroom during lunch periods.

The district claimed that its actions in employing Lindsey were shielded from suit by immunity—in particular, immunity that shields government officials from suit when they engage in "discretionary functions" (discussed below). The trial court dismissed the plaintiffs' claims on this basis, and the plaintiffs appealed.

Holding: The Supreme Court of Iowa reversed the ruling and reinstated the claims.

Discretionary function immunity protects from suit governmental actions and decisions that are based on considerations of public policy grounded on social, economic, or political reasons. The trial court in this case held that as the hiring, retention, and manner of supervising Lindsey all required the exercise of discretion, these actions were shielded from suit. This conclusion, said the court, is a misapplication of the law. Not only must a particular action involve some element of choice (as almost any action taken by a government official would), it must also involve some element of social policy making—that is, it must have some effect on the "big picture."

While employment decisions about an individual teacher may be made with policy considerations as a backdrop, taken individually they are merely day-to-day operational decisions, not policy formulations. As the district failed to proffer any reason why their employment of Lindsey reflected some sort of policy consideration, it is not shielded by discretionary function immunity. ■